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OBAMA ADMINISTRATION'S ABUSE OF POWER

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BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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OBAMA ADMINISTRATION'S ABUSE OF POWER

WEDNESDAY, SEPTEMBER 12, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Committee) presiding.

Present: Representatives Smith, Coble, Gallegly, Goodlatte, Lungren, Chabot, Issa, Pence, Forbes, King, Franks, Gohmert, Jordan, Chaffetz, Griffin, Marino, Gowdy, Ross, Adams, Quayle, Amodei, Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Quigley, Chu, Deutch, and Polis.

Staff Present: (Majority) Richard Hertling, Staff Director and Chief Counsel; Travis Norton, Counsel; Holt Lackey, Counsel; David Lazar, Clerk; (Minority) Perry Apelbaum, Staff Director and Chief Counsel; Danielle Brown, Counsel; and Aaron Hiller, Counsel.

Mr. SMITH. The hearing will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone to this hearing. We are going to begin with opening statements by me and the Ranking Member. Then I will introduce the witnesses. Then we will proceed to questions for those witnesses.

This Committee has held hearings on many of the ways in which the Obama administration has abused its power, ignored its duties, evaded responsibility and overstepped the Constitution's limits on the President. Today's hearing will look at the pattern of ignoring constitutional limits created by all these examples of abuses.

The Administration has repeatedly, in my view, put its partisan agenda above the rule of law. In doing so, it has eroded the constitutional and legal foundations that have kept America prosperous and free for over 200 years. President Obama has to an unprecedented extent failed to "take care that the laws be faithfully executed." Instead he, has repeatedly issued blanket waivers that exempt large classes of the population from duly enacted laws.

For example, the President once acknowledged that for him to "simply through Executive order ignore" the immigration laws on the books "would not conform with his appropriate role as President." Nonetheless, he acted contrary to his own words and decided not to enforce some immigration laws. As a result, in these times of sustained unemployment, American workers will be forced to

compete with illegal immigrants who, according to the law should not be given work permits.

Similarly, the Administration has issued waivers to the No Child Left Behind Act and the Welfare reform bill that are so broad that they effectively rewrite the law instead of enforcing it.

Just because you don't like the law, doesn't mean you can ignore it. Many people have gone to jail for doing just that. The President ignored the Senate's constitutional role in the appointment process in order to place partisans in key positions that regulate labor and the financial markets. To do so, he took the unprecedented position that he could make a so-called "recess" appointment even when the Senate by its own rules, was not in recess.

The Administration also has shown contempt for Congressional oversight of its activities. In order to hide documents related to the Fast and Furious scandal the President asserted a broad executive privilege that is not supported by precedent. Executive privilege cannot apply to documents that don't involve the President or his close advisers "if there is any reason to believe government misconduct occurred." Operation Fast and Furious and the Administration's misleading statements to Congress about the operation are exactly the sort of misconduct that Presidents may not conceal behind a claim of privilege. By concealing the truth about Fast and Furious behind an improper claim of privilege, the President has undermined the constitutional requirement that the executive branch answer for its actions to Congress and the American people.

The President has also ignored the Constitution's protections of individual rights, most notably religious freedom. By mandating that employers pay for health care products and services that many employers believe to be morally wrong, he has forced Americans to choose between violating the law or violating their religious beliefs. The Constitution does not allow the government to put Americans to such a choice.

Together, these abuses by the Obama administration form a disturbing pattern. When the Constitution and laws limit the Administration's ability to impose its partisan agenda, the President ignores the Constitution and the laws. This pattern of behavior hurts our country, disrespects the Constitution and undermines our democracy. It is easy to think of disputes about the President's power as abstract questions of constitutional theory, unimportant to anyone but law professors and D.C. Insiders. But when the Administration repeatedly ignores constitutional and legal limits on the President's power, it undermines the rule of law, with very real consequences.

In 2008, the United States ranked number one in the World Economic Forum's Global Competitiveness Report. In just 4 years, we have fallen to the seventh most competitive economy in the world. According to the report, a large part of America's lost competitiveness comes from the decline in faith in public institutions and the government. The Obama administration's continued abuse of authority contributes to this decline in faith in our institutions and creates uncertainty that undermines America's job creators and businesses.

America has been the most prosperous and free Nation in the world in large part because of our adherence to the Constitution

and the rule of law. Today's hearing examines how the Obama administration has ignored this long tradition and how we can return to it.

That concludes my opening statement. And the gentleman from Michigan, the Ranking Member of the Judiciary Committee, is recognized for his.

Mr. CONYERS. Mr. Chairman, we have had a respectful relationship in the way that you have Chaired this Committee, but I must observe that in the title for today's hearing it is unnecessarily open ended and provocative, and I would ask you to please consider withdrawing the hearing title from the official record when we go to print. And why? Because the use of such an incendiary term without having any conclusion or hearings or evidence that lead to this conclusion "abuse of power" is one that should not be taken lightly. I believe it is inappropriate when no factual or legal predicate has been presented to justify this terminology and that in my judgment the tenor of this hearing by its mere title alone fails to distinguish the differences between opinion and true abuses of the public trust. And of course all Members are entitled to their political opinion, but they are not entitled, none of us, to label every disagreement with the White House as an abuse of power.

I know something about this because in 1965 when I came to this body I have had enough disagreements since then with enough Presidents to recognize that not every difference that I have with them in policy preference is evidence of an abuse of Executive power.

President Nixon, for example, and I disagreed on many issues, including civil rights and crime policy. Those were political disagreements. The abuses were separate. They came later. In 1973 the Senate Watergate Committee uncovered President Nixon's enemies list. I was number 13 on that list, and so I am able to speak from firsthand experience. The investigation of this Committee revealed that the Nixon administration's plans to "use the available Federal machinery" to attack its "political enemies," including illegal wiretaps, slush funds and break-ins, all of which happened. In 1974 we learned that the President had engaged directly in attempts to obstruct the Watergate investigation. These acts, damaging to the office and in many cases criminal as well, constituted true abuse of power.

Now it is accurate that as the Chairman of this Committee in the 110th Congress I called a hearing examining the Bush administration's broad claims of Executive power. But we titled that hearing Executive Power and Its Constitutional Limitations. We were not conclusionary. We did not determine what we thought was the case and started off the hearing in that sense, as I think we are erroneously doing this morning. I believe we kept the tone of that hearing academic and respectful. We did not presuppose any wrongdoing in the title that was noticed to the public, as is the case here today.

And it is also true that in March of 2009 the Committee issued a report titled Reining in the Imperial Presidency. In that report totaling 478 pages, 1,736 footnotes, we used the term "abuse" with respect to issues like the unlawful firing, hiring and firing of Justice Department personnel, warrantless wiretapping and torture of

detainees. We concluded that this conduct constituted an abuse of executive authority only after years of research and documentation. Our conclusions were backed by successful litigation and numerous Inspector General reports. And we did not release these findings 2 months prior to a presidential election.

So Mr. Chairman, you may believe that the President's recess appointments are unconstitutional, but this issue will be resolved by the courts. There is little we can do or say to change the outcome of that litigation. And similarly you may believe that the Obama administration's decision to invoke executive privilege in the Fast and Furious investigation is unprecedented and abusive. This case is not as clean cut as when the Bush administration invoked the blanket privilege over all testimony and documents in the U.S. Attorney's investigation, and I would argue that the implication of privilege here is not unprecedented. But it will be up to the courts to decide whether or not it is abusive.

Again, there is little more that we can add to the debate today. So in the few working days that remain in this Congress I would urge my colleagues to address some of the issues that will not have the benefit of a first hearing in this Committee let alone a second. You see we have not had a single hearing on the incredible attempts to suppress the vote through new identification requirements and limits on registration and early voting. I was here for the passage of the Voting Rights Act of 1965, and I consider these new State laws, many of them, a direct threat to our democratic process and the very fabric of our Nation.

We have not yet had a hearing, a single serious discussion about real comprehensive immigration reform or what steps we can take to invest in young people brought to the United States through no fault of their own who want to pursue an education or serve in our military.

We have done nothing to address the stunning rate of incarceration in the United States, seven times that of the rest of the world, 40 times that for our African American population within the United States; 2.3 million Americans behind bars is a sign of gross injustice let alone misuse of funds and surely worthy of our discussion.

We have had hearings, briefings, and a contempt citation on the floor targeted at Operation Fast and Furious but we have not yet held a single hearing in the Committee to address the flood of weapons trafficking across our borders and into Mexico, not a single discussion about gun violence in this country, the scourge of which claims 33,000 lives every year, one minor every hour.

And so I urge my colleagues to the best extent that we can to put aside the partisan rhetoric and return to the people's business in this hearing and in this Committee. And I thank you Chairman Smith.

Mr. SMITH. Thank you, Mr. Conyers. I will proceed and introduce our witnesses. And our first witness is Senator Mike Lee of Utah. Senator Lee was elected in 2010 as Utah's 16th Senator. He is a member of the Senate Judiciary Committee where he serves as Ranking Member of the Antitrust, Competition Policy and Consumer Rights subcommittee. He is also on the Energy and National Resources, Foreign Relations, and Joint Economic Committees. Be-

fore his election to the Senate, Senator Lee had an impressive legal career, both in private practice and in public service. He worked as a law clerk for Judge Dee Benson of the U.S. District Court for the District of Utah and for Justice Samuel Alito both on the U.S. Court of Appeals for the Third Circuit and the Supreme Court. Senator Lee also served as an Assistant U.S. Attorney in Salt Lake City and General Counsel to Governor Jon Huntsman of Utah.

Our second witness, Lori Windham, is a Senior Counsel with the Becket Fund for Religious Liberty. Ms. Windham has represented a variety of different religious groups, including cases under the Free Exercise Clause, Establishment Clause and the Religious Freedom Restoration Act. Ms. Windham is a graduate of Abilene Christian University and Harvard Law School.

Our third witness, Michael Gerhardt, is the Samuel Ashe Distinguished Professor of Constitutional Law and Director of the Center on Law and Government at the University of North Carolina. Professor Gerhardt's specialties include constitutional conflicts between Congress and the President. Professor Gerhardt has participated in the Senate confirmation hearings for five of the nine justices currently sitting on the Supreme Court. He has previously served as Dean of Case Western Law School, taught at Wake Forest and William and Mary Law Schools and been a visiting professor at Cornell and Duke Law Schools.

Our final witness, Lee Casey, is a litigation partner at the law firm of Baker Hostetler. After graduating from the University of Michigan Law School, Mr. Casey clerked for the Honorable Alex Kozinski, the Chief Judge of the United States Court of Federal Claims. From 1986 to 1993, Mr. Casey served in various capacities in the Federal Government, including the Office of Legal Policy and the Office of Legal Counsel at the Department of Justice. He also worked as the Deputy Associate General Counsel at the U.S. Department of Energy. He served as a member of the United Nations Subcommittee on the Promotion and Protection of Human Rights from 2004 through 2007.

Welcome to all of our witnesses today. And Senator Lee, if you will begin.

TESTIMONY OF THE HONORABLE MIKE LEE (R-UT), UNITED STATES SENATOR, STATE OF UTAH

Senator LEE. Chairman Smith, Ranking Member Conyers and other Members of the Committee, I thank you for the opportunity to testify before this distinguished body today on an issue that is at the heart of our Constitution's structure, the essential duty of the legislature to ensure that the executive branch does not exceed its rightful authority.

Now, at the outset I want to point out I don't want to wade into a dispute between the Chairman and the Ranking Member. My purpose here today is to discuss the concerns of the founding generation, to discuss the concerns embodied in the Constitution itself. The founding generation, including the authors of the Federalist Papers, made clear that they understood based on their colonial experience with Great Britain that there was great potential for abuse in the chief executive. Consequently the Founding Fathers put together a document that put numerous checks on Executive

power to make sure that this power wouldn't be used excessively or as they origin referred to it abused.

Alexander Hamilton referred repeatedly in the Federalist Papers, most notably in Federalist 66 and in Federalist 77, to what he himself referred to as an abuse of power. He used that term sometimes not just as a legalistic term to describe what might have been perhaps a criminal violation of law, but also to describe an excess of power, one that might be offensive to the legislative branch. He made clear that it was not only the right but also the duty of the legislative branch to make sure that any such excesses of power were responded to appropriately by the legislative branch in order to protect the legislative branch's own prerogatives.

So again, our discussion today about Executive power is a timely one. In recent decades we have witnessed the executive branch claim for itself more and more power. But this trend has arguably reached a new disturbing level under the current Administration. President Obama has treated the Constitution's separation of powers principles as if those principles were matters of convenience that may simply be ignored when they happen to get in the way. Rather than cooperating with Congress or respecting the Constitution's separation of powers he has in many instances chosen to go it alone. And in the process he has expanded the proper boundaries around Executive power boundaries that were put in place for a reason.

The framers were very well versed in the dangers of excessive government power. With the abuses of King George III fresh in their minds they drafted the Constitution so as to provide each branch with the necessary means and the personal motives to resist the encroachments of the other branches of government. Among the means the Constitution affords Congress to check the President's power and ensure that he faithfully executes his responsibilities is the right to withhold consent to the President's judicial and executive branch nominations.

Article II, Section 2 of the Constitution provides that the Senate must give its advice and consent to the President's appointment of such persons. Congress also has an essential oversight role with respect to the executive branch. When executive officials make mistakes or exercise poor judgment, internal procedures will sometimes but not always remedy the problem. Inherent in our Constitution's system of checks and balances is the need for Congress to have access and visibility into the executive branch's administration of our laws to help ensure the proper functioning of the Federal Government. Congress must also ensure that the executive branch does not usurp legislative power.

Article I, Section 1 grants Congress all legislative powers. When an Administration agency makes broad legislative rules or when it enacts regulations that contravene Federal policy as embodied in Federal statute the executive branch violates Article I of the Constitution.

I would like to briefly discuss just a few instances in which President Obama has exceeded the Constitution's boundaries.

On January 4, 2012, President Obama made four controversial executive appointments even though the Senate had refused to give its consent for one of those appointments and had no opportunity

to consider the others. The President asserted that these appointments were made pursuant to the Constitution's recess appointments clause, even though the appointments occurred at a time when the Senate did not consider itself in recess and even though the Constitution expressly grants the Senate and Congress generally the power for each body to set its own internal rules, including its own schedule.

Even more troubling, in justifying its unconstitutional recess appointments the President relied on the Department of Justice Office of Legal Counsel memorandum which asserted that the President may unilaterally decide when the Senate is and is not in session for purposes of the recess appointments clause. President Obama's appointments were no different in kind—they were indeed different in kind than previous recess appointments made by any President of either party. It is often controversial when a recess appointment is made. But this kind of recess appointment, one made when the Senate did not consider itself in recess, is not one of those appointments.

No President has ever unilaterally appointed an executive officer during an adjournment of less than 3 days as determined by the Senate's own rules. Neither to my knowledge has a President of either party ever asserted the power to determine for itself when the Senate is or is not in session.

Another examine of President Obama's refusal to respect the Constitution's separation of powers occurred when he improperly asserted executive privilege in response to a legitimate congressional inquiry related to Operation Fast and Furious.

Now, courts have recognized two different types of executive privilege. There is executive process privilege and the presidential communications privilege. The deliberative process privilege does not apply in this instance with respect to the Fast and Furious investigation because government misconduct here is misleading Congress in a February 2011 letter that asserted that the Administration did not allow gun walking is the basis for Congress' request for documents. And the privilege disappears altogether when there is any reason to believe government misconduct has occurred. That is according to the standards set by the U.S. Court of Appeals for the District of Columbia Circuit.

With respect to the presidential communications privilege the executive branch may assert that privilege only for communications made in operational proximity to the President, communications at a level close enough to the President to be the revelatory of his deliberations or to pose a risk to his advisers. Accordingly either high-level Administration officials were involved in misleading Congress or the White Houseis improperly asserting executive privilege.

President Obama again abused Executive power when earlier this year he announced that he would stop enforcing key provisions of the Immigration Nationality Act. Specifically, he issued an Executive order providing that illegal immigrants who meet certain qualifications may apply for work permits. President Obama sought to justify this abuse of Executive power by claiming that he may properly rely on the notion of prosecutorial discretion. But prosecutorial discretion is something different than what happened

here. That refers to the concept that the government may or may not be able to enforce the law with respect to each and every instance of a violation of the law. What happened here isn't that. Here the President outlined entire categories of individuals who while violating the law may nonetheless receive the express blessing of the Federal Government to remain here and work in violation of our laws.

One of the reasons this is disturbing is because Congress had in fact specifically considered legislation that would have had this effect. That legislation was rejected by Congress. It didn't pass. The President nonetheless decided to go it alone and to implement this policy by means of an Executive order, thus usurping the proper role of the legislative branch.

As these examples demonstrate, when faced with opposition from Congress President Obama has repeatedly sought to go it alone. It is thus all the more necessary and important that Congress continue to exercise its constitutional role and to check this President's abuse of power wherever it sees that occurring.

Mr. SMITH. Thank you, Senator Lee.

[The prepared statement of Senator Lee follows:]

Testimony Before the House Committee on the Judiciary
"The Obama Administration's Abuse of Power"
Wednesday, September 12, 10:00 a.m.

Senator Michael S. Lee

Introduction

Chairman Smith and Members of the House Judiciary Committee. Thank you for the opportunity to testify today on an issue at the heart of our Constitution's structure: the separation of government powers into three branches and the essential duty of the legislature to ensure that the executive branch does not exceed its rightful authority.

The Constitution envisions a balance of power among the three branches of government and, in particular, among the executive and legislative branches. This balance ensures that the executive branch may not operate without oversight from the people's elected representatives in Congress. The need for such oversight can hardly be overstated: nothing less than individual liberty is at stake. If left unchecked, unrestrained, and unlimited, the executive branch—in its natural appetite for power—may take actions to destroy the liberty of the people.

Our discussion of excessive executive power is timely. In recent decades we have witnessed the executive branch claim for itself more and more government power. But this trend has reached new, disturbing levels under the current administration. President Obama has treated the Constitution's separation of powers as if it were a matter of convenience that may be ignored when it gets in his way. Rather than cooperating with Congress or respecting the Constitution's separation of powers, he has in many instances chosen to go it alone and in the process has exceeded the proper bounds of executive power. Today I will focus on President Obama's unconstitutional recess appointments; his action to obstruct legislative oversight of his administration, including his abusive assertion of executive privilege; and his decision to issue an executive order contravening Congress's immigration policy. But these are only a few of many instances in which President Obama has exceeded his rightful authority and ignored the Constitution's checks and balances—actions that have resulted in an economy that is worse off and a people that is less free than when he took office almost four years ago.

Background

The Framers were well versed in the dangers of excessive government power. With the abuses of King George III fresh in their minds, they drafted our Constitution so as not to place all government power in a single department, but rather to divide power among three co-equal branches. As James Madison explained in Federalist 51, a properly framed Constitution must "enable the government to control the governed," but it must also "oblige it to control itself" through internal checks and balances. To accomplish this internal control, the Constitution

provides each branch with the "the necessary [] means and personal motives to resist encroachments of the others."[1] Without the effective functioning of these checks and balances, a single branch might accumulate all powers—legislative, executive, and judicial—a result that, in Madison's words, "may justly be pronounced the very definition of tyranny."[2]

Among the means the Constitution affords Congress to check the President's power and ensure that he faithfully executes his responsibilities is the right to withhold consent for the President's judicial and executive nominations. Article II, Section 2 of the Constitution provides that the Senate must advise and consent to the President's appointment of judges and executive officers. The Senate has the responsibility, right, and duty to see that the President's nominations have been properly considered and that the appointment will be for the good of the country.

Congress also has an essential oversight role with respect to the executive branch. As the branch tasked with enacting the nation's laws, Congress must see that the executive branch enforces those laws faithfully and impartially. The value of such oversight can hardly be disputed. Since our country's founding, the executive branch has grown in size from a small group—consisting primarily of the President, his cabinet, and a limited number of supporting employees—to a massive bureaucracy that employs hundreds of thousands of government officials, each of whom has motives and incentives that may be adverse to the liberty of the people. When executive officials make mistakes or exercise poor judgment, internal procedures will sometimes but not always remedy the problem. Inherent in our Constitution's system of checks and balances is the need for Congress to have access and visibility into the executive branch's administration of our laws to help ensure the proper functioning of the government.

Congress must also ensure that the executive branch does not abrogate unto itself legislative power. Article I, Section 1 grants Congress "all legislative powers." The Constitution's requirement that only the legislature create legislation is important because it limits the scope and volume of legislation and it ensures that policy decisions are made by the people's elected representatives. When an administrative agency makes broad legislative rules, or when it enacts regulations that contravene congressional policy, the executive branch violates Article I of the Constitution—something the executive branch has done with increasing prominence and frequency under President Obama.

In sum, the Constitution's structural principles—separation of government powers and checks and balances—are essential to a properly functioning, limited government. Indeed, James Madison said of the principle of separation of powers that "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty."

[1] The Federalist No. 51 (James Madison).
[2] The Federalist No. 47 (James Madison).

Unconstitutional Recess Appointments

Since taking office, President Obama has sought to aggrandize his position and increase the executive branch's power at the expense of the Constitution, the legislative branch, and the liberty of the American people. In keeping with a pattern of Constitutional abuses, earlier this year President Obama sought to circumvent the Constitution's requirement that his appointment of executive officers receive the advice and consent of the Senate. On January 4, 2012, President Obama announced appointments to the Consumer Financial Protection Bureau and National Labor Relations Board, even though the Senate had refused its consent for one of the appointments and had not had an opportunity to consider the others. The President asserted that these appointments were made pursuant to the Constitution's Recess Appointment's Clause, even though the appointments occurred at a time when the Senate did not consider itself in recess. In fact, the appointments came one day after the Senate held a pro-forma session on January 3, 2012, and only two days before the Senate held another such session on January 6, 2012.

Even more troubling, in later justifying his unconstitutional appointments, the President relied on a Department of Justice memorandum, which asserted that the president may unilaterally decide when the Senate is and is not in session for purposes of the Recess Appointments Clause. Under the procedures set forth in the Constitution, it is for Congress, not the president, to determine when Congress is in session. Indeed, the Constitution expressly grants the Senate power to "determine the Rules of its Proceedings." To assert that the president has an unconstrained right to determine for himself when the Senate is or is not in session and to appoint nominees unilaterally at any time he feels the Senate is not as responsive as he might wish—even when the Senate is meeting and conducting business—is to trample upon the Constitution's separation of government powers and the system of checks and balances that animated the adoption of an advice-and-consent requirement in the first place. The Constitution's separation of powers is "not simply an abstract generalization in the minds of the Framers: it [is a principle] woven into the document that they drafted in Philadelphia in the summer of 1787."[3] Surely, the Constitution's separation of powers can mean little if the executive is allowed to deprive the Senate of its constitutional right to make its own rules and determine for itself when it is and is not in session.

In addition, the Obama administration's assertion that the Senate's pro forma sessions are not cognizable for purposes of the Recess Appointments Clause violates past constitutional practice and tradition. In separate provisions, the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," and that "unless [Congress] shall by law appoint a different day," Congress shall begin each annual session by meeting "at noon on the 3d day of January." The Senate has

[3] *See INS v. Chadha*, 462 U.S. 919, 945 (1983); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[It was] the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

commonly, and without objection, used pro forma sessions to fulfill both constitutional requirements, evidencing a past consensus that such sessions are of constitutional significance. President Obama's novel assertion that such sessions no longer count for purposes of the Recess Appointments Clause thus upsets precedent and creates an internal contradiction in the treatment of Senate sessions for purposes of the Constitution.

It bears emphasis that President Obama's appointments were different in kind than previous recess appointments made by any president of either party. No president has ever unilaterally appointed an executive officer during an adjournment of less than three days. Neither, to my knowledge, has a president of either party ever asserted the power to determine for himself when the Senate is or is not in session for purposes of the Recess Appointments Clause.

In sum, President Obama disregarded the Senate's constitutional role in advising and consenting to the appointment of executive officials and instead made the appointments unilaterally. He then subsequently justified those appointments by asserting that it was for him, and not the Senate, to determine when the Senate is in session. With respect to the Recess Appointment's Clause, no President has attempted anything even remotely as dramatic, novel, and unconstitutional as what President Obama did on January 4, 2012.

Obstruction of Legislative Oversight

Another example of President Obama's refusal to respect the Constitution's separation of government powers occurred when he improperly asserted executive privilege in response to a legitimate congressional inquiry.

In the aftermath of troubling revelations relating to the so-called Fast & Furious operation, Congress exercised its oversight role and began seeking answers regarding who in the executive branch approved the practice of gun walking. In a February 4, 2011 letter sent in response to a congressional inquiry, the Department of Justice ("DOJ") asserted that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") made "every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico." Ten months later DOJ withdrew that letter, conceding it was false and misleading. Nonetheless, in response to continued congressional inquiries, the Obama Administration delayed and refused to provide relevant information. After Congress issued a subpoena for documents related to the administration's false February 2011 letter, the Obama administration again refused to comply and ultimately took the extraordinary step of asserting executive privilege over the requested material.

Courts have recognized two types of executive privilege: the "deliberative process privilege" and the "presidential communications privilege." The deliberative process privilege does not apply because government misconduct is the basis for Congress's request for

documents, and the privilege "disappears altogether when there is any reason to believe government misconduct has occurred."[4]

With respect to the presidential communications privilege, the executive branch may only assert that privilege for communications made in "operational proximity" to the President—communications at a level "close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers."[5] Accordingly, either high level administrative officials were involved in misleading Congress, or the White House is improperly asserting executive privilege.

President Obama's abusive assertion of executive privilege is particularly troubling given his promise to "creat[e] an unprecedented level of openness in Government," and to "establish a system of transparency, public participation, and collaboration."[6] Instead of transparency and openness, President Obama's administration has misled Congress and obstructed legitimate congressional oversight by concealing relevant documents and abusing executive privilege. In light of the tragic nature of the Fast & Furious operation—a misguided program that led to the death of a U.S. border patrol agent—and the need to understand the process within the executive branch that led to these poor judgments, President Obama's refusal to allow legitimate congressional oversight is particularly repugnant to the Constitution's separation of powers.

President Obama's Refusal to Enforce Immigration Laws

President Obama's abuse of executive power was again made manifest when, earlier this year, he issued an executive order providing that illegal immigrants who meet certain qualifications will receive a two-year deferral from deportation and may apply for work permits. By refusing to enforce the Immigration and Nationality Act—a law duly enacted by Congress—President Obama has failed to carry out his responsibility as chief of the executive branch. President Obama's unilateral imposition of this controversial immigration directive is particularly dismissive of the legislative branch because it was issued after Congress specifically rejected immigration legislation embodying that policy.[7]

President Obama sought to justify his abuse of executive power by claiming that he may properly refuse to administer immigration laws under the traditional doctrine of prosecutorial discretion. But his new policy is different in kind than legitimate prosecutorial discretion. A blanket policy of non-enforcement of the law goes well beyond the kind of case-by-case analyses and decision making involved in prosecutorial discretion. By imposing on all government

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[4] *Id.* at 745, 746; see also *id.* at 737-738 ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government.").

[5] *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

[6] Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009," WhiteHouse.gov (available at http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment).

[7] *See* S.1545, the DREAM Act.

officials an immigration policy that Congress has rejected, President Obama has taken unilateral executive action that may fairly be characterized as a form of legislation. The Obama administration has thus violated Article II of the Constitution and the principle of separation of powers, which ensure that such contested policy decisions are made by the people's elected representatives in the legislature.

Conclusion

Quoting the French political thinker Montesquieu, who laid the intellectual framework for separation of powers, Madison wrote in Federalist 47, "When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest *the same* [body] should *enact* tyrannical laws to *execute* them in a tyrannical manner."[8] Facing opposition from Congress, President Obama has repeatedly sought to go it alone. By so doing, he has sought to unite in himself the government powers the Constitution properly places in three separate branches of government. It is thus all the more necessary and important that Congress continue to exercise its constitutional role and check this President's abuse of power.

[8] The Federalist No. 47 (James Madison) (emphasis in original).

Mr. SMITH. Ms. Windham.

TESTIMONY OF LORI WINDHAM, SENIOR COUNSEL, THE BECKET FUND FOR RELIGIOUS LIBERTY

Ms. WINDHAM. Mr. Chairman and distinguished Members of the Committee——

Mr. SMITH. Let me make sure your mike is on.

Ms. WINDHAM. Mr. Chairman and distinguished——

Mr. SMITH. It is still not working.

Ms. WINDHAM. Mr. Chairman and distinguished Members of the Committee, thank you for the invitation and the opportunity to be with you today to offer testimony on the Obama administration's abuse of power in violating Americans' religious freedom.

I am here today representing the Becket Fund for Religious Liberty, where I serve as senior counsel. At the Becket Fund we protect religious freedom for all religious traditions, including Buddhists, Christians, Hindus, Muslims, Jews and others.

I will summarize my remarks and ask that my full written testimony be entered into the record.

Nearly a year ago, on October 5, I sat with my colleagues before the United States Supreme Court. We were there to argue that churches and synagogues have a constitutional right to choose their clergy according to religious principles and not government regulations. I was not alone in being shocked when the Obama administration's lawyers stood up to oppose us and argued that churches are no different than bowling clubs; that our First Amendment guarantee of religious freedom does not protect religious organizations. We said that this would be a clear breach of the First Amendment and a power grab by the executive branch. The Supreme Court agreed. As you know, the justices ruled in our favor unanimously. In a 9–0 decision in *Hosanna-Tabor v. EEOC* the Supreme Court rejected the Administration's arguments and called them extreme. But I am saddened to report that this Administration's overreach and its attempt to redefine the limits of our religious liberty did not end or begin with *Hosanna-Tabor*.

Unfortunately, this Administration has kept us very busy. At the Becket Fund we call them as we see them and that means we are on the same side as the Department of Justice when they get it right and we oppose them when they get it wrong, and today they are getting it wrong. The ability of millions of Americans to practice their faith is now at risk. If the government can trample First Amendment freedoms then none of our fundamental rights are secure.

Last summer the Administration, acting pursuant to the Affordable Care Act, issued a regulation requiring all employer health plans to provide contraceptives, sterilization and abortion causing drugs. Much has already been said before this Committee about that mandate and the constitutional problems with it. Because the mandate violates both the Religious Freedom Restoration Act, RFRA, and the Constitution the Becket Fund filed the first lawsuit in the Nation challenging the mandate on behalf of Belmont Abbey College in North Carolina. Since then at least 22 additional lawsuits have been filed. And the Becket Fund has filed five more legal challenges on behalf of Colorado Christian University, Eter-

nal Word Television Network, Ave Maria University, Wheaton College, and just this morning Hobby Lobby, a family owned retail chain that faces nearly half a billion dollars in fines for following its faith. These religious individuals and organizations must now choose between following their faith and paying a government fine. That is a choice no American should have to make.

Not only has the Administration restricted religious freedom, it used questionable tactics both to create the mandate and then to insulate it from judicial review. The Administration issued the mandate without first publishing a proposed regulation or accepting public comment as Congress requires of it under the Administrative Procedures Act. When the Administration finally did take public comments on the mandate it refused to budge.

What the Administration did do in response was to attempt to delay any judicial scrutiny of its actions until after November 2012. First, the Administration created a 1-year safe harbor for some nonprofit religious organizations. Then it proposed an alleged compromise, an inadequate compromise, and used that proposal to try and keep the mandate out of court. The government has treated both its proposed new rule and its safe harbor guidelines as a moving target altering and manipulating them as needed to avoid judicial scrutiny of the mandate. Six months after the announcement the government refuses to publish a proposed rule or say when it might do so. The government has also changed the safe harbor three times in 7 months in order to avoid defending lawsuits against it.

This Administration has paid lip service to the importance of religious freedom while at the same time launching an unprecedented governmental encroachment on a fundamental right. When it comes to the First Amendment the Administration should not be saying one thing and then doing another. Protecting religious freedom, as we well know at the Becket Fund, often means defending people who disagree with you. If these abuses are permitted to continue they will set a terrible precedent for even more serious restrictions on liberty. Every American should be concerned regardless of their political or religious beliefs.

Mr. SMITH. Thank you, Ms. Windham.

[The prepared statement of Ms. Windham follows:]

Prepared Statement of Lori Windham, Senior Counsel, The Becket Fund for Religious Liberty

Mr. Chairman and distinguished Members of the Committee, allow me to thank you for the invitation and opportunity to be with you today to offer testimony on the Obama Administration's abuse of power in violating Americans' religious freedom.

I am here today representing The Becket Fund for Religious Liberty, where I serve as Senior Counsel. At the Becket Fund, we protect religious freedom for all religious traditions, including Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, and others. I will summarize my remarks and ask that my full written testimony be entered into the record.

I. INTRODUCTION

Nearly a year ago, on October 5th, I sat with my colleagues before the United States Supreme Court as we argued that churches and synagogues have a constitutional right to choose their clergy according to religious principles, without government interference. I was not alone in my shock when the Obama Administration's lawyers opposed our position by arguing that churches are no different than bowling

clubs, and that our First Amendment guarantee of religious freedom does not protect religious organizations. In fact, the position taken by the Administration was so extreme that several Justices criticized the argument from the bench, calling it "extraordinary" and "amazing." The government stood before the Supreme Court and argued that it could control the hiring decisions of religious institutions. We said that this would be a clear breach of the First Amendment, and a power grab by the Executive Branch.

The Supreme Court agreed. As you know, the Justices ruled in our favor unanimously. In a 9–0 decision, the Supreme Court rejected the Administration's arguments and its attempt to regulate how religious organizations choose their leaders, calling its position "extreme." But I am saddened to report that the overreach of this Administration in redefining the limits of religious liberty in this country did not end—or even begin—there.

The Becket Fund for Religious Liberty is a non-profit organization which, for the past eighteen years, has worked to defend the religious liberty rights of people of all faiths. Our work crosses political and religious lines and focuses on the constitutional and legal guarantees enshrined in our founding, guarantees that enable every American to live with the dignity they deserve. We call them as we see them, and sometimes that means we side with the government and sometimes we don't. We've been on the same side as the Department of Justice where they get it right and oppose them when they get it wrong.

Unfortunately, this Administration has kept us very busy. And "unfortunately" is actually not strong enough a word, because the ability of millions of Americans to live according to the dictates of their consciences is now at risk. If the government can trample First Amendment freedoms, then none of our fundamental rights are secure.

I would like to share a few of the cases where the Becket Fund has been fighting back against overreach by the Administration.

II. THE ADMINISTRATION'S ATTEMPT TO TRAMPLE RELIGIOUS FREEDOM IN *HOSANNA-TABOR* V. *EEOC*

In the recent U.S. Supreme Court case, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC,* which I referred to at the beginning of my testimony, the Becket Fund sought to protect the Lutheran church's ability to hire and fire religion teachers according to the teachers' ability to represent the Church's religious message. The doctrine at issue—the "ministerial exception" doctrine—is one that has long existed in our religious freedom jurisprudence. It springs from the well-settled understanding that our Constitution protects religious groups from government interference, including and perhaps especially when it comes to matters of internal governance and religious autonomy. Another way to put it is this: If the separation of church and state means anything, it means that government officials shouldn't be in the business of picking priests and rabbis.

Yet the Obama Administration in *Hosanna-Tabor* veered far off the path of established precedent. It argued that the First Amendment provides no special protection to religious organizations in the selection of their own clergy. This position was so drastic that Supreme Court Justices called it "untenable," "remarkable," and "extreme." All nine Justices agreed that the Administration's position had to be rejected

The Becket Fund won a unanimous victory in *Hosanna-Tabor* and sent a strong message to the Administration that it could not tell a church whom it should choose to teach its beliefs.

But apparently the Administration did not get the message.

III. THE ADMINISTRATION'S ATTEMPT TO TRAMPLE RELIGIOUS FREEDOM UNDER THE HHS CONTRACEPTION MANDATE

Last summer, the Administration, acting pursuant to the Affordable Care Act, issued a regulation requiring all employer health plans to provide contraceptives and abortion-causing drugs. That regulation, "the Mandate," applies to most religious organizations that are opposed to contraception or abortion, and to many business owners who want to ensure their practices are consistent with their faith. The Administration's actions were met with public uproar, with religious groups opposed to contraception or abortion decrying the violation of their religious freedom.

A. The Mandate's Lack of Protection for Religious Freedom

Although the Mandate is riddled with exceptions—exceptions for certain religious organizations, exceptions made for convenience or expediency—the Administration has stubbornly refused to create an exception that would protect thousands of reli-

gious organizations and individuals who cannot follow both the Mandate and their faith.

The Mandate has a very narrow religious exception. The Mandate exempts certain religious employers, but it defines "religious employers" so narrowly that millions of employers who are inspired by and implement their faith through their work have been left unprotected. Indeed, the exception is so narrow that even Mother Theresa would not have qualified as a "religious employer." For example, the exception requires that an employer primarily employ and serve people of their own faith. This has effectively penalized those who express their faith by serving the community at large. The same religious organizations that help the government in fulfilling the essential needs of all Americans are now being forced by the Administration to choose between following their faith or facing hefty fines for non-compliance with the government's Mandate.

The Mandate also applies with full force to businesses that are religiously-oriented or owned and operated by religious individuals. The government has effectively said that you forfeit your free exercise rights when you open a business. But in the only decision on the merits of the Mandate to date, a Colorado federal district judge disagreed. The government argued that businesses, even small family businesses, have no constitutional or statutory protections for religious freedom. The judge rejected this argument and issued an injunction against the Mandate.

The assault on religious liberty the Mandate represents is unprecedented. Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health care sector. Moreover, Democratic congressman Bart Stupak, when offering the critical vote that enabled the health care bill to become law, reaffirmed his belief in the President's assurances that the conscience rights of Americans would be secure. As it happened, he was completely mistaken.

The government Mandate is also far broader than any state contraception mandate to date. At least 22 states have no contraception mandate at all. Of the 28 states that have some mandate, none require contraception coverage in self-insured and ERISA plans, and the vast majority exempt plans for other reasons as well. The Mandate ends those exemptions and forces organizations that were exempt from state mandates to comply with the federal Mandate.

Because the Mandate violates both the Religious Freedom Restoration Act (RFRA) and the Constitution, the Becket Fund filed the first lawsuit in the nation challenging the Mandate, on behalf of Belmont Abbey College in North Carolina. Since then, the Becket Fund has filed four more lawsuits on behalf of Colorado Christian University, Eternal Word Television Network, Ave Maria University, and Wheaton College. At least twenty-three additional lawsuits, brought by a wide variety of religious organizations, are currently pending in federal courts across the country.

B. The Government's Attempts to Circumvent Both the Administrative Procedure Act and Judicial Scrutiny

Not only has the Administration restricted religious freedom, it has used questionable tactics to create the Mandate and insulate it from judicial review. The Administration issued the Mandate without first publishing a proposed regulation or accepting public comment, as is required by Congress under the Administrative Procedure Act. The Administration claimed the ability to subvert and radically accelerate the normal APA procedures because of the great importance of the regulation. It accepted comments on the rule only after it was put into place, and it has refused to rescind the rule or expand the narrow religious employer exemption as a result of those comments.

Predictably, this example of executive overreach caused a great public outcry. Rather than revise or rescind the Mandate, the Administration has responded to the complaints of hundreds of thousands of objectors with a series of inadequate measures. First, the Administration announced that while it would not expand the religious employer exemption, it would give certain non-profit religious groups an extra year to comply with the Mandate. This so-called "safe harbor" meant that such religious groups would have one more year to decide whether to comply with the Mandate and violate their faith, drop health care insurance coverage for their employees altogether and incur a hefty fine, or try to offer non-compliant insurance and incur even larger fines.

Second, when this did not end the public protest against the Mandate, the President announced a supposed compromise. He promised that in a rule yet to be developed, insurance companies—not the religious employers themselves—would be forced to pay for the abortion-inducing drugs, sterilization, and contraception. In March, the Administration issued an Advance Notice of Proposed Rulemaking (ANPRM), in which it suggested "potential means of accommodating" religious orga-

nizations subject to the Mandate. However, the administration's proposed "accommodation" fails in many important respects.

The first problem is that it leaves out many entities that should be protected. It is limited to non-exempt, "non-profit religious organizations." Although the Administration does not say how it intends to define "religious organizations," it suggests that the definition should be limited to churches or tax-exempt organizations that are "controlled by or associated with a church or a convention or association of churches." Under the definition (and other alternative definitions), a small business owner will not be covered by the accommodation because she is a not a non-profit. Similarly, a non-profit, non-religious organization dedicated to caring for women in crisis pregnancies will not be covered by the proposed accommodation, nor will fraternal organizations, religious colleges, or parachurch ministries, which are not "controlled by or associated with a church or a convention or association of churches," be covered.

An even deeper problem with the proposed "accommodation" is that it does not actually relieve the burden on many of the religious organizations that qualify for the accommodation. Under the proposals outlined in the ANPRM, religious organizations will still be obligated to assist in providing these drugs and services by providing their insurers with the information and authorizations necessary to provide these drugs. The ANPRM does not offer any adequate solution for self-insured organizations, who must otherwise pay for these drugs out-of-pocket. The proposals in the ANPRM for dealing with self-insured organizations range from impractical to illegal, and have been criticized by an industry group, the Self-Insurance Institute of America, on this basis.

Worse yet, the government has treated both the ANPRM and its safe harbor guidelines as a moving target, altering and manipulating them as needed to avoid judicial scrutiny of the Mandate. Although the government has offered suggestions for a new regulation in the ANPRM, it has not yet published a proposed rule, and has repeatedly used the tentative nature of the ANPRM to avoid judicial review of the rule already in place. The government has argued, in some cases successfully, that courts should not review the existing Mandate because the forthcoming rule might change its impact on those challenging the Mandate. But nearly six months after the ANPRM, the government still refuses to state what that new rule is going to look like.

The government's manipulation of the safe harbor guidelines has become even more transparent over time. First, the government has promised not to enforce the Mandate for a year, but it has refused to exempt religious organizations from private enforcement. That means that religious organizations may face lawsuits in the coming year from private individuals who object to their policies. Second, the government's safe harbor guidance document indicates that employers who object to some, but not all, forms of contraception are not eligible. But the Administration has since stated in court papers that those organizations are eligible for the safe harbor. Third, just last month, the government quietly revised the safe harbor to cover some additional organizations. It did this because it faced a lawsuit from Wheaton College, which was not eligible under the original safe harbor. Time and again, the government has changed the rules in order to insulate the Mandate from judicial review. But there is one rule they won't change: forcing religious organizations to pay for drugs contrary to their religious beliefs.

C. The Mandate's Threat to Religious Liberty

Congress has made it clear that federal laws, including the Affordable Care Act, should not compromise religious freedom. But the Administration has trampled upon that guarantee time and time again. The Administration has ignored the intentions of Congress and restricted the rights of religious individuals and organizations. In doing so, it has violated the Constitution, ignored the Congressional command of RFRA, and endangered the rights of millions of Americans seeking to work, worship, and serve others.

IV. CONCLUSION

The Administration has paid lip service to the importance of religious freedom, while at the same time launching an unprecedented government encroachment on the fundamental right of religious freedom. When it comes to the First Amendment, the Administration should not be saying one thing and doing another. Protecting religious freedom often means defending the rights of people with whom you disagree. If these abuses are permitted to continue, they will create grave injustice and set a terrible precedent for even more serious restrictions on liberty in the future. Every American should be concerned, regardless of political or religious beliefs.

Mr. SMITH. Mr. Gerhardt.

TESTIMONY OF MICHAEL J. GERHARDT, PROFESSOR OF CONSTITUTIONAL LAW AND DIRECTOR, CENTER ON LAW AND GOVERNMENT, UNIVERSITY OF NORTH CAROLINA

Mr. GERHARDT. Thank you, Mr. Chairman and Ranking Member Conyers and Members of the House Judiciary Committee. It is always an enormous privilege and honor for me to have the opportunity to meet with you and to speak with you and I greatly appreciate the invitation. I should tell you as a constitutional law professor nothing has greater meaning for me than the opportunity to be able to be of service to this Committee and to government in general.

You have my written statement and I won't rehash it here. Instead I would just like to try to make two observations, and I would be happy to take any questions you have later.

The first observation I make again is as a constitutional law professor, and I simply want to state that I take great heart in a robust system of checks and balances. I have for many years believed in the system of checks and balances and I heartily uphold and support Congress and this Committee's strong assertion of its prerogatives. I believe that this Committee has the ability and the power to exercise oversight and to strongly push the President to defend the constitutional basis for his actions.

At the same time I believe that the President has the ability to strongly defend his actions and to strongly support his actions and to strongly push back against any inquiry into either the motivations or support for his actions. That is what makes for a system of checks and balances. It is the give and it is the take, it is the back and it is the forth. And in this system of checks and balances I might point out there are many different facets. One of them is today's hearing. Another one is fast approaching, and that is the presidential election. And I should just point out that on every single one of these matters that are being discussed today the President stands politically accountable before the American people in just a matter of weeks. That check is not insignificant and I think it should be something that we all might want to take into account in the course of determining the next issue I want to mention, and that is how do we determine whether or not there is an abuse of power.

I don't take that lightly. I am sure none of us do. The question of whether or not a President or his Administration abuses power is about as serious a question as can ever be asked, not just in constitutional law but in law generally. I don't think you can answer that question by asking whether or not you agree with what the President did. There just simply are too many things that a President does, countless numbers of things that a President does, to allow agreement or disagreement with a particular decision as the basis for determining whether or not there is abuse of power.

Also, I think you must ask a different question. Imagine for example if this were a President from your party what would you say. What would be the test if, for example, you were Republican and this were a Republican President? Would you still think there were abuses of power? Or reverse the sides. Exchange them. See

where you come out. If you come out the same place that means something. If you don't come out the same place that also has meaning.

I think there is other sets of questions we should ask as well. For example, I think we should ask has the President and his Administration acted in good faith. Has he and his Administration been transparent and open and deliberative in the process of making decisions about recess appointments, executive privilege and every other matter that we will discuss today. Other questions we could ask include what are the bases for the President's judgments? Do they have a basis in past practices, do they have a basis in judicial precedent, do they have a basis in a balancing of the different consequences involved in the decision? These are all questions I think that are perfectly reasonable to ask, and these are the kinds of questions I think we should be asking in determining whether or not there has been any kind of abuse of power.

For myself I think it is pretty obvious that there has been no abuse of power. I believe in answering those questions that you can find that the President has been both transparent, open and deliberative and reasonable. Of course we could disagree, but that again is not the matter. For me the issue is whether or not I can have confidence in the process by which he has made those decisions and by which the Administration has made its decisions in all the areas we are talking about, and my answer today to that is yes.

Thank you.

Mr. SMITH. Thank you, Mr. Gerhardt.

[The prepared statement of Mr. Gerhardt follows:]

Prepared Statement of Michael J. Gerhardt, Samuel Ashe Distinguished Professor of Law and Director of UNC Center on Law and Government, UNC—Chapel Hill

I am honored by the invitation to participate in the House Judiciary Committee's hearing, "The Obama Administration's Abuse of Power." It is always a great privilege to appear before this Committee, and I appreciate the opportunity to share my perspective on the important subject of your hearing. There is nothing more meaningful to a constitutional law professor than the opportunity to be of service to this institution on significant questions about the meaning and scope of the Constitution.

I cannot imagine a topic of greater concern to the Congress, this nation, and its citizens than the possibility (or fact) of a president's or his administration's abuse of power. As you know, this is not a new subject for me. For more than 20 years, I have studied the impeachment process and presidential misconduct. I take the possible occurrence of official misconduct quite seriously, and I have thought long and hard—and written one book and numerous articles—on the constitutional issues arising from the misconduct of high-ranking officials, including the President.

Although I have had the privilege of advising members of Congress on various issues relating to official misconduct in the past, I of course speak today only for myself and not for anyone else or my home institution, the University of North Carolina, where I have the privilege of teaching constitutional law and professional responsibility.

Given that I did not receive your invitation until Tuesday morning and my uncertainty over the particular matters you will be reviewing at this hearing, I thought the best way I could help you is to share with the Committee the two, fundamental principles that guide my thinking about the possibility of this President's or this administration's possible abuses of power. I know we agree about these principles, but I thought it might still be useful to make them explicit beforehand.

The first guiding principle is recognizing and abiding by the all-important distinction between politics and the Constitution. I say "all-important" because it is so easy to forget and confuse political with constitutional choices. Yet, they are distinct, even though they frequently overlap. For years, many scholars rightfully criticized the Supreme Court for sometimes confusing political decisions with constitutional

law; they argued, persuasively I thought, that the Court should not strike down a political decision with which it disagreed but only those things that violated the Constitution. A similar principle applies to presidents, or, for that matter, members of this august institution: The fact that we disapprove of something does not make it unconstitutional. Not every action with which we might disagree, or with which we might disapprove, is unconstitutional. Most of what a president does involves political choices; it involves making choices about policy. I do not come before you to discuss politics or policy, and I have nothing to say about the President's political choices, nor any of yours, except to say that the Constitution allows for national political leaders to make a wide range of political, even partisan, decisions.

As we consider the possible abuses of power that the President, or people under his direction, may have made, we cannot ignore the timing of today's hearing. Charging any president or administration with abuse of power is serious business, and the timing of today's hearing, with a presidential election just weeks away, may lead many people to wonder why now. Some people may even believe that there are political incentives, or motivations, for conducting such an inquiry at a time like this. My reverence for this institution precludes me from agreeing with this criticism. But, at the same time, my reverence for this institution leads me to suggest, with all due respect, that you take the time to explain your timing, you maintain your focus on the Constitution, and you do what you can to ensure the hearings do not deviate from a legitimate constitutional inquiry into political theater.

Once we focus on the Constitution, at least one thing should become glaringly clear: Presidents, like members of Congress, make constitutional choices all the time, and many people within their administrations are of course charged with implementing or assisting them in making those choices. The fact that a president's constitutional choices have political ramifications does not make them political or purely partisan acts. Nor should those ramifications be confused with the arguments that support, or oppose, the constitutional judgments in question. Moreover, the fact that a president makes a constitutional choice different than the one that you or I would have preferred does not make it unconstitutional. An important consideration for me is not whether I agree with a president's constitutional choices but rather whether I think they have been made in good faith. To assess whether they have been made in good faith, we can examine the President's transparency and candor in making constitutional judgments. I believe that this President, like most presidents, has made his constitutional reasoning quite openly and deliberately, and on that basis, at least, I cannot take issue with how he has handled his constitutional responsibilities.

If you disagree that a demonstration of good faith in making constitutional judgments is not enough, inconsequential, or perhaps irrelevant, I can suggest another, possibly more effective test: Consider whether you would think what the President did was unconstitutional if he were a member of your party. Thus, I think we can all agree that Richard Nixon's ordering the IRS and FBI to investigate his political enemies was an abuse of power. It was not an abuse of power because he was a Republican. It does not matter whether he was a Republican. It should not matter that President Obama is a Democrat or running for reelection. What should matter, in my judgment, is whether Democrats or Republicans on the Committee would make the same charges, or raise the same defenses, regardless of the President's party.

You may use this same test for any of the officials whose legal or constitutional judgments you may question. I know many members of this Committee may not, for instance, agree with the President's, the Attorney General's, and the Office of Legal Counsel's judgment that executive privilege may be extended to cover documents that were produced in internal deliberations within the executive branch. Would you reach the same conclusion and hold the same kind of hearing if the President, the Attorney General, and the Office of Legal Counsel had different political affiliations? The judgment about whether executive privilege applies is, at bottom, a constitutional choice, albeit one that obviously has political ramifications. I think there is credible support for the President's and administration's judgment on executive privilege, including historical and judicial precedents, and this credible support would exist, regardless of the President's party or the political affiliation of the people who lead his Justice Department.

The second principle I follow is affirming the Constitution's establishment of a robust system of checks and balances. I believe that the Constitution vests Congress with substantial responsibilities, including oversight. In virtually all of my publications and prior testimony before Congress, I have expressed this belief, indeed, this conviction. You certainly have the power and opportunity to second-guess the President's constitutional choices, and of course you may subject him or other department heads to rigorous oversight. You may urge close scrutiny of the constitutional and

legal judgments of these officials and question them. At the same time, the President undoubtedly has the authority by virtue of the Constitution, and I believe the prerogative, to push back, to defend himself, to explain his constitutional reasoning and of course to stand his ground. For example, many of you may argue that Congress and Congress alone has the authority to determine when a recess occurs, including how long it may last. At the same time, the President may argue that he is not bound by this judgment, just as President Andrew Jackson argued that he was not bound by the Supreme Court's decision in *McCulloch v. Maryland* because he was entitled, by virtue of his oath, his election, and his stature within the constitutional scheme, to make his own, unilateral judgments about the Constitution's meaning and scope. President Obama is entitled, in my opinion, like Jackson, Lincoln, and every other president, to make independent constitutional judgments, just as each of you is entitled to push him hard to defend or explain those judgments.

As a constitutional law professor, I appreciate the robust system of checks and balances the founders gave us in the Constitution. Today's hearing is plainly an exercise in checks and balances in practice. Of course, this system does not always require, or entail, conflict, but conflict is inevitably a dynamic within it. Another, critical feature of this system is the accountability of the officials who serve in our government: High-ranking executive officials serve at the pleasure of the President and are subject to congressional oversight and subject to the impeachment process, and national political leaders are all electorally accountable. The same check applies to congressional and presidential overreaching—the fact that members of Congress and the President require the public's approval in order to continue in office. Ours is of course a government of laws not men (or women), which means that everyone who serves in government should abide by the law and is subject to the accountability that the law—the Constitution—provides. Whatever you may think of the President's constitutional choices, he now stands politically accountable for all of them before the American people. This is true for recess appointments and every other matter we may discuss at today's hearing. For, as you well know, it is not just constitutional law professors, members of Congress, or presidents who get to interpret the Constitution and debate its meaning; the American people get to do that as well. Indeed, I think that is a major reason we are here today—to educate the public. I expect that the Constitution will be discussed a good deal over the next several weeks. I look forward to that discussion and to what it will teach us about the Constitution and the President's constitutional record.

Mr. SMITH. Mr. Casey.

TESTIMONY OF LEE A. CASEY, PARTNER, BAKER HOSTETLER

Mr. CASEY. Thank you, Mr. Chairman and Members of the Committee. It is an honor to appear here today to discuss the question of the abuse of presidential power. I should at the outset note that I am speaking here on behalf of myself.

Strong Executive power is very much part of the Constitution's design. However, the framers also established a separation of powers between the President, Congress and the courts. Although they anticipated conflicts between the branches, they also expected a basic level of respect by each branch for the other's legitimate authority. Unfortunately, the Obama administration has broken with this tradition, most especially in its disregard for the legitimate authority of Congress.

The most troubling instances of unconstitutional behavior involve the Administration ignoring clear statutory requirements by claiming to exercise prosecutorial or enforcement discretion, particularly in limiting enforcement of the immigration laws for certain classes of individuals.

The President must take care that the laws be faithfully executed. He has no power either to dispense with statutory requirements in individual cases or to suspend the particular law's operation. A legitimate exercise of prosecutorial discretion ordinarily in-

volves a determination whether a particular individual or entity should be subject to an enforcement action for past conduct. In this instance the Administration has eschewed enforcement actions against whole categories of persons whose violations are continuing.

In addition, legitimate prosecutorial discretion involves resource allocation rather than direct challenges to Congress' basic policy judgments as the Administration did in providing young undocumented aliens much of the relief it championed as part of the DREAM Act. The President must enforce the law as adopted by Congress and must respect its policy choices until changed through legislative action.

The Administration also ignored constitutional limits on presidential appointments when the President made recess appointments to the Consumer Financial Protection Board and the National Labor Relations Board earlier this year. Recess appointments are a narrow exception to the general rule requiring Senate confirmation for high-level Federal officials. Presidents have increasingly used this power to install favored nominees in the face of Senate opposition. The Senate moved to check this practice in 2007, choosing often to remain in session on a pro forma basis during congressional adjournments. The Administration argues that the Senate is not available to receive an act on nominations during such sessions, but that body has in fact conducted business, including passing legislation, when it is convened pro forma. The Senate, not the President, is the constitutional judge of what business can or will be transacted during its sessions however brief. The Senate's reliance on pro forma sessions to prevent recess appointments may be frustrating to the President, as it surely was to his predecessor, but he cannot arrogate to himself the power to judge the adequacy of the Senate's rules.

The Administration has also acted to frustrate legitimate congressional oversight of the ill-conceived Operation Fast and Furious. The President asserted executive privilege with respect to materials sought by Congress as part of its legitimate oversight functions, materials which the House Oversight Committee believes may have involved deliberate misrepresentations to Congress. But executive privilege is manifestly unavailable here. Because the President and his immediate advisors deny any involvement the constitutionally grounded presidential communications privilege does not apply. The common-law deliberative process privilege also does not apply where, as here, there is any reason to believe that government misconduct has occurred. The Administration's assertion of the privilege cannot be legally justified and again reveals a determination to ignore or evade lawful limits on Executive power.

Overall the Obama administration has disregarded some of the most basic constitutional limitations on presidential power in order to achieve its policy goals or to avoid congressional scrutiny. Whether this is a deliberate effort to undercut the role of Congress or simply impatience with political opposition and legal constraint the result is the same; a direct and sustained assault on the balance of power so carefully constructed by the Constitution's framers.

Thank you.

Mr. SMITH. Thank you Mr. Casey.

[The prepared statement of Mr. Casey follows:]

Prepared Statement of Lee A. Casey, Partner, Baker Hostetler

Thank you Mr. Chairman and Members of the Committee.

It is an honor to appear here today to discuss the very important issue of the Obama Administration's abuse of presidential power. I should note at the outset that I am speaking here on my own behalf.

I am a strong advocate of vigorous executive power, which I believe was very much a part of the Framer's design for our Constitution. Indeed, an examination of the records of the Constitutional Convention makes clear that few questioned the need for a strong executive at the heart of the new national government. Most of the discussion was directed at what form that executive would take, what specific powers it would enjoy, and how best to ensure that—once established—the executive did not overstep the bounds of its proper authority.

The system the Framers ultimately adopted was one of separation of powers, dividing power first between the federal government and the States, and then among the executive, legislative & judicial branches of government. Each of these branches was vested with different powers and responsibilities and there is little doubt that the Framers anticipated conflicts between the branches regarding the proper scope of their respective authority and overall role in our system of government. Indeed, it is in that very conflict that they saw the most important guarantee of constitutional government and liberty.

Nevertheless, for all of the potential rivalries built into the system, the Framers assumed a fundamental level of respect between and among the three branches of government, and an appropriate deference to the claims of each when operating at the core of their constitutional role. And, by and large, this has been our national experience. Congress and the Courts over time have deferred to the Executive Branch in the formulation and execution of foreign policy, the President and Courts defer to Congress in fiscal matters, and Congress and the President defer to the Courts on questions of law.

Unfortunately, the Obama Administration has broken with this tradition in several critical ways, most especially in its disregard for the legitimate authority of Congress. In particular, focusing on what I believe to be the most egregious examples, the Administration has worked to undermine statutory requirements duly enacted by Congress as the national legislature, it has ignored the limits on the President's power to fill federal offices by recess appointment, and it has worked to frustrated legitimate congressional oversight of its activities. The Administration has done all of this in a manner that goes beyond the normal cut and thrust of partisanship and politics, evincing a marked impatience and even disdain for the Constitution's limits on presidential power.

1. SUSPENSION OF STATUTORY REQUIREMENTS

By far the most troubling of the Administration's instances of unconstitutional behavior involve ignoring clear statutory requirements as a matter of supposed executive enforcement discretion. First among these was its determination, in June 17, 2011, effectively to limit enforcement of the immigration laws to undocumented aliens who have committed other, criminal violations, followed more recently by the Administration's grant of enforcement immunity to undocumented young people who entered the United States as children.

The Constitution specifically requires that the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. This language was not surplusage. It represents one of the most important constitutional limits on the executive power—the President *must* enforce the laws enacted by Congress—and it is there for a very good reason.

Two generations before our revolution, the British Crown claimed the legal right to suspend enforcement of duly enacted statutes. This was accomplished either through individually granted dispensations or simply by suspending the law's operation across the board. This dispensing/suspending power was claimed to be part of the king's inherent "prerogative," invested in the monarch as a necessary attribute of executive power. These claims, were among the factors which ultimately led to the ouster of King James II in the "Glorious" Revolution of 1688. Parliament, in other words, refused to be reduced to the level of a mere debating society, unable to enact laws the king was required to respect and enforce.

One hundred years later, the Constitution's Framers—with this history very much in mind—made plain that no American president could claim similar power, permit-

ting nullification of the laws by simple executive fiat. Such authority would, of course, cripple the very separation of powers they hoped to achieve. As the Supreme Court noted in an early case, where a presidential suspending power was suggested (although not, significantly, by the incumbent President Martin Van Buren):

> This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.
>
> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.

Kendall v. United States, 37 U.S. 524, (1838).

Of course, it has long been recognized that the President and his delegees may exercise a certain level of discretion in determining how best to carry out his constitutional duty to enforce the laws, and especially to establish his administration's enforcement priorities. The courts have recognized this "prosecutorial discretion" as legitimate, *see, e.g., Nader v. Saxbe,* 497 F.2d 676, 679 n.18, n.19, and it is therefore hardly surprising that the Obama Administration has characterized its most flagrant acts of suspension/dispensation merely as exercises of such discretion. *See* Memorandum from Janet Napolitano, Secretary of Homeland Security, June 15, 2012, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children;* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, June 17, 2011, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.*

There are, however, fundamental differences between the simple exercise of prosecutorial discretion and the Administration's actions here. First and foremost, a legitimate exercise of prosecutorial or enforcement discretion ordinarily involves a determination whether a particular individual or entity should be the subject of an enforcement action for *past* conduct. In this instance, the Administration has not merely concluded that prosecutions should be eschewed for existing offenses, but that no enforcement action will be taken for continuing and future ones. In other words, the beneficiaries of this determination (defined on a categorical rather than individual basis) are assured of immunity from legal consequences even though their violations continue. This is not simple prosecutorial discretion, but suspension of the law's operation with respect to this group.

Second, a legitimate exercise of prosecutorial discretion is about priorities and resource allocation; it does not challenge and ignore the basic policy judgments Congress' made in enacting the law at issue. That, however, is precisely what the Administration did when it announced that young undocumented aliens should not be the subject of deportation proceedings. As Secretary Napolitano states unequivocally in her June 15, 2012, memorandum,

> Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

In fact, rightly or wrongly, the immigration laws make no such distinctions. Indeed, it is because current law *does not* provide relief for youthful undocumented aliens that the Administration championed the Development, Relief, and Education for Alien Minors Act of 2011 or "Dream Act" which would, if enacted, grant this relief "notwithstanding any other provision of law," *i.e.,* the preexisting requirements of the Immigration and Nationality Act.

The President must enforce the law as adopted by Congress, and he must respect the policy choices Congress has made. He cannot, true to his office and oath, work to undermine or nullify the law simply because he disagrees with those choices, and or seek to substitute his own policy preferences and goals through administrative means. Such changes must be sought and obtained from Congress. Granting assur-

ances to categories of individuals that otherwise applicable law will not be applied to them is an "entirely inadmissible" act of suspension.[1]

2. "RECESS" APPOINTMENTS TO FEDERAL OFFICE

The Constitution's requirement that the President appoint high level federal officers "by and with the Advice and Consent of the Senate" is another fundamental check on executive power ignored by the Obama Administration when, at the beginning of this year, the President made "recess" appointments to the Consumer Financial Protection Bureau and National Labor Relations Board. The Framers adopted this critical requirement to ensure the quality of federal appointees and to defeat any drift towards presidential cronyism. As Alexander Hamilton wrote in *The Federalist:*

> It will be readily comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body.

The Federalist No. 76 (A. Hamilton) 513 (Jacob E. Cooke ed., 1961). The right to consider and approve or reject presidential nominees to the very highest offices has, of course, traditionally been one of the Senate's most jealously guarded authorities.

The Constitution does, of course, make one exception to this general rule. The Framers did not expect that Congress would remain in session for most of the year, and anticipated long periods of time (counted in weeks and months) when the Senate would be unavailable to play its advice and consent role in federal appointments. Their solution was to permit the President to make temporary, "recess" appointments: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. Art. II, § 2, cl. 3.

Successive presidents have made full use of this power, and such appointees have included agency heads, ambassadors, and even Supreme Court justices. Recess appointees may serve until the end of the Senate's next session and can, of course, serve longer if reappointed after the Senate has given its consent upon their nomination. Justice William Brennan, for example, was originally recess appointed by President Eisenhower in 1956, and was then reappointed after the Senate acted favorably on his nomination the next year. More recently, presidents have used the recess appointment power to install in office favored nominees even in the face of significant Senate opposition.

The Constitution does not, of course, define "recess" for purposes of the President's recess appointment power, but the Department of Justice's Office of Legal Counsel has advised successive presidents that recess appointments are permissible in both intersessional and intrasessional adjournments, so long as these are of "substantial length." *See Recess Appointments,* 13 Op. O.L.C. 325 (1989). In that case, the recess in question was 33 days, but recess appointments have been made during recesses of far shorter duration. Nevertheless, in view of the purpose of this exception to the general rule, a senatorial absence of more than a few days has been considered the minimum necessary requirement to a legitimate recess appointment. *See e.g.,* 33 Op. Att'y Gen. at 25 (suggesting that a 5 or 10 day adjournment is insufficient for a recess); *The Pocket Veto: Historical Practice and Judicial Precedent,* 6 Op. O.L.C. 134, 149 (1982) (advising President to avoid making recess appointments "when the break in continuity of the Senate is very brief.") *See also* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Re: Recess Appointments in the Current Recess of the Senate at 3 (Feb. 20, 2004) (cited in Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions at 9 n.13 (Jan. 6, 2012) (noting argument that a minimum of 3 days is necessary in view of the requirements in Art. I, § 5, cl. 4 that neither house can adjourn for more than three days without the other's consent)) [hereinafter Opinion of January 6, 2012]. And, of course, the Senate must *actually be in recess.*

As the number of recess appointments has grown, so has the Senate's determination to check the practice. Beginning in 2007, that body has chosen often to remain

[1] The Administration, it must be noted, has taken similarly impermissible actions with regard to other statutory schemes, including work/training requirements in the 1996 welfare-reform law and strict student testing and monitoring requirements in the 2001 "No Child Left Behind" law. Although certain aspects of the Personal Responsibility and Work Opportunity Act are subject to waiver, the federal work requirements are not among them. Similarly, the "No Child Left Behind" provides no authority for waivers from the relevant requirements—which, of course, were at the very heart of the law.

"in session" on a *pro forma* basis during congressional recesses so as to prevent controversial nominees from being recess appointed. Whether such *pro forma* sessions are inherently sufficient to defeat a presidential recess appointment can be honestly debated. The practical test, as outlined in OLC's 1989 Recess Appointments opinion, is "whether the adjournment of the Senate is of such duration that the Senate could 'not receive communications from the President or participate as a body in making appointments.'" 13 Op. O.L.C. 325.

In justifying President Obama's January 4, 2012, recess appointments to the CFPB and NLRB, OLC argued that the Senate was not "available to receive and act on nominations" during a *pro forma* session, and that such sessions could not therefore prevent recess appointments. Opinion of January 6, 2012, *supra,* at 1. Unfortunately, the office gave short shrift to the most fundamental objection to its conclusions: that it is the Senate, and not the President, which is constitutionally empowered to determine how it will operate and what business can or will be transacted during its sessions, however brief. *See* U.S. Const. Art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings.").[2]

And, in fact, at the time the January 4 appointments were made, the Senate was capable of transacting business in accordance with its own rules and past practice, including acting on legislation.[3] There is no doubt that the Senate's adoption of *pro forma* sessions as a means of preventing recess appointments is frustrating to the President, as it surely was to his predecessor. President Bush, however, accepted the ultimate authority of the Senate to govern its own proceedings, and did not purport to exercise his recess appointment power when the Senate was in *pro forma* session. President Obama's approach necessarily arrogates to himself the ultimate authority to determine the adequacy of the Senate's rules and how nominations are handled. The Constitution simply does not give the President such power.

3. FRUSTRATION OF LEGITIMATE CONGRESSIONAL OVERSIGHT

Earlier this year the Administration's refusal to provide documents to the House Committee on Oversight and Government Reform led to an unprecedented contempt citation by the House of Representatives against Attorney General Eric Holder. The issue involved, of course, was Committee demands for documents relative to the astonishingly ill-conceived "Operation Fast and Furious," through which thousands of firearms were smuggled into Mexico at the behest of U.S. government agencies and officials as part of an anti-drug cartel initiative. Of perhaps 140,000 responsive documents, the Justice Department has produced about 7,600 pages, many with heavy redactions. Last June, the President asserted Executive Privilege with respect to those materials directly bearing on the Justice Department's handling of the fallout from Operation Fast and Furious, which the Committee believes may have involved deliberate misrepresentations to Congress.

Executive privilege, of course, is not specifically provided for in the Constitution's text, but since Washington's administration has been inferred based upon the Executive Branch's status as a separate and co-equal branch of government and the President's authority to supervise and direct the Executive Branch. It has been fully recognized by the courts. *See e.g., In re Sealed Case,* 121 F.3d 729 (D.C. Cir. 1997).

That said, executive privilege is not absolute—as President Nixon found to his great cost. *See United States v. Nixon,* 418 U.S. 683 (1974) (need for information for a criminal trial sufficient to overcome President's assertion of executive privilege with regard to White House tapes.) In the context of determining how powerful any particular assertion of privilege may be, the courts have distinguished between two components of executive privilege. The first and strongest type of executive privilege, grounded entirely in the Constitution's separation of powers, is the "presidential communications privilege." This covers communications from and to the President and extends to his immediate advisors. *See e.g., Judicial Watch v. Department of Justice,* 365 F.3d 1108, 1114–1116 (D.C. Cir. 2004). A very strong showing of need, as where documents may be necessary to a criminal *trial* (not simply an investigation) as in *Nixon,* must be made to overcome the presidential communications privilege. *See In re Sealed Case,* 121 F.3d at 744–45.

In this instance, of course, "the White House has steadfastly maintained that it has not had any role in advising the Department with respect to the congressional

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[2] As other commentators have correctly noted, the precedents cited to the contrary in OLC's Opinion of January 6, 2012, *supra,* at 1, involved the question of individual rights and are inapposite. *See* Todd Gaziano, "Whitewash on Illegal Appointments Won't Work" (Jan. 12, 2012), available at, http://blog.heritage.org/2012/01/12/whitewash-on-illegal-appointments-wont-work/.

[3] As OLC's Opinion of January 6, 2012, itself acknowledges, the Senate had in fact passed legislation (a politically important payroll tax cut extension) during a pro forma session. Opinion of January 6, 2012, *supra,* at 21.

investigation." Letter from the Hon. Darrell Issa to the President, June 25, 2012, at pp. 1–2, available at, http://images.politico.com/global/2012/06/issaobamaltr.pdf. As a result, it would not be appropriate for the Administration to assert the strictly constitutionally-based presidential communications privilege.

The second type of executive privilege is the "deliberative process privilege." This privilege is far broader than the presidential communications privilege, and generally protects materials reflecting federal agency deliberative or policymaking processes. According to the D.C. Circuit, the deliberative process privilege "originated as a common law privilege," and only certain "aspects of [that] privilege, for example the protection accorded the mental processes of agency officials . . . have roots in the constitutional separation of powers." *Id.* at 737 & n. 4. *See also* Letter Opinion to the Counsel to the President, Assertion of Constitutionally Based Privilege Over Reagan Administration Records, 2004 OLC LEXIS 24, 28 Op. O.L.C. 1 (Jan. 12, 2004) (referencing "government-wide deliberative process component of the President's constitutionally based privileged."). It is "[t]he most frequent form of executive privilege raised in the judicial arena." *In re Sealed Case,* 121 F.3d at 737.[4]

Although reaching a much broader range of materials, the deliberative process privilege also is far weaker than the presidential communications privilege. This is because the relevant communications do not involve the President directly, and often are very far removed indeed from his own deliberative and decision making processes. The separation-of-powers concerns are, therefore, far less evident. As a result, of course, the showing of need necessary to overcome this species of executive privilege is much less demanding and, as noted by the United States Court of Appeals for the District of Columbia Circuit in a leading case, "the privilege disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case,* 121 F.3d at 746.

This, of course, is the case with regard to Operation Fast and Furious and the Justice Department's initial statements to Congress about that embarrassing and tragic fiasco. Moreover, when the need for executive branch secrecy regarding the formulation, execution, and closure of this program is weighed against Congress' legitimate oversight needs, the balance to be struck is clearly in Congress' favor. As a result, the Administration's assertion of the privilege here cannot be legally justified and again reveals a determination to ignore or evade the lawful limits on executive authority.

Overall, the Obama Administration has disregarded some of the most basic constitutional limitations on presidential power, ignoring those limits in order to achieve its desired policy outcomes, or to avoid scrutiny of its programs and operations. Whether this grows out of a determined effort to undercut the role of Congress in our constitutional system, or from a simple impatience with political opposition and legal constraints, the result is the same—a direct and sustained assault on the balance of powers so carefully constructed by the Constitution's Framers.

Thank you, and I would be pleased to answer the Committee's questions.

Mr. SMITH. Senator Lee, thank you for staying for questions. I very much appreciate your testimony and let me direct my first question to you.

What is fundamentally wrong with the President himself alone deciding when the Senate is out of session?

Senator LEE. First and foremost, the Constitution itself gives each House of Congress the prerogative of determining its own schedule, subject to certain general parameters outlined in the Constitution, and just as importantly giving each body the power to establish its own rules. And so its own rules often determine its own schedule and determine when it is and is not in session.

So when you take that, and you take the fact that the Constitution requires Senate confirmation of executive branch nominees and judicial nominees, you can destroy that power or at least seriously undermine it if you allow the President to conclude based on his own judgment that the Senate while it considers itself not to

[4] This is because Congress has itself recognized the "deliberative process privilege" in section 5 of the Freedom of Information Act. *See* 5 U.S.C. § 552(b)(5).

be in recess in fact is in recess perhaps because the President doesn't think enough is happening. At that point as soon as the President has that power the President can in many, many circumstances just circumvent the confirmation prerogative of the Senate, the advice and consent function of the Senate. That is dangerous.

Mr. SMITH. Thank you, Senator Lee.

Mr. Casey, when the Administration unilaterally decides to either ignore immigration, welfare or education laws what is the impact of that on our democracy?

Mr. CASEY. Well, Mr. Chairman, I think among all of the issues we are talking about that one is the most critical because refusing, failing to carry out the law as Congress has passed it undercuts Congress' role in our constitutional system. It seizes for the executive a kind of legislative power which our framers would have been astonished and appalled to see any President attempt to exercise.

Mr. SMITH. Thank you, Mr. Casey.

And Ms. Windham, what impact does the contraceptives and abortion inducing drugs mandate that is in the new health care bill have on religious and Catholic employers?

Ms. WINDHAM. It has a tremendous impact on religious employers, Catholic employers and employers of other denominations and faiths as well. If you refuse, if an employer cannot in good conscience provide these drugs and services they are facing fines of $1,000 per employee per year and also $100 per employee per day. These can easily run into the hundreds of thousands and even millions of dollars. So for an organization like Colorado Christian University, which is an evangelical university in Colorado, they are looking at $500,000 a year. If they choose to have policies that follow their faith they are looking at hundreds of thousands of dollars, a crushing amount, for simply asking for the right to practice what they preach.

Mr. SMITH. Thank you, Ms. Windham.

That concludes my questions, and the gentleman from Michigan Mr. Conyers is recognized for his questions.

Mr. CONYERS. Thank you, Chairman Smith. Let me turn to Professor Michael Gerhardt and track the last question that was raised by our distinguished Chairman.

Does the Health and Human Services rule violate the exercise of free speech when 28 States for years have already required that contraceptives be covered similar to prescription drugs? Could you pick up on that discussion between the previous witness and yourself?

Mr. GERHARDT. Yes, sir. Obviously I don't perceive there to be a constitutional or legal violation here. But let me if I might just go back to a focus on process. I don't think on that issue or any of the other issues we have been talking about the President of the United States or his Administration are standing alone. It is not as if they are out there unsupported and unjustified in taking positions on any of the issues we just talked about. On the one you have just mentioned there are other Members of Congress, there are other scholars, others that view that the Administration, for that matter the State policies you just pointed out, take a position of neutrality on the issue of contraceptives as one of the things to

provide as part of medical services. And the Administration's position on this I think has been evolving, which suggests that in fact they are trying to reach some sort of accommodation that may or may not make everybody happy. But that seems to me to be part of the process. And I think at the same time a lot of what is going on here is the result of institutions having taken Federal money, and Federal money comes with conditions attached, and that is one of the consequences of taking the money.

Mr. CONYERS. Well, you have done what I was going to next ask, which is to try to review any of the assertions made by your fellow witnesses that we want to kind of get in the record and get cleared up. I think that as a constitutional scholar who has been before the Judiciary Committee not many times but at least some times that you could be very helpful to all of us in that regard.

Mr. GERHARDT. Well, thank you. I just might add though that it is not my point to suggest that I think there is an obvious single correct answer here. I think this is largely about whether or not we have confidence in the process, confidence in whether or not these issues are being approached in good faith and handled competently and credibly and that there is credible constitutional support and legal support for the positions of the Administration. That is my point. My point isn't to suggest that any of the issues being raised here are being raised inappropriately or in bad faith, but simply that I think the Administration's approach does not constitute any abuse of power.

Mr. CONYERS. Now, in your testimony you distinguished between political choices and constitutional choices. Now, to your knowledge has anyone determined as a matter of law that the Obama administration has acted unconstitutionally on any of the matters that we have discussed today, invoking executive privilege in Fast and Furious, making recess appointments, exercising prosecutorial discretion and enforcing immigration laws?

Mr. GERHARDT. I think the answer is no. And I think this is a function of what I sometimes describe as the constitution outside the courts. When you are operating outside the courts, as what is occurring here, you will get some conflict, you will get some tension, but at the same time the President at least for his part and his Administration for its part has put forward the support for its positions and is trying to in a sense explain what it has done. Obviously this institution will push back to some extent. But that is the nature of the process. But I don't think there is any—to answer your question succinctly, there is no finding of any legal violation the President or his Administration has committed. There is disagreement but disagreement doesn't constitute violation.

Mr. CONYERS. Thank you, Professor Gerhardt. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Conyers. The gentleman from California, Mr. Gallegly, is recognized.

Mr. GALLEGLY. Thank you very much, Mr. Chairman, and thank you for calling this hearing. While I want to have an opportunity to have a couple of questions for our witnesses I would just like to respond to my good friend from Michigan's opening statement. And he truly is my good friend and has been a good friend for a long time and will continue to be a good friend. But I have to respect-

fully disagree with one of the statements he had regarding voter ID. With all due respect, I believe the greatest threat that we have to our democracy or to any democracy is fraud in the electoral process. And if we don't have control over the legitimacy of an election, that compromises the democracy more than anything. And so we may have a little disagreement on how we get there, but I think at the end of the day we want the same thing.

Mr. CONYERS. Would the gentleman yield for just a moment?

Mr. GALLEGLY. I will yield.

Mr. CONYERS. Thank you very much. I appreciate it. Could you just document somewhere in the course of our judiciary hearings all the fraud in the electoral process that you have ever come across?

Mr. GALLEGLY. Well, I think common sense will predicate that if people do not have to show that they have a legal right to vote, and of course one of the things if we go back historically on the issue of absentee voting that has changed dramatically. And we don't have a check and balance. If you go to K-Mart or any other place and you give them a check for $3 they are going to want to know you are who you say you are. And so I think that that in and of itself invites significant debate.

And I would like to have an opportunity now to talk to some of our witnesses. And Senator Lee, thank you very much for being here this morning. Senator, despite the fact that Congress has repeatedly failed to pass the DREAM Act the President recently unilaterally granted a de facto amnesty to many illegal immigrants.

How do you see that if any way impacting the ability for millions and millions of Americans that are out of work finding a job?

Senator LEE. Obviously any decision that involves either loosening or tightening our immigration laws might have an effect, will inevitably have an effect on the job market by either contracting or expanding the supply of labor. So this is one of many factors that ought to apply in any public policy decision made within the Federal Government with regard to immigration laws, especially with regard to those laws that govern one's ability to work in this country as an immigrant.

So absolutely it will have an effect. It is difficult to quantify exactly what that effect might look like, in part because we don't know exactly how many people this might apply to. But the point is that these are legitimate policy concerns. There are legitimate policy arguments to be made on both sides of the DREAM Act issue. But the Constitution in its opening line, right after the Preamble in Article I, Section 1 says that all legislative powers herein granted shall be vested in the Congress which shall consist of a Senate and a House of Representatives. Now, the legislative powers encompass the power to legislate. To legislate is to make rules, rules carrying the force of generally applicable law. The coercive force of government will enforce those rules. Here with this Executive order we have what is in effect a piece of legislation. It didn't go through Congress. So whether you are a Republican or a Democrat, whether you are a liberal or a conservative, whether you are pro-immigration reform or anti-immigration reform, especially if you are a Member of Congress, and in any event if you favor the

rule of law you should want that policy decision to be made by Congress.

Mr. GALLEGLY. Thank you, Senator Lee.

Mr. Casey, do you think that the de facto amnesty in any way will act as a magnet or send a signal to others that have not arrived here illegally to come to this country illegally as though it is a de facto invitation?

Mr. CASEY. Sure. Well, I think any time that the executive publicly makes plain that a particular law or part of a law will not be enforced it acts as an incentive to others to break that law since there very possibly or very likely will be no consequence. So yes, I think so.

Mr. GALLEGLY. Thank you, Mr. Casey. Maybe Senator Lee might like to jump in on this one as well. Do you think that, or are you concerned about future Presidents, Democrat, Republican, whatever the situation, would use this precedent of granting de facto amnesty unilaterally to other groups of immigrants and, if so, give me an example?

Mr. CASEY. Well, yes, a precedent—we live by precedent in our law and once this line is crossed it is very likely that a future President will cross it again. And you can think of an entire range of potential areas where there may be good policy arguments for nonenforcement, be it in the immigration area or even some of our criminal laws, that will if a future President decides that it is against his policy preferences to enforce he will not enforce and cite this example.

Mr. GALLEGLY. Thank you very much, Mr. Chairman. I see my time has expired. I would like to make a unanimous consent request that a recent article in Maryland Politics regarding Maryland Democrat Quits Congressional Race Amid Voter Fraud Allegations.

Mr. SMITH. Without objection.

[The information referred to follows:]

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

Mr. SMITH. Mr. Nadler is recognized.

Mr. NADLER. Ms. Windham, you said in your testimony regarding what you regard as the mandate, that is, the regulations on contraceptives in the Affordable Care Act that government—that there should never be—force anybody to make a choice between religious conscience and obeying the law; is that correct?

Ms. WINDHAM. Yes.

Mr. NADLER. Thank you. Now you seem to advocate for the right of any employer then, even for example someone who owns a McDonald's, to object on religious grounds to insurance that covers contraception, is that correct?

Ms. WINDHAM. What we believe——

Mr. NADLER. Is it correct, yes or no, please, because I have a lot of questions.

Ms. WINDHAM. We believe that religious conscience should be respected. So if a religious business owner has——

Mr. NADLER. So the answer is yes, please.

Ms. WINDHAM. When that is protected by our First Amendment or RFRA, then yes.

Mr. NADLER. So please just answer yes, then. So in other words, that would apply also to someone who said, my religion tells me that no one may come into my McDonald's store who is Black or a woman because that violates my religious freedom, the government has to right to say no to that, correct yes or no?

Ms. WINDHAM. I am not aware of any case where RFRA——

Mr. NADLER. That is not the question. Do you believe that government has the right or not to violate, to tell a person to violate his religious conscience by serving Black people?

Ms. WINDHAM. I believe that the government has a right as is said under RFRA and as is said under our First Amendment to restrict religious conscience only when there is a compelling——

Mr. NADLER. Okay, only when there is a compelling State interest. Now, now the Supreme Court—now Justice Scalia said that to make an individual's obligation to obey such a law, that is a law of general applicability such as any of the laws we were just talking about, including the contraceptive mandate, to make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs contradicts both constitutional, traditional, and common sense and would make every individual a law unto himself.

Now we thought that went a little too far and we enacted, and I was one of the sponsors of the Religious Freedom Restoration Act, we said that in order to enforce a law of general applicability against religious conscience one should have to show compelling—that there was A, an undue burden placed—a substantial burden, not undue, a substantial burden placed on the religious exercise of a freedom and that undue, that substantial burden was justified by the States showing that it was necessary to place that substantial burden on the exercise of religious conscience in order to vindicate a compelling state interest and that that was the least restrictive means of doing so, the so called strict scrutiny test.

With any number of—and yet and you seem to be arguing that the mandate simply by saying that an institution like a hospital

must purchase insurance that allows people to get contraception is—do you believe that is a substantial burden on religious belief?

Ms. WINDHAM. If that is contrary to their sincere religious beliefs, then yes.

Mr. NADLER. So any law that contradicts sincere religious belief is a substantial burden.

Ms. WINDHAM. Not any law. It has to be a substantial burden on their religious exercise, such as when it forces them or threatens them with a fine to violate their faith. The Supreme Court said it was a substantial burden when Amish families were fined $5 because they refused to send their children to public school.

Mr. NADLER. But the Supreme Court rejected the claim that an individual's payment of taxes for registration fees, where that money might be used to fund health care to which the payer objects on religious grounds, imposes a substantial burden on religion. They have rejected the claim that registering for the draft imposes a substantial burden on religion. They have rejected the claim that paying taxes that go for defense against someone's religious principles are a substantial burden. And they have rejected the Amish claim that paying Social Security taxes is a substantial burden.

Mr. Gerhardt, would you comment on the absolutist claims of Ms. Windham and the people who say that the contraception mandate is a violation of religion in light of the Supreme Court decisions, in light of the Religious Freedom Restoration Act, and in light of the finding that women's cost for health care can be in many cases 68 percent higher than men's because of the necessity to pay for contraception and for other gynecological problems that men don't have and that this in fact is an exercise of the State's right to exercise its right to vindicate a compelling State interest?

Mr. GERHARDT. I can try, but Mr. Chairman, I see my time is up.

Okay. Well, thank you, Mr. Nadler. Thank you, Mr. Chairman.

I think Ms. Windham makes perfectly reasonable arguments. I think that one of the things we need to think about is what is the legal doctrine or legal framework within which all this takes place. And for example, Mr. Nadler, you had referred to the Supreme Court's test, for example, in *Smith v. Employment Division* which relates to how do we determine the constitutionality of a generally neutral applicable law. Well, the answer there is that we use the rational basis test. That is an opinion by Justice Scalia. We don't use any heightened scrutiny in a circumstance like that. But I think one reason we are in this discussion is because we are in a very difficult, tricky area of constitutional law and it is the intersection between free exercise and establishment. When you are in that intersection you are within under the thorniest areas of constitutional law. And all I can tell you there is what one of my former law professors said and I will try to say this in the 14 seconds I have left. I was a research assistant to Philip Kurland, who was a great constitutional law professor, formerly clerk to Justice Frankfurter, conservative law professor, University of Chicago for many years. And he said the only way I can think my way out of this thicket is to expect neutrality from government. That is to say government takes a neutral position. If you create an exception in a law that benefits only religious organizations, then you could at-

tack it for being an establishment. So either way you are going to face some dilemma.

Mr. NADLER. So a neutral application of the general law for contraception coverage would be regarded how by Professor Kurland?

Mr. GERHARDT. Well, I would think he would think that is plainly constitutional. When you start creating exceptions in the law that favor religion then one issue you have got to confront is whether that confronts——

Mr. NADLER. So this mandate is not an unprecedented attack on religious liberty?

Mr. GERHARDT. No.

Mr. SMITH. The gentleman's time has expired, thank you. Thank you, Mr. Nadler. The gentleman from North Carolina, Mr. Coble, is recognized.

Mr. COBLE. Thank you, Mr. Chairman. I apologize I have had a simultaneous hearing in Transportation so I have been back and forth. Good you to have you all with us, particularly my fellow Carolinian from Chapel Hill.

Mr. GERHARDT. I am having a little trouble hearing.

Mr. COBLE. I just said it is good to have all of you with us but in particular my fellow Carolinian from Chapel Hill.

Mr. GERHARDT. Thank you, sir. It is great to be from there.

Mr. COBLE. It is good to have all of you. Senator Lee, you have had boots on the ground on the other side of the Hill now for a good while. Share with us if you have any concerns about the decisions that the President may have made as Commander in Chief. I realize that is a general question.

Senator LEE. With regard to the President's Commander in Chief powers I was personally somewhat concerned when we got involved in military action in Libya without any prior consultation of Congress, without a declaration of war, without an authorization for use of military force.

Now I will be the first to concede that there is some gray area, there is some uncertain middle ground between where the President's Commander in Chief powers on the one hand and where Congress' power to declare war begins.

Congress has sought through the War Powers Resolution to clarify some of that gray area and to at least establish some standards. But even within those standards the President in my opinion did not take adequate care to consult or obtain permission from Congress before going there. That is the most glaring example I can think of with regard to his Commander in Chief powers.

Mr. COBLE. I thank you, Senator.

Ms. Windham, much has been said about the mandate. In your opinion does the mandated health care coverage have a chilling effect on religious organizations that serve their respective local communities through various charitable works?

Ms. WINDHAM. Yes, sir, we believe it does have a chilling affect. What is so troubling about the way this mandate has been written is that it specifically hits religious organizations who choose to open their doors and serve anyone who is in need. And so you are not eligible for the mandate's very narrow religious exemption if you decide to serve people who are not of your own faith. I think it is very troubling to set a precedent that religious organizations

forfeit some of their constitutional rights when they choose to serve their country and serve the public.

Mr. COBLE. I thank you both. Mr. Chairman, I have got to go back to my other hearing, so I am going to withdraw if I may and yield back.

Mr. SMITH. Thank you, Mr. Coble. Gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT. Thank you, Mr. Chairman. I am going to follow up on that same line of questioning and point out that in the 1960's when we passed Medicare all of the hospitals in the South were racially segregated as a matter of religious belief and the segregation was preached from the pulpit. President Johnson by Executive order mandated the idea that if you accepted Medicare you could not be—run a segregated facility.

Ms. Windham, in your judgment did President exceed his presidential authority?

Ms. WINDHAM. I am not familiar with what law was being discussed there or what was being relied upon. I am not here to argue and I am not aware of any cases arguing that religious hospitals can discriminate according to race because of RFRA or the First Amendment. All we are here to ask for is that our clients and religious organizations and religious individuals have the same rights today that they had on July 31st, 2011, the day before the mandate went into effect. If we were not——

Mr. SCOTT. Well, did President Johnson's Executive order prohibiting hospitals that accepted Medicare from running segregated facilities, racially segregated facilities, did that violate—did he exceed his powers?

Ms. WINDHAM. Again I am not familiar with what he did there in the Executive order. Again I am not here to argue with anyone.

Mr. SCOTT. Let me ask Mr. Gerhardt a question. Mr. Gerhardt, Professor, I want to point out to my friend from North Carolina that you were a Virginian before you were a North Carolinian.

Mr. GERHARDT. Covered all my bases.

Mr. SCOTT. Is there a difference in application of rules between a volunteer free clinic run by a religious organization and a public hospital that accepts Medicaid, Medicare and is open to the public in terms of their responsibility to follow generally applicable law?

Mr. GERHARDT. Well, I think the answer to that would have to be yes. If you are the latter, then as you just pointed out, you are subject to all the conditions that would apply to any other institution or entity that operates in the same field.

Mr. SCOTT. And if you are a public accommodation, what is wrong—you kind of alluded to it, what is wrong with an exception for individual conscience?

Mr. GERHARDT. Well, we obviously try and provide that and the law tries to provide that in all sorts of ways. But I was just trying to point out that this is a very tricky area and one of the difficulties you have got is once you move away from a generally mutual applicable neutral law and start making exceptions only, for example, religious organizations then that raises a possible establishment problem. And so government when it sets out making regulations has got to sort of maneuver through that thicket. And I think

that that is what the Administration is plainly trying to do in this area.

Mr. SCOTT. If people have individual religious problems with one regulation or another, is that just too bad?

Mr. GERHARDT. Well, it shouldn't just be too bad. Obviously people have sincere religious beliefs that are being burdened, that does raise some serious concerns.

Mr. SCOTT. When I was growing up one religious belief was that the races should be separated and that was preached every Sunday from the pulpit. If you have a public accommodation, are you going to allow any individualized conscience as an exception?

Mr. GERHARDT. Well, as you know, when you move away from the pulpit into civil institutions, they are going to be subject to the law and one of those laws is legal protection clause or in the case of a Federal——

Mr. SCOTT. And so the difference—if you are running a public operation that just happens to have certain religious beliefs, that is different from running a religious mission, a volunteer free clinic as opposed to a public hospital, is that right?

Mr. GERHARDT. I would say that is correct, yes.

Mr. SCOTT. Can you talk a bit about what the precedence is on recess appointments and when it is a recess and when it isn't?

Mr. GERHARDT. Well, one of issues that arises in that area as Senator Lee was alluding to was the question of when the recess occurs. And one of the disagreements we have here is how do we go about determining that. I think the complication for the President of the United States in this instance was that the pro forma sessions in the Senate were something he thought were designed to obstruct his recess appointing power, and then the question becomes how is he able to defend his prerogative. And I think that is precisely what he was trying to do. The pro forma session exists for a number of reasons, one of which I think frankly is to impede that presidential authority. And I think the President has got the ability and authority to in a sense push back, to say you can't make a unilateral decision about when there is a recess, when I think in fact it is being done solely for the purpose of frustrating one of my powers.

Mr. SCOTT. And who decides ultimately?

Mr. GERHARDT. I am sorry?

Mr. SCOTT. Who ultimately decides that question?

Mr. GERHARDT. Well, it depends on how it plays out. I know it may be pending in the courts, the courts may or may not want to get to the merits of the issue. If the courts don't get to the merits of the issue, then it gets played out between this institution and the President. And that is how a lot of suppression of powers issues get played out, they get played out over time and how these institutions work together and reach some accommodation.

Mr. SMITH. Thank you, Mr. Scott. The gentleman from Ohio, Mr. Chabot, is recognized.

Mr. CHABOT. Thank you. Before I get into my questions, Senator, did you have a comment that you wanted to follow up on there?

Senator LEE. Thank you very much, Congressman, I appreciate that. I wanted to respond very briefly a couple of these religious liberty points just to make sure there is no ambiguity. Making sure

there is a religious exemption here would not in my opinion cause either of the two problems that have been suggested. Number one, it would not lead to a risk of racial discrimination on the basis of a purported religious belief. There is precedent from the Supreme Court in the 1983 decision of *Bob Jones University v. United States* in which the Supreme Court of the United States upheld Federal tax law revoking the tax exempt status of Bob Jones University which claimed the right to discriminate in its admission decisions on the basis of race. Predicating that practice on religious belief, that was soundly and roundly rejected by the Supreme Court in an 8 to 1 decision in 1983. This is in fact a compelling State interest that the Federal Government has and it does thwart any kind of religious belief there with regard to or desire to racially discrimination.

Secondly, I want to respond to any suggestion that may have been made that granting a religious exemption to the abortifacient and contraceptive mandate would somehow amount to a violation of the establishment clause of the First Amendment. This kind of assertion was soundly and roundly rejected by the Supreme Court of the United States in the 1987 decision of Corporation of the Presiding *Bishop v. Amos.* Congress is free, the Federal Government is free to grant religious exceptions and doing so does not amount to an establishment clause violation.

Thank you.

Mr. CHABOT. Thank you very much, Senator.

Mr. Casey, I wanted to direct my first question to you. You had talked during your testimony about the Obama administration breaking with traditional separation of powers originally adopted by the framers in the Constitution. And I would like to focus on one of the particular abuses of power that I see.

In early July the Obama administration unilaterally announced that it would disregard current law and allow states to apply for waivers of the work requirements that have been critical to the success of welfare reform. We passed welfare reform back in 1996, and it was TANF of course. I was here, I had been just elected in 1994 and I had some experience at the local level with the need to reform welfare. I was on city council in Cincinnati and I was the county commissioner, and we had lots of folks that were growing up in homes where they had never seen an adult in the home go to work. What was supposed to be temporary help for the truly needy had far too often become a permanent way of life. And we came together with mostly Republicans but had quite a few Democrats support it, and President Clinton vetoed it twice but finally signed it the third time. I want to be very clear about this, there was no question about the waiver requirement. We wanted to make sure that people actually had to work. There are all kinds of—people had unfortunately gamed things like this in the past where you had people go from training program to training program, never actually go to work and that was a lot of the battle that went on. So we made it very clear that was very important and now the Administration has claimed authority basically to change those welfare-work provisions. And it really does in my opinion circumvent Congress' power and step all over separation of powers.

And last week even the GAO, the Government Accountability Office, agreed that the Administration exceeded its authority in granting the waivers. In a letter to Members of Congress GAO's General Counsel, Lynn H. Gibson observed that the waiver policy was beyond the discretion granted to the executive branch by the Constitution.

So what threats are there when a President does clearly circumvent the separation of powers here and trample upon really what is very clearly the law. Could you comment on that?

Mr. CASEY. Sure. I would say obviously the President has no inherent power to waive the requirement of any law. You have to look at each statute to see if Congress has included a waiver provision. In many statutes it does. And in particular with complicated statutes like the welfare reform statute. You also need to look to see whether the waivers Congress may have included, and there are some, apply to the provisions that the President wants to waive. As I understand it here they do not. As a result you get a similar effective suspension of the application of the law by the executive without congressional permission, involvement.

Mr. CHABOT. Thank you very much.

Mr. SMITH. Thank you, Mr. Chabot. The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman. Let me apologize to Senator Lee and Ms. Windham I was in a markup in another Committee and missed your testimony. Mr. Gerhardt, welcome Mr. Casey, welcome, whether you are from Virginia or North Carolina. I like both of those States and I especially like folks from the University of North Carolina Law School, so I appreciate your being here.

It seems to me that while this is an important hearing, academic hearing, which deserves some review there is precedent for virtually everything all over the board here I think about—so if there has been an abuse of power it seems to me that it has been a bipartisan abuse of power by Presidents throughout the history of the country. I mean if this President has abused it then other Presidents have abused it in a number of respects. I think of signing statements that all Presidents have signed saying they are going to apply a particular law that we passed one way or another. That seems to me even when the signing statements are clearly in conflict with the legislative intent, the plain language of the statute that we pass. I think of recess appointments that both Presidents, Republican and Democratic Presidents, have engaged in over time.

I think of war powers that several of you have mentioned. There has always been a difference of opinion about who—what authority the Commander in Chief has versus the seemingly clear language that the President should not declare war without the approval of Congress. So whatever is going on seems to me to be fairly standard stuff, whether we agree or disagree.

I kind of like Professor Gerhardt's analysis. There is a lot of things that happen both by Republican Presidents since I have been here and Democratic Presidents since I have been here that I didn't necessarily agree with. I am not sure that I thought they were an abuse of power, I just happened to disagree with them.

And I think it is incumbent on all of to us try to apply the same standards to a Republican President or a Democratic President.

I leaned over to my good friend Bobby Scott from Virginia, there must be something in the water in North Carolina and Virginia when Professor Gerhardt said something about applying the same standard to Republicans and Democrats. And I remember sitting here during the impeachment hearings in this Committee and Bobby Scott and I in the midst of all of what was going on discussing with each other whether we would apply the exact same standards, constitutional standards in an impeachment to a Republican President as we were applying in the Clinton administration, to the Clinton impeachment. We had that discussion and either rightly or wrongly felt that we were applying the same principles without a partisan bent on it. So I think that is a wonderful standard that Professor Gerhardt has outlined for us and I am troubled more by people applying one standard to this President and a different standard when a Republican President is in power. At least apply the same standard if we are going to do this. So if nothing else comes from this hearing, Mr. Chairman, I hope that we will maybe kick out the stool under this hearing that is labeled partisanship and at least all try to apply the same standard whether we are talking about abuse of power by a Democratic President or abuse of power by a Republican President because from my view all of them have been either on the edge or over the edge so—depending on how you look at it.

So with that I don't have any questions. I think the panel has been—I am glad you at least put one witness on that is from North Carolina and from Virginia that makes it sound at least balanced in the approach. I yield back.

Mr. SMITH. Thank you, Mr. Watt. The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman. And I thank the witnesses for your testimony here this morning. I picked up some of it and like others I have been a little bit busy with some other duties too. But I am looking at this list of subjects that I think are encompassed by this hearing and I just go down through some of them, the contraceptive, sterilization, abortifacient manufacture policy by the President of United States, the DREAM Act light so to speak, the amnesty piece which manufactures immigration law out of thin air, the No Child Left Behind component, the welfare to work being struck, and its title languages could be written that prohibits any kind of an executive interference within requirement to welfare to work on TANF, that blown out of the water by their President of the United States. The recess appointments which are certainly the subject of this discussion as well.

I go down through some others that the courts have looked at some I might not necessarily agree with their opinion but the effort on the part of the President to implement cap-and-trade by EPA rules is another one. I am looking at this Congress and thinking this, and I pose my first question to Senator Lee because your written testimony alludes to it to some degree. And that is this, in the understanding of the framers that set up the three separate branches of government and that balance of powers it is my belief that they believed that each branch of government would jealously

protect the power and authority granted to it within the Constitution and that that natural tension in that struggle to maintain the power and authority that is constitutional there would be a protection from the overreach on the part of any branch of government, and they saw the judicial branch as the weakest of the three, and they saw the LEGISLATIVE BRANCH as being able to control the executive. And I would ask Senator Lee if you agree with that? And what are the remedies that might fit within the vision of the framers?

Senator LEE. Thank you, Congressman King. This question actually relates closely to what Congressman Watt said quite well a few moments ago. These things are not new—Executive powers are not new, they are as old as the republic itself. And they are in fact much older than that and that is why we have the Constitution doing what it did. So I think the solution lies in acknowledging that this tendency exists. It exists for——

Mr. SMITH. Let me see if we can get the acoustics working.

Senator LEE. Is that better? Okay, so, these——

Mr. KING. It is my microphone here. I will move down one.

Senator LEE. These things happen not because we have had bad men as Presidents. We haven't, we have had good men, that includes our current President. These things happen because Presidents are human beings, humans are themselves, self interested and they are also fallible. Those two things when coupled with power lead to abuses of power. And again I don't mean the word abuse of power to refer to anything criminal necessarily, it can lead to that, but it doesn't necessarily involve that. It just means excesses of power based on what is granted in the Constitution.

So with regard to the question dealing with how we deal with it, we deal with it in precisely the manner described by the Constitution. We exercise our own power because we are also human and we are also self interested. And when we see someone stepping over what we perceive to be our boundary line, stepping onto our property so to speak, we hold hearings, perhaps we pass legislation but there are other remedies at our disposal. But most importantly, we cannot ignore abuses of power because if we ignore them then they become part of the established practice and tradition within the constitutional system and that is dangerous.

Mr. KING. I would add, Senator, down the line of the list, one is the advice and consent of the Senate that you reference, that is a leverage point. But if the President can declare the Senate not to be in session when they are in session, then he is essentially mooted the effort of the Senate all together.

We have the ability, especially in the House, to withhold funding for implement or enforce the overreach of the executive branch of government, but if the President ignores that and does say intradepartmental transfers, if the President does interdepartmental transfers, what is our remedy? I think the remedy we get to is the subject matter that Mr. Watt brought up if you follow this down to its logical extension. I would add also that in my view the public has to be behind this. However you shake this thing down, whichever branch of government it is it is going to come through and prevail it will be because the public stands behind them, but I am looking at this memorandum that is issued by the President

June 15th of this year and it is the one that establishes, I will call it, executive amnesty. It is pretty interesting when you read through this he declares prosecutorial discretion. And he has seven references to prosecutorial discretion in this little memo that is two and a half pages long and he has 22 references to individuals, dealing with individuals. That in truth it creates four classes of people and it manufactures new immigration law work permit out of thin air that they just began releasing yesterday. And I want to quickly ask Mr. Casey what is our remedy in this case in particular?

Mr. CASEY. Well—Mr. Chairman, may I?

Mr. SMITH. Please respond.

Mr. CASEY. You raise a very good question. In taking up something Professor Gerhardt mentioned, one of the real problems is that these, many of these issues are of the type that don't get to court either because of standing issues or because the courts choose to exercise political question doctrines. And that especially with the immigration memo you are referring to is going to be a real problem, it is going to be very difficult to get that issue before the courts. As a result it is going to be between Congress and the President, and frankly Congress needs to pursue this, needs to assert its legitimate authority and prerogatives because, of all the things I think we have discussed, the suspension of the laws is the most dangerous. It reduces this body to a debating society.

Mr. KING. Thank you and thank you, Mr. Chairman. I yield back.

Mr. SMITH. Thank you, Mr. King. The gentlewoman from Texas, Ms. Jackson Lee, is recognized.

Ms. JACKSON LEE. Mr. Chairman, thank you very much. I could not start this hearing without expressing my public expression of sympathy for the loss of Ambassador Stevens and three other Americans in Libya. All of us offer to their families our extreme and deepest sympathy and concern for Americans who serve us both in the military and as civilians overseas.

I do want to say that I think that every President that comes to office and takes the oath of office comes with the respect of the Constitution and the belief in the values of this Nation and the respect for the three branches of government. I just can't imagine no matter what party affiliation they have. So I would like to operate from that perspective and just quickly make some comments and pose some questions.

First of all, I do want to say in general that I don't think there is a Member here that is not a believer in the freedom of religion. It is exhibited in the Judiciary Committee over and over again in trying to separate church and state and to recognize the sanctity of that special right that religion has.

With respect to contraceptives, it is important to note that your organization, the Becket organization, had a lot of opportunity post-August 2011 to comment on what was an administrative action by Health and Human Services. And the good news was a final rule came out on February 15, 2012 that separated out religious employer, synagogues, mosques, Catholic churches, and Protestant churches and others and indicated that they would look to a safe harbor for additional employers, nonprofits, Catholic Charities and other. I happen to represent Catholic Charities in my Congressional district and welcome that. I understand now that they are

taking additional comment which the Becket organization will have the ability to comment on and they started that on March 21, 2012. I say that to say that that had nothing to do with the presidential power. I do know as I recall in the news that the President was concerned and wanted to make sure that the Affordable Care Act recognized religious freedom and that HHS administratively handled that, and so I wanted to put that on the record as I proceed.

Senator Lee—Senator Casey—Senator Lee, that is what it looks like it is. Is it correct here? Yes. Let me proceed. It seems that I recollect meeting or hearing your Governor speak—I am not sure if this Governor is still in office who spoke about a very reasoned immigration policy in the State of Utah dealing with individuals who needed access to legalization. But what I want to pose a question to you very quickly is that you in your testimony recognize that prosecutorial discretion is well established and extends to the establishment of enforcement priority, but you argue that the Secretary of Homeland Security exceeded that authority and you use her memo indicating that she said that immigration laws are not designed to be blindly enforced without consideration given to individual circumstance of each case. You did not read further into her memo where she specifically said the requests for release pursuant to this memorandum are to be decided on the case-by-case basis. And of course this has to do with persecutory discretion with respect to individuals who came to the United States as children. How do you equate that to presidential abuse of power?

Senator LEE. I don't think that what you are quoting from was from my testimony. But more broadly, let me just say what we are talking about here with regard to the immigration issue is that when the executive branch adopts a policy that will be reflected in the implementation of Federal law and that policy——

Ms. JACKSON LEE. Let me correct it, that was Lee Casey's comments but you can go ahead and answer, go ahead.

Senator LEE. But when the executive branch contravenes, contradicts that policy as established in Federal statute, that we have the wrong body in effect legislating, the executive branch rather than the legislative branch.

Ms. JACKSON LEE. Well, you know that this was a decision made under the authority of Homeland Security and prosecutorial authority which has nothing to do with the presidential authority per se. It is part of the Administration.

Senator LEE. I understand that and I understand that prosecutorial discretion is real. As a former prosecutor myself I am very familiar with that. Prosecutorial discretion refers to the fact that the resources of the government are necessarily limited, in terms of human resources to implement and to enforce the law. And so case by case judgment calls have to be made regarding where to deploy your prosecutorial resources. You have——

Ms. JACKSON LEE. But that does not, if I might because I need a question to Professor Gerhardt, that does not impact on a presidential decision if it is an administrative decision or prosecutorial decision made by a department that has nothing to do—it doesn't link itself to a constitutional question of presidential abuse.

May I just ask Professor Gerhardt a question?

Mr. SMITH. The gentlewoman's time has expired. The gentlewoman is yielded an additional minute.

Ms. JACKSON LEE. I thank the distinguished gentleman and I think the Senator. Let me just proceed to the professor and thank you so very much. As I note there is constitutional permission on recess appointment that is well stated filling the vacancies and I think the premises for the government's continuity to give the President that opportunity in order for there to be—the work of the government to continue. We note for the record that President Clinton had 139, President Bush 171 and this President at the end of his term 32. What is the premise of argument that that is an abuse of discretion? It is allowed during a framework of when the Senate is in session. And I know there was some discussion as to pro forma and whether they had stepped out of pro forma. What argument could they make legitimately?

And Mr. Chairman, when the professor concludes I have a memo that I would like to submit into the record, but yes, professor, and thank you for the time.

Mr. GERHARDT. Well, I think as stated here, and I am sure I can be corrected as necessary, but as stated here I think the argument is that the Senate and for that matter Congress but in particular the Senate was not in recess at the time the President made these appointments. It was in the midst of a pro forma session and that is not the same thing as a recess and to amplify that argument, it would also suggest that the House has the authority to adjourn, it didn't undertake that authority here and therefore the President acted at a time that was illegitimate. That is the construction of some Members of Congress, a perfectly reasonable construction. The President I don't think feels that he is bound by it. Oftentimes Presidents will not feel bound by constitutional judgments made by other authorities with which they disagree. You can find the history of constitutional law replete with that. In this case I think the President felt among other things pro forma sessions were undertaken for the primary purpose of frustrating and impeding its recess authority. At the same time he felt supported by the Senate Judiciary Committee's construction of what recesses are. They said that if there is a break in which they are unable to act on an appointment or nomination, that is a recess. He agreed with that. The OLC memorandum agreed with that. So he got support for this position and didn't use it widely. He used it with regard to these specific vacancies and thus I think takes a very credible position.

Mr. SMITH. Thank you.

Ms. JACKSON LEE. Mr. Chairman, I submit this into the record, please.

Mr. SMITH. Without objection.

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Posted at 02:49 PM ET, 09/10/2012

Maryland Democrat quits congressional race amid vote fraud allegations

By Ben Pershing

This post has been updated

A Maryland Democratic candidate quit her congressional race Monday after her own party told state officials that she had committed fraud by voting in both Maryland and Florida in recent elections.

Wendy Rosen, a small-business owner running against freshman Rep. Andy Harris (R) in the Eastern Shore-based 1st Congressional District, released a statement saying that "with great regret, and much sorrow" she was resigning from the contest.

"Personal issues have made this the hardest decision that I have had to make," Rosen said.

Rosen's announcement came the same day the state Democratic party released a letter to state Attorney General Douglas Gansler and state prosecutors reporting the allegations against Rosen.

"The Maryland Democratic Party has discovered that Ms. Rosen has been registered to vote in both Florida and Maryland since at least 2006; that she in fact voted in the 2006 general election both in Florida and Maryland; and that she voted in the presidential preference primaries held in both Florida and Maryland in 2008," wrote Yvette Lewis, the state party chair. "This information is based on an examination of the voter files from both states. We believe that this is a clear violation of Maryland law and urge the appropriate office to conduct a full investigation."

A senior Maryland Democrat said the party had been tipped off this weekend by someone within the party about Rosen's potential issue. After checking the allegation, the party contacted Rosen on Monday morning and urged her to quit.

Local Democratic committees in the 1st district will now meet and vote on a new candidate to replace Rosen on the ballot. The new name must be submitted to the state by Sept. 27.

Regardless of his opponent, Harris is considered a safe bet for reelection. Though the 1st district was previously competitive — Democrat Frank Kratovil won the seat in 2008 before being ousted by Harris in 2010 — it was redrawn to be safer for Republicans after the 2010 Census.

Voter fraud has been a heated political issue, both in Maryland and across the country. Republicans have frequently accused Democrats of turning their backs on the practice, while Democrats say the GOP uses alleged fraud as a way to keep Democrats from the polls.

If the Maryland Democrat Party is willing to push one of its own

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candidates out of the race due to voter fraud, I'm sure this means they will join us in an effort to purge the rolls across Maryland of illegal immigrants, the deceased, and those otherwise unqualified to vote," said David Ferguson, executive director of the Maryland Republican Party. "It is a sad state of affairs that Democrat voters considered Wendy Rosen to be their model citizen for the First District and represent them on November's ballot."

As recently as Sunday, Rosen still believed her campaign was going full-speed ahead.

"My trip to Charlotte was incredible!" she wrote on her Facebook page. "I didn't get a moment on the floor of the arena ... I spent all of my time hunting for campaign support! Everyone was so helpful from Jan Schakowsky and Ben Cardin to all of the women's groups, environmental groups, jewish organizations. I feel re-energized for this last 8 weeks! Forward, not Backward!"

By Ben Pershing | 02:49 PM ET, 09/13/2012

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Yes, sick her out but the Rasublican voter so-called fraud ID laws they are pushing probably would not have caught her. She most likely has residences in both states and registered in each using proper ID.

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Mr. SMITH. Mr. Goodlatte is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding this hearing. The Constitution is a sacred contract between the Federal Government and the people in which the American people chose to bind themselves to a set of rules in order to protect their God given freedom from abusive leaders and governments. When politicians are allowed to confuse and blur the very clear limits that the U.S. Constitution places on presidential authority, our liberties are threatened.

Today we are looking at how President Obama has abused and inappropriately expanded the finite authority the Constitution grants him and how that affects Americans' liberties. So let me direct this question to Senator Lee and thank him for participating today.

From the recent amnesty for hundreds of thousands of illegal aliens to Executive orders that create new laws, President Obama has repeatedly exceeded his constitutional executive authority, ignored the legislative branch and positioned himself as both lawmaker and enforcer. I believe our framers would have seen this as a very dangerous development and a violation of the separation of powers they enshrined in the Constitution. Do you agree and why is this type of consolidated power so dangerous to our system of government?

Senator LEE. Thank you, Congressman Goodlatte. It is a pleasure to answer that question because it strikes to the heart of why we have a Constitution. Political philosophers for centuries have believed that centralization of power brings about an unacceptable risk of tyranny. And so it has long been understood that there are three basic types of government power, Executive power, legislative power and judicial power. Our Founding Fathers sought to separate those so that no one person or no one group of persons could aggregate unto himself or herself all such power, thus becoming a tyrant at least not too easily, at least not without regular routine input from the people.

One reason why the aggregation of Executive power can be so dangerous is because you have all the power of the executive branch of the Federal Government essentially more or less consolidated into one human being. And that really can create a high risk, and that is why we have a lot of checks and balances on presidential power. That is why, for example, we have a requirement that the President's appointees be confirmed by the Senate. That is why the President has the power to sign and veto legislation, but Congress has the power to override that veto and so on and so forth.

So this is about human nature and what power does to human nature. It is not about any President being a bad person.

Mr. GOODLATTE. Thank you.

Let me direct this question to Ms. Windham. Americans' religious freedoms come from God as protected by our Constitution, not from President Obama. However, President Obama's actions are muting these God given rights.

Ms. Windham, when President Obama signed his mandate that requires businesses to cover—against their religious beliefs—sterilization, abortion inducing drugs, and other birth control measures,

it was a direct blow to religious freedom. However, do you also believe that if this mandate is allowed to stand it will have more subtle but long lasting influence over Americans' expectations of what their religious freedoms are? Isn't there a danger that this action could gradually lead to a new norm where citizens have a smaller view of their religious freedoms and begin to believe that these rights come from government?

Ms. WINDHAM. Certainly it does. As I said earlier, I am very disturbed that the Administration thinks that when an institution steps out and starts to serve the public and opens its arms to other, as many religions teach, that somehow they are forfeiting their constitutional rights. And so it is a very disturbing trend that people might believe when you start to serve the public and you start to do good in your country you are then giving up some of your constitutional rights and your freedoms.

Mr. GOODLATTE. Thank you. Professor Gerhardt, a former University of Chicago constitutional law lecturer by the name of Barack Obama was quoted as saying, "With respect to the core of executive privilege, the Supreme Court has not resolved this question, and reasonable people have debated it. My view is that executive privilege generally depends upon the involvement of the President and the White House."

According to this interpretation, there must be a direct link to the President or his senior advisors in order for a claim of executive privilege to be appropriate; is that correct?

Mr. GERHARDT. Well, that is one construction, sir. As Senator Lee alluded to earlier, I think one of the issues here is whether or not executive privilege applies to what is called deliberative process, and that is claiming what the President is arguing and the Attorney General is arguing here.

Mr. GOODLATTE. If this interpretation that he states in his statement and my interpretation of what you say is one interpretation; if that interpretation is accepted, does the claim of executive privilege with respect to the documents being sought in the Fast and Furious investigation seem to implicate top White House officials?

Mr. GERHARDT. I have no idea, no knowledge of any of the underlying facts of what went on within the Justice Department in response to hearings and other requests. So I don't know any of the facts there. I don't know that we could draw that inference.

Mr. GOODLATTE. But if he is held to his own standard that he set forth as a University of Chicago law lecturer, wouldn't one be able to draw that conclusion, that if now the protection of executive privilege is being exercised it would implicate the involvement of the President and the White House, wouldn't it, in order to exercise executive privilege? If it is only in the Justice Department, it would not be exercised both under the standard that President Obama articulated as a constitutional law professor, and if it doesn't then it would seem to indicate the President and the White House——

Mr. GERHARDT. I can't answer that because it depends on facts and supposition about facts that I can't make.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Goodlatte. Gentlewoman from California, Ms. Waters, is recognized.

Ms. WATERS. Thank you very much, Mr. Chairman. I would like to direct my question and discussion to Professor Gerhardt. Relative to recess appointments, recess appointments have been utilized by numerous Presidents. Today the Obama Administration has signed 28 recess commissions comparable to George W. Bush 171, Bill Clinton 139, George H.W. Bush 73 and Ronald Reagan's 240 where the recess appointment clause authorized the President to act. I am wondering if the criticism that I am is hearing is appropriate. I am intrigued by the description of pro forma session as opposed to recess. And I want to know where in law or our Constitution is this distinction made?

Mr. GERHARDT. Well, it is a very good question. I think that the dispute between the President and some Members of Congress is not just about how we determine recess. I think it is also a dispute about methodology. One way we could construe the Constitution is sort of a formalistic way, that is to say recess has got to serve strict definition and that only the House or the Senate may determine whether or not there is a recess.

An alternative method, which I think is the one the President adopted, is what we will call functionalism, where he looks at the practicalities involved. And so I think the answer to your question is I think he is taking a practical functional approach in saying this pro forma session has a function of being like a recess.

Ms. WATERS. However, this hearing is about abuse of power. It is not about functionality as such, it is not about nuancing and some loose interpretation of law or Constitution. This is about basically an accusation that the President has abused his power as it relates to recess appointments. And I think you are correct and I am correct that nowhere in law or Constitution can you point to what the President has done as having violated the law or disregarded or violated the Constitution. So I think we should get that out of the way and I think you have done that and I think you have done a good job of explaining that, that it is about kind of determining how he operates rather than being able to absolutely point to some abuse of power.

Now I have a second part to the question that has to do with once we make law, it has gone through the entire process, signed by the President of the United States, such as Dodd-Frank, with the Consumer Financial Protection Bureau. In this case the Consumer Financial Protection Bureau, charged with the authority to regulate consumer financial products and services and enforce consumer protection laws.

The reason I point to this is because serving on the Financial Services Committee what we discovered and I think what the entire country discovered was our regulatory agencies had not done a very good job for the consumers. They were charged with the responsibility of making sure that safety and soundness and all of that in our financial institutions as well as protection of the consumers and they had just kind of forgotten about the consumers and what they do. And so this bureau emerges as very important and significant and what the Congress of the United States, what the Members said was, we want to create something that will give real consumer protection and we have discovered that they have not been taken care of. And so it was important to many of us who

work on Financial Services and who served on the conference committee working out all of the terrific complications of Dodd-Frank that we get this bureau up and going and give the consumers and the citizens some confidence in our legislative ability to address their problems and concerns.

Do you not believe in the way that the President did this recess appointment that he was looking out for, not only the consumers but the work of this Congress in saying we want this done and getting it done, is that not appropriate?

Mr. GERHARDT. Well, I would say it is appropriate. When I testified on this matter in the House Oversight Committee that is one of the grounds that I mentioned. I also supported the President's actions here. There is a law that has been created, put into effect, as you just mentioned, a whole legal regime in fact, and an office that been created by Congress. And both that legal regime and that office in a sense remained inactive. And he is trying to put those things into effect through the use of the power he has been given explicitly under the Constitution to make recess appointments.

Mr. SMITH. Thank you, Ms. Waters. The gentleman from Pennsylvania, Mr. Marino, is recognized.

Mr. MARINO. Thank you, Mr. Chairman. Let me apologize for not being here to hear opening statements. As an officer of the court I had to give my CLE courses in for Pennsylvania, so I am sure you understand that. I will be one of the first individuals to stand up and say, particularly as an officer of the court but also as a freshman Congressman, that whatever our standard is pursuant to law we need to apply it consistently, it doesn't matter who is in the White House, it doesn't matter who is in Congress or what segment of government we are talking about. So I don't think anyone has at least on this Committee and throughout Congress, I don't think anyone says we should be applying different standards. It just doesn't make any sense.

Senator Lee, thank you so much because you zeroed in on an issue concerning the First Amendment to the Constitution, the establishment clause and religion. So you answered my question long before I had an opportunity to ask it, but you did a very, very concise job on those cases and I am familiar with one of those cases as well.

But I want to get to an issue that I would like each of you to answer briefly. I have a limited amount of time. Professor Gerhardt, you made an interesting statement that we should have confidence in the process and the process in and of itself. So just for example purposes I would like to zero in on an issue—nothing pursuant to the facts of Fast and Furious but the fact that the Attorney General raising through the President the executive privilege not to turn over documents or to testify pursuant to those documents. And I know that some of your statements are going to be well, we handled it through the courts or we handled it through the electoral or legislative branch but it doesn't seem to be effective. So number one, are we in a little bit of quandary here? Who does the Attorney General work for? The people of the United States or specifically is he or she general counsel for the President? And when we get into a situation whereby executive privilege is exercised where it has been on numerous occasions on both sides of the aisle

at the White House and there is a refusal to turn over documents and the Justice Department is responsible then when one is held in contempt for taking that investigation and pursuing it, refuses to do that. What is the answer to this dilemma?

It just doesn't seem to be working when we say through the legislative process or through the legal process. Because, as you clearly expounded on, the courts, before we even get to it, we are talking about 2 years later. So I would like to hear your insights, as brief as you possibly can make it, concerning what is the remedy for this, if there is one, and what dilemmas would be raised by it. So, Professor, please.

Mr. GERHARDT. I will be as brief as possible. It is actually a terrific question.

And my brief answer is that it takes us into the realm of—well, first of all, the Attorney General, of course, is the head of the Justice Department, the executive department, and therefore works in the executive department. He serves at the pleasure of the President. But, of course, he is also appointed by—with the confirmation of the Senate, and he is subject to the laws, and he is held accountable to those laws. And he has duties, as every Attorney General I think recognizes, not just to his department but to the Constitution and, ultimately, as you say, to the people of the United States.

Secondly, in terms of how to deal with the enforcement of a contempt citation, that is a very difficult question. And I can't give you a—I won't give you an exhaustive answer, but one of the avenues that is left to Congress is whether or not to sue the Attorney General, and I know that is one that is being considered.

Other than that, you have obviously tried to sort of look through the U.S. Attorney as well as go to the Department of Justice. But I think what you may be left with at the end of the day is what has happened a lot in American history. These things don't get resolved in the courts, and they don't get resolved in any short period of time, but in a longer view there is a settled understanding and accommodation.

Mr. MARINO. Mr. Casey, please.

Mr. CASEY. I actually agree with much of that. The thing, obviously, as practicing lawyers, you always have to explain to your client you can sue, but it is going to be 2 years or 3 years or 4 years before this gets resolved.

Mr. MARINO. You are disappointing me so far. I wanted the answer that, okay, we will change this tomorrow.

Ms. Windham.

Ms. WINDHAM. I don't know that I can really speak to that issue or have expertise on that issue.

I just do want to emphasize that when the Administration——

Mr. SMITH. Ms. Windham, could you pull the mike a little bit closer?

Ms. WINDHAM. Yes, sir.

I don't really have any expertise on that particular issue, but I——

Mr. MARINO. I saw your background. You are very qualified.

Ms. WINDHAM. Well, thank you.

I just want to emphasize that when the Administration starts to overstep its bounds and uses administrative agencies in a way that

restricts on fundamental First Amendment freedoms you are seeing a serious problem and you are seeing a serious overreach of Executive power.

Mr. MARINO. And Senator.

Senator LEE. I agree with what Professor Gerhardt said on this. His assessment of who the client is was absolutely accurate.

This is one of the reasons why we place enormous trust in our chief executive and one of the reasons why it is important when the political branches—when the other political branch of government sees an abuse of Executive power that the two bodies that comprise Congress air and discuss the overreach. Because if it is not discussed there is a good chance nothing will ever be done about it. Because by the time the courts have a chance to address it, it might be too late.

Mr. MARINO. Thank you, lady and gentlemen. And I yield back.

Mr. SMITH. Thank you, Mr. Marino.

The gentleman from Georgia, Mr. Johnson, is recognized.

Mr. JOHNSON. Thank you, Mr. Chairman.

I believe that the title of this hearing, "The Obama Administration's Abuse of Power," is indeed indicative of the politicization of this hearing. It is overly political. It is happening during an election time, less than 60 days before the next election. And I think of what the Founders, the Framers of the Constitution, I think of what they might be thinking as they look down on this spectacle to see Republicans reducing the Constitution to a mere political tool to be used against a sitting President.

And, quite frankly, Senator Lee, I am really wondering whether or not your appearance here today in this setting is actually an unprecedented act by a sitting United States congressman. I have never heard that this would happen, that a United States Senator—and I grant you, you are duly elected by the citizens of the State of Utah. You were sworn in January 3, 2011, so you are new here. But I think that we owe our Founders, our Framers the dignity in the office, the offices that we hold, to act in accordance with their lofty aspirations for this country and for its government.

And so I am concerned about just the precedent of your appearance here today on an obviously political mission coordinated to besmirch this President. When in fact we had other situations where Democrats have been in control, the Bush administration fires eight attorneys general in what is known as the Saint—not Saint Valentine's Day massacre, it was the Pearl Harbor Day massacre back in December of 2006, firing U.S. attorneys en masse because they did not heed the desire of the White House to initiate what they considered to be unfounded prosecutions against Democrats. And we held numerous—we held a series of hearings on that, but never did we frame the discussion in terms of a hearing on the President's abuse of power.

This appears to be an attempt to talk to the extremist Tea Party Republican element of the electorate. It seems that this is an attempt to agitate them and to fire them up, to exaggerate and make them think that the President has embarked upon an unprecedented abusive Presidential power. And I believe that that is reckless, and I don't think that the Framers of our Constitution would be looking very favorably upon this.

Now, Senator, you mentioned that the greatest abuse of executive authority by this President that you have seen thus far is the President's actions as commander in chief in the Libyan incident or the Libyan conflict that we as a Nation supported; and you indicated there was some gray area between the President's authority as commander in chief, which is not enumerated in terms of the specific powers thereunder, and the legislature's authority to declare war.

We have only declared war five times in the United States—in the history of the United States, but we have had numerous conflicts. Are you here to say that the President was abusive of his authority in the Libyan conflict? You are. You said that. I have to take issue with that. I take issue with that. And I know I have said a lot, but I sure would love to hear——

Mr. SMITH. Senator Lee, please feel free to respond. But before you do let me point out that your appearance here is not unprecedented. There have been many instances where sitting senators have testified before the House Judiciary Committee.

But please respond.

Mr. JOHNSON. Now, if the gentleman will yield, I am not certain that during an election year, less than 60 days before the election in a hyper-partisan atmosphere, I am not sure that, insofar as such an exaggerated type of hearing as we are having today with the incendiary allegations being made, that a Senator has ever sat before the House and testified in accordance with the spirit of the hearing.

Mr. SMITH. I think one of the great benefits of today's hearing is that it has not been hyper partisan. I think there has been a good discussion of the issues that have been factual, nonemotional, and I think very beneficial.

But, Senator Lee, please feel free to respond.

Senator LEE. Congressman Johnson, I certainly appreciate your concerns. I respect and I agree with your desire to ensure that we have civility marking all of our proceedings in Congress, and that is why I have gone out of my way today to point out that this is an issue that is neither Republican nor Democratic; it is neither liberal nor conservative.

You and I, as Members of two different Houses of Congress, share much more in common here than we do things that divide us on this issue. Because, as Members of the Article 1 branch, of the legislative branch, it is our duty to see to it that the executive branch, regardless of the partisan affiliation of the person who holds that office, to see to it that the executive branch doesn't tread on our power. And so I have gone out of my way to make this not about a partisan issue.

And I will make you a deal. In the future, whenever we have got another President, whether Republican or Democratic, if you have got an issue that you are concerned about about that chief executive overreaching, give me a call. I would love to talk to you about it. And it may well be that you and I will agree that that President, whether Democratic or Republican, has overreached his or her authority.

But you referred specifically to the Libya situation. I didn't identify that as the greatest overreach, but I was asked a specific ques-

tion with regard to the President's commander-in-chief powers, whether there was anything this President had done that I disagreed with that I thought might fit into this category, so I identified the Libyan conflict as that. There is gray area between the President's commander-in-chief powers and Congress' power to declare war. Much of that has been at least arguably clarified in the war powers resolution, but the President didn't abide by that either.

Mr. JOHNSON. Well, the legislation would not trump the Constitution, would it?

Senator LEE. And it does not in this instance.

Mr. SMITH. Thank you, Mr. Johnson.

The gentleman from Utah, Mr. Chaffetz, is recognized.

Mr. CHAFFETZ. I thank the Chairman.

And with full disclosure, being the representative from Utah asking a question of the Senator from Utah, it should be fully disclosed that I am frequently called upon to give rides to the Senator, and whenever he asked for such ride I duly comply and drive him from place to place.

With that said, I will ask the hardball question here.

If the Senator would—you know, recess appointments can be overused, abused. It doesn't matter if Republican or Democrat. I think we want to help change that system. Can you offer your perspective on that?

Senator LEE. Certainly. And I want to make clear that there is reciprocity in the ride arrangement. I was once referred to as the chauffeur to the chief of staff to the Governor of Utah.

Mr. CHAFFETZ. Then I lost rank, and now I am back driving my own car. But, nevertheless, we will dispute that later.

Senator LEE. At the time, he had a broken foot. He had to ride in the back seat with his foot elevated. So I literally looked like a chauffeur. I wanted to buy a chauffeur's hat.

Recess appointments. So what we have to consider with recess appointments is the fact that the President does have to get Senate confirmation for executive branch and judicial nominees. There is an exception for that, and several Members of the Committee have correctly pointed out President's of both parties have throughout time utilized the recess appointment of power.

But that is not really what we are talking about here. This is not a garden-variety exercise of the recess appointment of power. Because the recess appointment of power has to be exercised as outlined in Article 2, Section 2, Clause 3 of the Constitution when the Senate is in recess. So it begs the question, when is the Senate in recess?

Well, Article 1, Section 5, Clause 2 gives each House of Congress the power to establish its own rules.

It goes further in Article 1. In Article 1, Section 5, Clause 4 says that before either House of Congress may adjourn for a period of more than 3 days it has to get the permission of the other House of Congress.

So, in this instance, January 4, 2012, the Senate had not, according to its own rules, been adjourned for more than 3 days. Historically, that has been regarded as at least an important touchstone for deciding whether or not the Senate is in recess. The Senate has

never been deemed for purposes of the recess appointment of power to be in recess during an adjournment of less than 3 days, and so we didn't have the House's permission to adjourn for more than 3 days. And by our rules we had been in session about 24 hours earlier. So that is why we have got a problem here. That is what makes this incident different from every other exercise of that power.

Mr. CHAFFETZ. And then the second part that I want to talk about, it seems to me, Chairman, that executive privilege has not been articulated with specificity so that we know what it is, when it should be used, when it could be used, is it overused. I think this is a concern from the legislative branch in general. I find it, particularly in the case of Fast and Furious, to be overly used, such a blanket, well, we are just going to invoke executive privilege.

Is that something that we should—and, Chairman, what I am interested in is perhaps pursuing legislation that would clarify and codify exactly what executive privilege is and what it is not, where it would apply and where it would not.

Senator Lee and then other members of this panel, if you care to respond, that would be great.

Senator LEE. I do have a response to that.

As we discussed briefly earlier, there are two varieties, two flavors, if you will, of executive privilege here. We have got the deliberative process privilege. But the deliberative process privilege, according to the D.C. Circuit's own standard that is fairly well understood, does not apply here where we have reason to believe that government misconduct is involved.

Here the government misconduct could be said to exist in the Administration's claim that—misleading Congress in a letter delivered on February 11, 2000—in February 2011, asserting that the Administration did not in fact allow gun walking. And so that privilege doesn't really apply here.

So the other flavor of the privilege is the Presidential communications privilege. But in order to get into the realm of that privilege you have got to have someone involved in the decision-making process who had what we call operational proximity to the President, the President or the President's immediate advisors or some combination of the two.

The claim that we had from the beginning, as I understood it, was that there was not a lot of involvement by the President and his closest advisors or any involvement. So one of two things has to be true then if the executive privilege can be properly invoked here. Either the President and/or his very close advisors were directly involved or this privilege may not be invoked.

Mr. CHAFFETZ. Does anybody else care to comment on executive privilege and should we as a Congress be articulating and writing in legislation what it is and what it is not?

Yes, sir.

Mr. GERHARDT. I appreciate the chance just to make a couple of quick points.

One is I just would respectfully perhaps disagree with Senator Lee in one regard. It may be a small one. And that is it is not settled whether or not deliberative process is something to which exec-

utive privilege may stand. But that is clearly the position of the Administration, that that is what is the basis for its assertion here.

In terms of legislation, I would say that raises a really interesting question of constitutional law. You have given me my exam question for my Con Law I class, whether or not Congress could legislate the meaning of executive privilege. But I think it would be difficult for Congress to dictate to the President the scope and contours of that privilege.

Mr. CHAFFETZ. I thank the Chairman. I yield back.

Mr. SMITH. Thank you, Mr. Chaffetz.

The gentlewoman from California, Ms. Chu, is recognized.

Ms. CHU. Thank you.

Before I begin with the substantive questions I want to express my disappointment with today's hearing. We essentially have six legislative days before we go into long recess, and yet we are wasting time talking about the Administration's alleged abuse of power when we could be discussing other pressing issues. And in fact many of the issues that have been mentioned thus far have already been discussed in previous hearings throughout the year.

As I see it, this hearing has nothing to do with the abuse of power. It is simply a hearing rehashing political disagreements.

But let me ask this question about the rulemaking process for contraceptive coverage. And, Professor Gerhardt, I would like to ask you this question.

The way I see it is that there was extensive procedures pertaining to this rulemaking process for contraceptive coverage. In August 2011, the Administration announced an interim rule regarding preventive care for women under the ACA after months of public comment at the Institute of Medicine. This interim rule was announced a full year before the regulations were to go into effect.

HHS then opened a public comment period and received over 200,000 comments. In response to the public suggestion, HHS ultimately amended their final rule to exempt religious organizations such as churches from having to provide contraception to their employees. But they went even further to address the public's concern about the potential impact on religious-affiliated entities.

In March of 2012, the Administration announced in advance notice of proposed rulemaking and opened public comments on that rule, which closed in June. And although the final rule on religiously affiliated entities had not been published it is not atypical for regulations to take several months to finalize after the public comment has closed. Yet, in her testimony, Ms. Windham claimed that, quote, the Administration issued the mandate without first publishing a proposed regulation or accepting public comment as required by Congress under the Administrative Procedure Act.

I think it is blatantly untrue myself. But, Mr. Gerhardt—Professor Gerhardt, what procedures does the executive branch have to follow when promulgating regulations in order to comply with the rule and do you believe it is an abuse of power if the Administration provides an opportunity to comment on the interim final rule before it is finalized?

Mr. GERHARDT. Well, of course, generally, as you know, the APA, Administrative Procedure Act, would apply.

But I also just want to emphasize an agreement with what you just said. I had earlier suggested that the Administration's position on this was both evolving and attempting to create an accommodation. That is precisely why I think it is premature to talk about any abuse of power.

It seems to me in this circumstance at most what we may have is a disagreement with how the Administration has approached this and maybe with where the Administration comes out. But I don't think that a disagreement constitutes an abuse of power. It is a disagreement. And we are likely to have many disagreements across a wide range of legal and constitutional issues between one branch and another. Those disagreements don't add up to abuses of power.

Ms. CHU. Thank you for that.

And I now would like to ask about the legal authority for the deferred action process with regard to the DREAM students.

My colleagues on the other side of the aisle have criticized the Administration for the decision to use prosecutorial discretion in immigration cases, and they claim that there is no legal authority for that. And yet I see that there is legal authority for such an action, and in fact I would say that it is supported by, first, the Supreme Court precedent, including the Court's recent decision in *Arizona v. United States* explaining that immigration officials have broad discretion in the removal process, that includes whether it makes sense to pursue removal at all; as well as the former general counsel of the INS who wrote a memo in April of 2011 that the Administration has authority to exercise prosecutorial discretion and offer deferred action on a case-by-case basis to individuals based on their membership in a discrete class; as well as the Congressional Research Service, which issued a July, 2012, memo analyzing legal authority for the Secretary's 2012 memorandum on the exercise of prosecutorial discretion for DREAMers; as well as nearly 100 law professors who sent a 2012 letter to the President addressing the executive's authority to grant administrative relief; as well as our own Judiciary Committee Chairman, Lamar Smith, Henry Hyde, and other Republicans who sent a 1999——

Mr. SMITH. Since you mentioned my name, let me respond not only on my own behalf but on behalf of a number of others. Because I think what you said was not true.

Prosecutorial discretion is usually given on an individual basis, and I certainly support that. But here you have a President abusing that particular power and applying prosecutorial discretion to a wide class of individuals. That is not what I intended in anything that I have said, nor do I feel that it was intended by any of the other individuals that you have mentioned. A few minutes ago, Senator Lee made that distinction himself. So I think your statement in regard to prosecutorial discretion is not accurate.

Ms. CHU. Well, let me continue then with the other sources of legal authority. For instance, former INS Commissioner Doris Meissner with a 2000 memorandum which lays out the strong authority for exercising prosecutory discretion in the immigration enforcement context and Congress which directed the Secretary in code to establish national immigration enforcement policies and priorities.

And so, Professor Gerhardt, how would you respond to these claims?

Mr. GERHARDT. Well, I think you have amply summarized all the different and wide range of support that exists for prosecutorial discretion in this instance. I think—and I would just point out or reemphasize that it includes the statement in *Arizona v. United States* by the majority suggesting there is broad discretion in the Administration within this realm.

So it seems in this instance that is exactly what the Secretary exercised. And the support that you have laid out just demonstrates how the Administration I think in this instance has not acted sort of hastily, without deliberation, without consideration to support the memorandum that was issued by the Secretary of Homeland Security.

Mr. SMITH. The gentlewoman's time has expired. However, the gentlewoman did say that a statement made by Ms. Windham was false, and I would like to give her a chance to respond to that assertion.

Ms. WINDHAM. Thank you, Mr. Chairman.

If you want to know whether the statement I made is correct, you need to look no further than the text of the interim rule itself. The Administration said when they made this interim final rule that they had the authority to suspend the normal APA procedures and go straight to the interim final rule stage.

The legally operative term there is final rule. They published this rather than publish a proposed rule and take notice and comment, because they said this was an issue of great public importance. We believe it is an issue of great public importance that the Administration has chosen to restrict religious freedom for millions of Americans while exempting, as they have estimated, 100 million Americans from this mandate for reasons of convenience and cost. And that is a violation of religious freedom and a violation of the Administrative Procedures Act.

Mr. SMITH. Thank you, Ms. Chu.

The gentleman from South Carolina, Mr. Gowdy, is recognized.

Mr. GOWDY. Thank you, Mr. Chairman.

Senator Lee, I want to say I am actually delighted to have you here; and to have a United States Senator with your constitutional acumen answering questions from House Members, some of whom lack that constitutional acumen, is really a testament to you. So I appreciate your being here. You have appeared before other Committees, and the fact that you would be willing to come and answer questions from us is a testament to your character.

Mr. Chairman, when I saw the title of this hearing, I was vexed, because I didn't know where to start. Do we start with Solyndra and the abuses of favoring certain industries over others, certain applicants over others, helping certain applicants to draft their loan proposals, using private email to communicate so there would be no record? Do we start with this Administration's failure to execute laws with which it disagrees, regardless of one's opinion on the Defense of Marriage Act, Mr. Chairman? It was passed by both bodies and signed by the President, a rare feat indeed these days, Mr. Chairman.

In fact, if memory serves me, the President who signed the Defense of Marriage Act into law was none other than the former convention speaker, President Bill Clinton. And that is fine. People change their mind. That is what happens in a representative democracy. You change your mind.

Where I disagree with this Administration is you have to change the law. You don't just summarily decide that you are not going to enforce laws that have been duly passed and signed by the chief executive. And this Administration, Mr. Chairman, turned the doctrine of prosecutorial discretion on its head. It has summarily refused to prosecute certain laws.

So, Mr. Chairman, what I would appreciate from my friends on the other side of the aisle is a list, a roster of which laws I need to tell my constituents they need to follow and which ones they don't need to follow. Prosecutorial discretion is not announcing in advance in an election year because you are trying to court a certain constituency that we are not going to enforce this law. If you don't like the law, change it.

Or should we, Mr. Chairman, talk about executive privilege, as Mr. Chaffetz did? Should we contrast Candidate Obama's position on the use of executive privilege with President Obama's invocation of the doctrine? That, Mr. Chairman, would be a fine exercise to me, to have a debate between Senator Obama and President Obama. I don't know who the folks at MSNBC would pull for in that debate, Mr. Chairman.

Or should we talk about the transformation of energy secretary Steven Chu, who at one time advocated for European level gas prices $10 a gallon and then had an epiphany timed almost exactly with his confirmation hearing where he wanted lower gas prices?

Or do we discuss recess appointments and again how Senator Obama had a different perspective from President Obama? And color me naive, Mr. Chairman, for thinking that the phrase "recess appointment" would mean the exact same thing when a Republican was in power than when a Democrat was in power.

Let the chronology be on the sequel, Mr. Chairman. With the NLRB, that vacancy existed for 6 months. In December, mid-December, the President sent a name to the Senate, and then 10 days later he makes a recess appointment. Under his version, a nap, a lunch break in the United States Senate, both of which happened from time to time, would constitute sufficient recess for him to make a recess appointment.

Do we discuss Fast and Furious and this, the most transparent Administration since the Earth cooled, withholding documents and having to be sued and held in contempt of Congress to simply turn over documents?

Do we focus on how a demonstrably false letter could be written on Department of Justice letterhead and then withdrawn 10 months later?

I have decided, Mr. Chairman, to focus on Secretary of Health and Human Services Kathleen Sebelius balancing my right to the free exercise of religion with her desire to require that health insurance include free—whatever that word means—contraception. And I would invite anyone who is interested to go back——

Secretary Sebelius appeared before the Education and Workforce Committee, and I asked her, Senator Lee, about the constitutional basis for this rule, and I was stunned at her reaction. She could tell you the political ramifications of the rule. She could tell you the electoral math ramifications of a rule. She never once consulted the Constitution. She couldn't tell me whether you have a compelling interest in free contraception. She couldn't tell me how this was the least restrictive means or the least restrictive way of accomplishing this goal, even if she met the first prong.

Her response was that she is not a lawyer, as if you have to be one to read the Constitution and understand it. So I am going to give the award to her.

And I know I am out of time. If I could have 30 more seconds, Mr. Chairman.

Mr. SMITH. Without objection, the gentleman is yielded an additional minute.

Mr. GOWDY. Senator Lee, I would love for you, just on this recess appointment, once and for all, is my chronology wrong? I think you got the name in December, and then there was an appointment made a couple of weeks later. And with the CFPB this is a nascent entity. It has never existed before. But somehow or another having a director is of constitutional significance. Who controls the calendar in the Senate? I thought the Democrats were in control. I thought they could schedule a hearing on Mr. Cordray. I thought they could schedule a vote on it.

So I will give the rest of my time to you.

Senator LEE. The Senate does in fact have control over its own calendar. Article 1 makes that pretty clear. The Senate did convene in a session that was held on January 3, 2012, about 24 hours before the recess appointments were made.

Now to answer your question, one of these recess appointees had previously been considered by the Senate but had not been approved. Votes could have been scheduled at any time, of course. The votes, as it was understood by the party holding the majority, were not there to secure his confirmation, and so that one didn't happen.

Now, with the other three, the other three recess appointees had not previously been reviewed by the Senate. We had not even had an opportunity to review them to that point.

Mr. GOWDY. Thank you, Senator.

I thank the other witnesses, and I yield back.

Mr. SMITH. Thank you, Mr. Gowdy.

Let me also thank Senator Lee, Ms. Windham, Mr. Gerhardt, and Mr. Casey for their testimony today. I think we have had an excellent discussion. This was a high-level panel. I appreciate your time. Thank you again for your contributions.

And we stand—not yet adjourned. Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. And we stand adjourned.

[Whereupon, at 12:40 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Committee on the Judiciary

Mr. Chairman, this hearing on the "Obama Administration's Abuse of Power" should be called the "Republican Congress' Abuse of Power."

There are many important and timely issues that this Congress has not yet addressed. But rather than confronting the serious challenges that face this Congress, this committee is intentionally wasting valuable time on divisive issues to influence a presidential election. Rather than exploring this issue in an honest and fair title, the majority has chosen a title that is wildly inappropriate, accusatory, and incendiary. What's worse, we have already addressed these issues in at least one committee or subcommittee hearing. It is terrible precedent to hold a hearing on stale issues for the sole purpose of racking muck over any president prior to an election.

I am also saddened by the majority's short memory. Under the Bush Administration, executive authority experienced its largest expansion in decades.

President Bush's use of signing statements—the official executive branch pronouncements a President makes when signing a bill into a law—is a prime example of abuse of power. In a report by the American Bar Association, a bipartisan group of legal scholars criticized the Bush Administration's use of signing statements, calling them a "radically expansive view of executive power" and a "serious assault on the constitutional system of checks and balances." President Bush often asserted his own interpretation laws passed by this body, even where his interpretation wasn't consistent with Congress' legislative intent.

But the Bush Administration's signing statements didn't merely disregard legislative intent. These statements also avoided constitutional questions or created new sources of presidential power by loosely interpreting statutory language or construing large provisions as support for the Commander-in-Chief Clause or unitary executive theory. In another example, President Bush's signing statements consistently refused to honor Congressional attempts to impose affirmative action or diversity requirements on federal hiring. Senator Arlen Specter, a Republican and then-Chairman of the Senate Judiciary Committee, charged that congressional legislation "doesn't amount to anything if the president can say, 'My constitutional authority supersedes the statute.'"

But the Bush Administration's abuse of power did not stop at signing statements. President Bush again abused his executive power through his expanded use of wartime powers, while abrogating international law without any historical support in the process. John Yoo's "torture memo" applied the executive's power to authorize water-boarding and other forms of torture. This position expressly conflicted with the official U.S. position on torture, which is that no American law permits or excuses torture.

Lee Casey argues in his written testimony that the Obama Administration has gone "beyond the normal cut and thrust of partisanship and politics." But what if an administration appointed like-minded officials who lack relevant experience to advance a partisan agenda? Both the Office of the Inspector General and the Office

of the Professional Responsibility found that President Bush did precisely this. In a joint investigation within the Department of Justice under the Bush Administration, these offices found that the Bush Administration packed the Civil Rights Division with conservative lawyers without civil rights experience. The Government Accountability Office later reported that this politicized hiring might have altered the DOJ's enforcement of voting laws through a conservative strategy.

Today's hearing confuses fundamental disagreements over policy with true abuses of executive authority. Healthy debate between parties and branches of government is vital to the livelihood of a vibrant democracy, and evidence of the Founder's aspirations for a government with three separate branches.

This is just another example of a Do Nothing Congress focused more on defeating President Obama than addressing important issues.