

To: Participants in the University of Maryland Discussion Group on Constitutionalism
Executive Power “Schmooze”

From: Peter Shane

Date: February 13, 2013

Re: My ticket: “Executive Power, the Rule of Law and the First Obama Administration”

With some trepidation, I am sharing the attached all-but-un-footnoted and conspicuously incomplete manuscript as my ticket for next week’s schmooze. I’m out of town for the rest of this week so, unfortunately, this manuscript won’t get any better within a time frame consistent with your own leisurely reading of it. I am hence forwarding it now.

The paper aims to specify the first Obama Administration’s institutional conception of the “rule of law,” largely by examining controversial episodes outside the context of foreign affairs and war powers. (Anyone who has read my various online posts on some of these subjects will recognize a lot of the arguments.) Assuming I can do that, I would then want to measure the Administration’s performance in the foreign affairs and military arenas against its own model of the rule of law. I anticipate finding, in those arenas, that the Administration has sometimes been faithful to the rule of law in a quite reassuring way; that it has sometimes hewed to the model, but in a way that shows strains in the plausibility of the model; and that it has sometimes acted inconsistently with that model. But, I would argue, the key rule of law difficulties now posed in the foreign affairs and military contexts have less to do with presidential lawyering than with an increasingly obsolete legal framework, and the absence of effective accountability mechanisms post hoc. My final aspirations would be to say something sensible about what this view of the rule of law does and does not promise in terms of what I take to be its central aim, i.e., minimizing arbitrary government behavior. I will argue that, contrary to what I think is Adrien V’s view, this model of the rule of law is based on substantive commitments, and is not the same as rule by politics.

My trepidation is caused not only by the paper’s incompleteness (and the usual possibility that I may just be wrong in some of what I say), but that – because the parts I have written so far tend to support the idea of an Obama rule of law model, the incomplete manuscript will sound like an apologetic for the Obama Administration. That’s not what I intend!

I look forward to your reactions and, perhaps even more, to reading other people’s papers!

Executive Power, the Rule of Law and the First Obama Administration

Peter M. Shane¹

I. Introduction

In his Second Inaugural Address, President Barack Obama proclaimed: “We will defend our people and uphold our values through strength of arms and rule of law.” The rule of law claim echoes a theme prominent in the President’s explicit public philosophy at least since his 2008 presidential campaign. Then-Senator Barack Obama chided the Bush 43 Administration for having “repeatedly challenged” “our laws, our traditions, and our Constitution.”² Responding to a reporter’s questionnaire, he described as unconstitutional “[t]he detention of American citizens, without access to counsel, fair procedure, or pursuant to judicial authorization, as enemy combatants” and the “warrantless surveillance of American citizens, in defiance of FISA.” He found unlawful “[t]he violation of international treaties that have been ratified by the Senate” and “[t]he creation of military commissions, without congressional authorization.” He asserted that the Bush 43 Administration had “over-classified” information, and had used “signing statements to make extreme and implausible claims of presidential authority.”

Early pronouncements such as these created hope among many supporters that an Obama Administration would dial back on what I have elsewhere called “presidentialism,” a view of “the constitutional design as creating a largely autonomous executive branch, in which the President enjoys a robust range of inherent authorities, both foreign and domestic, which are beyond the power of Congress to regulate or the authority of the courts to review.” In exercising

¹ Jacob E. Davis and Jacob E. Davis II Chair in Law, The Ohio State University Moritz College of Law.

² <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/#>

presidential authority, it seemed that a President Obama would turn his back on presidential unilateralism, and hew conscientiously to a robust conception of the rule of law.

It is fair to say that a vocal segment of the President's erstwhile supporters thinks his first Administration fell short of that hope. The most trenchant criticism has come in connection with presidential military initiatives, including drone strikes in Pakistan and Yemen and our prolonged commitment of U.S. military assets to help overthrow Muammar Gaddafi. But the story of any Administration's relationship to the rule of law is a complex one. It is worthwhile before assessing the merits of the few most trenchant criticisms to step back and review more comprehensively what the first Obama Administration took the "rule of law" to be. To the extent we can identify a conception of the rule of law that animates an Administration's actions across a wide variety of contexts, two inquiries become possible: Is the Administration's rule of law conception an attractive one? And, did it live up to its own understanding?

It is sometimes argued that the "rule of law" is dependent upon, or even reducible to, a regime of highly specified ex ante rules constraining government conduct. If, however, the only government that counts as a "government of laws" is a government bounded by highly specified ex ante rules, then we clearly do not have a government of laws – and perhaps never have. Certainly, throughout most of the 20th century, no tightly rule-constrained depiction of the relationship between law and executive branch action could have been offered as a plausible description of how executive power actually works. This is not just because occasional emergencies defy precise legal control. It is also because, as Adrien Vermeule argues, much of the administrative state simply does not operate under highly specified rules in normal times. Using terms coined by David Dyzenhaus, Vermeule convincingly shows how even routine administrative law is shot through with "black holes" and "gray holes," that is, areas in which

law either explicitly assigns to the executive branch an all-but-unfettered zone of discretion or in which legal institutions establish essentially the same result, notwithstanding the nominal existence of legal standards. His analysis makes him a worthy heir to the eminent political scientist Theodore J. Lowi, who argued a generation ago that the broad delegations of authority under which the executive branch now operates were actually antithetical to law,³ although Lowi regarded this as a problem, which Vermeule largely does not.

Among others, however, I have argued that “rule of law” is best understood as a set of institutional arrangements designed to minimize exercises of government power that are arbitrary or without legitimate authority. At the most general level, this conception of a government of laws requires three things: institutions constitutionally authorized to make the rules that guide and constrain government behavior, practices for exercising government authority that promote conscientious attention to and interpretation of those constraints, and processes of accountability to determine whether the government has exercised its powers properly. Wherever possible, these processes should provide remedies when things go wrong and increase the potential for correction going forward. Thus described, the rule of law sounds very much like checks and balances. But these institutional arrangements do not necessarily refer to practices assigned respectively to three separate branches of government – the executive may promulgate some of its own constraints, for example, and courts need not be the exclusive (or primary) venue for accountability. Moreover, however important their formal actions may be, the effectiveness of rule of law institutions in minimizing government arbitrariness may depend in essential ways on norms, conventional expectations, and routine behaviors that are not always explicit, much less highly formalized constitutional arrangements.

³ THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969).

Against this background, Part II of this paper looks at nearly a dozen contexts other than managing the campaign against Al Qaeda that I take to be revealing of the Obama Administration's conception of the rule of law. Whether or not one agrees with the Administration's stance in each of these episodes, I conclude that they manifest an institutional conception of the rule of law that is practicable, coherent and normatively attractive. Part III then evaluates the "rule of law" critique typically levied against the Administration. I conclude that, in critical respects, the Administration has hewed to the attractive rule of law conception I see immanent in other contexts. Its most patent shortfalls have involved the way it conducted U.S. intervention in Libya and in the indefinite detention of Guantanamo detainees who have actually been cleared for release. Between examples of clear compliance and clear departure, I identify a series of cases in which the model is arguably followed, but its force in constraining arbitrary action open to serious question.

Under the analysis that follows, the rule of law is increasingly strained in foreign and military affairs, but not primarily because the Administration has been wanting in conscientious attention to and interpretation of applicable legal constraints. The key problems lay in the near-obsolence of the relevant constraining rules and in the weakness of institutions to promote after-the-fact accountability. If the Obama Administration is to be faulted, it is primarily for not promoting reforms in those two areas. A concluding section steps back once more to ask what all this means to us as citizens. I ask, in light of the Obama record, what the rule of law, institutionally conceived, actually accomplishes. I try to identify the differences between the rule of law thus described and what Vermeule might be more likely to call the rule of politics. Finally, I consider what the Obama record portends for the future of executive power and the rule of law.

II. President Obama and the Rule of Law in “Ordinary” Public Administration

By and large, President Obama has eschewed ambitious “presidentialist” legal claims. He has never asserted a power to deploy military force free of congressional regulation. He has not embraced the “unitary executive” theory of presidential control of the bureaucracy. He has not offered innovative claims of executive immunity from legislative control, such as President Bush’s insistence that Congress could not, consistent with his nominations power, create statutory qualifications for federal office. He has, on the contrary, repeatedly cited adherence to the rule of law as a key tenet of both his domestic and foreign policy. Yet for all that, the first Obama Administration has been unmistakable in its energetic use of executive power. This section looks at the Administration’s domestic record in an attempt to piece together what might be called the Obama conception of the rule of law.

A. *Constitutional Claims*

Major clues to an Administration’s understanding of the rule of law will appear, of course, in its articulation of constitutional doctrine regarding executive power. Constitutional claims may seem quite ambitious if (a) they are relatively unprecedented, (b) put the executive branch beyond the review of other branches, or (c) destabilize what might seem to be customary forms of interbranch interaction. In all these respects, the first Obama Administration was conspicuously unlike its predecessor.

1. Signing Statements

To an unprecedented degree, the Bush 43 Administration used presidential statements accompanying the approval of enacted legislation to assert constitutional claims regarding executive power. With regard to laws enacted between 2001 and 2009, President Bush objected to approximately 1070 provisions embodied in 127 statutes. Objections to a number of these

provisions were stated on multiple grounds. If one counts as an "objection" each precise ground on which the President registered concern about a provision of law, then the 1070 or so provisions at issue elicited 1496 objections.

The first term Obama record is strikingly different. Over four years, President Obama raised constitutional concerns relating to approximately 50-60 [still working on exact number] provisions scattered throughout 11 different statutes. If nothing else, this suggests that the Obama Administration did not regard signing statements as much of a sword with which to advance theories of executive power or as an exercise in the training of executive branch lawyers to articulate claims of unreviewable presidential authority at every conceivable turn. In addition, all but a handful of the objections were on grounds with a considerable historic pedigree, e.g., objections that the statutes, as written, could impermissibly interfere with the President's authority to negotiate with foreign nations or conduct foreign affairs, compromise executive privilege, give Congress unconstitutional legislative veto authority, or confer executive powers on officials not appointed to their positions in a manner consistent with Article II.

[Compare Obama claims of interference with supervisory power or recommendations power with Bush's]

As with his predecessor's statements, of course, the statements of President Obama might seem an inconclusive piece of evidence regarding his view of the rule of law unless we know how he acted upon them. To the best of my knowledge, no one has done a complete study of the Bush Administration's implementation or lack of it regarding the legal provisions to which he objected. One partial study strongly suggests that he generally complied, even when he had reservations. Both the Bush and Obama Administrations did, however, ignore statutory provisions seeking to prohibit the use of appropriated funds to permit the participation of

Administration officials in particular international meetings. In both Administrations, presidential signing statements indicated that the prohibitions sought impermissibly “to dictate the modes and means by which the President engages in international diplomacy with foreign countries,” a claim of presidential authority going back to the Washington Administration.

Three aspects of the Obama Administration episodes, however, are especially revealing. The Bush Administration’s constitutional analysis led to signing statements indicating that it would regard the appropriations limits as merely advisory; the Obama Administration regarded that interpretation as implausible, and was thus arguably more candid in its stance. It was willing to accept accountability for explicitly violating statutory terms, rather than couching its stance as mere statutory interpretation.

Second, the OLC memo supporting the first of these incidents was not premised, as were a variety of Bush Administration memos, on the idea that congressional regulation in foreign affairs was inherently suspect. Indeed, its premise was that “Congress quite clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration.” The claimed carve-out of presidential authority beyond congressional power to regulate is thus both narrow and nuanced.

Finally, the thoroughness of the OLC opinion supports the view that an early Obama memorandum purporting to limit the promulgation of presidential signing statements was, in fact, meaningful. Lawyers advising on the drafting of Obama signing statements appear to have implemented seriously the President’s commitment to “act with caution and restraint, based only on interpretations of the Constitution that are well-founded.”⁴ Thus, as a legitimate exercise in

⁴ <http://biotech.law.lsu.edu/cases/adlaw/AALS/2010/E9-5442.pdf>

presidential management, the memorandum appears to have functioned as a source of rules to guide and constrain an otherwise completely discretionary presidential practice.

2. Recess Appointments

The first Obama Administration witnessed extraordinary Senate delays and obstruction in confirming even noncontroversial executive branch appointees. A 2010 report by the Center for American Progress found that, after a year in office, the Obama administration lagged behind all four previous administrations in terms of the percentage of Senate-confirmed executive agency positions. This was true, even though President Obama had actually spent fewer days making nominations than the three previous presidents. Nonetheless, Obama showed more restraint than his immediate predecessors in using the recess appointments powers to fill such vacancies. George W. Bush made 171 recess appointments; Bill Clinton made 139 recess appointments; George H.W. Bush made 77 recess appointments; and Ronald Reagan made 243. Obama made only 29.

Yet, it might still be said that Obama's most aggressive exercise of constitutional authority in domestic affairs involved the four recess appointments he made on January 4, 2012. That is because he made them when the Senate, through so-called pro forma sessions, kept itself from adjourning for more than three days at a time with the apparent intent of forestalling presidential recess appointments. On January 25, 2013, a D.C. Circuit panel held unconstitutional three such appointments made to fill vacancies at the National Labor Relations Board. Notwithstanding the court's ruling, however – whose merits are very much in doubt – the way in which Obama used and defended his appointments still reveals much about the nature of the Administration's conception to a particular conception of the rule of law.

Here is the situation President Obama faced in January, 2012. First, the Senate had been delaying since July, 2011 a vote on his nominee, Richard Cordray, to head the Consumer Financial Protection Bureau. The delay was caused by a Republican filibuster explicitly based not on Cordray's suitability for the post, but on an effort to extort a rewrite of the recently enacted Dodd-Frank Act, which created the CFPB. The NLRB, for its part, was operating without a quorum, which requires at least three duly appointed members of the Board. The President's 2010 attempt to appoint to the Board a fully qualified lawyer whom Republicans thought too pro-union likewise met with a filibuster. Without Cordray or new NLRB appointees in place, neither agency could finalize any business, which – in the NLRB's case – was threatening to delay hundreds of adjudications.

When Obama made his appointments of Cordray and the NLRB members, the majority Democrat Senate had previously convened most recently on Tuesday, January 3, 2013 for a session that lasted 41 seconds. These 41 seconds were devoted to two items. The first was a reading by the Senate clerk of a letter from the Senate's then-President Pro Tem, Senator Inouye. The letter confirmed the appointment of Senator Mark Warner for the day to perform the duties of the Chair. The second item was Senator Warner performing exactly one such duty. Namely, he adjourned the Senate until its 29-second session on Friday, January 6. Senators living close to D.C. had been performing these rituals at three-day intervals since December 20, 2011. Their performances implemented a Senate order, adopted by unanimous consent on December 17, providing that the Senate would then adjourn but, until January 23, 2012, convene every three days for "pro forma sessions only, with no business conducted." The reason for this ritual was the decision of the majority Republican House of Representatives, under Article I, Section 5, Paragraph 4 of the Constitution to withhold its consent to a Senate adjournment of longer than

three days. The House Republicans were of the view that keeping the Senate on a three-day leash would prevent the President from making recess appointments and doing an end-run around the Senate Republicans' filibusters.

Against this background, three things are most notable about Obama's course of action. The first is the relative legal modesty of the OLC opinion on which the President relied. His appointments were clearly constitutional if either of two things is true. They were constitutional if, despite the pro forma sessions, the Senate was in recess from December 20 until January 23, or, indeed, from January 3 – the beginning of the 113th Congress – to January 23. If either hiatus amounted to a "recess" for purposes of Article II, Section 2, then the President's exercise of his appointment prerogative was permissible. The appointments would also be constitutional, of course, if the undoubted three-day hiatus between January 3 and January 6 was a "recess" for constitutional purposes. The President had plausible arguments either way.

OLC, however, left the latter, more ambitious argument to be reserved in a footnote. Its main conclusion was only that the pro forma sessions were of no constitutional significance in interrupting what was effectively either 20-day recess during the 113th Congress. OLC followed earlier Attorney General Opinions that had judged the concept of "recess" functionally, by whether "in a practical sense the Senate is in session so that its advice and consent can be obtained." Its functional analysis was well-grounded in historical precedent, and consistent with Supreme Court and D.C. Circuit opinions dealing with a structurally similar question, namely, when does Congress "by their adjournment" prevent the President from returning a veto message, thus triggering the President's power of "pocket veto."

The second notable aspect of Obama's action is how few nominees he advanced. Recourse to his recess appointment power was really the only plausible way of responding to a

pattern of Senate behavior – induced by the Republican minority – that paid no regard to his authority and obligation to appoint officers of the United States to a host of positions critical to effective governance. He was conspicuous in filling only executive, not judicial vacancies, and only in agencies that were utterly disabled from carrying out their legally assigned missions because of vacancies in leadership positions.

The third striking feature of the Administration’s handling of this matter was its litigating strategy. Despite the plausible urging of at least one *amicus curiae*, the Administration did not take the position that the constitutional sufficiency of any particular recess to support the President’s recess appointments power was a political question. That is, Justice did not argue that the issue was beyond a court’s power to review. In sum, the President’s position was supported by strong, if still debatable legal argument. He undertook his action in anticipation of accountability to the judicial branch. And, quite strikingly, his exercise of presidential discretion was done in a way that implied its own limiting principle out of respect for the Senate. As expressed by Laurence Tribe, the President implicitly claimed no more than “an irreducible minimum of presidential authority to appoint officials when the appointments are essential to execute duly enacted statutes,” and that pro forma Senate sessions during what would otherwise appear to be a substantial recess could not defeat the President’s power when such sessions “manifestly” served no purpose other than to serve as a “transparently obstructionist tactic.”

Reinforcing this picture of institutional self-restraint is its legal attractiveness as compared to the D.C. Circuit opinion. Despite a pretense of constitutional modesty, the court decided the Recess Appointments issue — which the appellant had not raised to the NLRB itself — on the broadest possible ground. The relevant constitutional text says, “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.” The panel unanimously read this language to mean that the President may fill vacancies only between “sessions” of the Senate – that is, between the period of time between when the Senate adjourns “sine die” (without a date) at the end of one year’s business and when it first assembles for the next year’s business. The first of these dates typically occurs in late fall. Under the Twentieth Amendment to the Constitution, the second date is now January 3 of each year.

Two of the three judges read into the language an additional limitation. They asserted that the President may fill only those vacancies that first arise during intersession breaks. If an advice-and-consent position becomes vacant, say, on January 4, and the Senate leaves town for the whole summer after sitting on the President’s nomination for six months, the President is just out of luck. As these judges read the Constitution, the President may not even fill the vacancy if it still exists when the Senate finally does adjourn sine die.

This second conclusion is ludicrous as a practical matter, and history utterly refutes it. Felix Frankfurter wrote in his famous *Youngstown* concurrence: “Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.” In this case, executive branch interpretation long ago rejected the D.C. Circuit view of appointment-eligible vacancies, and Congress itself has decisively accepted the executive branch view.

In 1823, Attorney General William Wirt concluded in a formal opinion that the Article II phrase refers to all vacancies that happen to exist during “the Recess.” This was, he wrote, “the only construction of the Constitution which is compatible with its spirit, reason, and purpose.”

As explained in a recent report by the Congressional Research Service, beginning in 1855, formal Attorneys General opinions accepted the Wirt interpretation, “even with respect to newly created offices that had never been filled.” The question first reached a federal court in 1880, and that court, like every other court to reach the issue until last week, accepted the Wirt view as proper.

Yet more remarkably, we know that Congress itself has endorsed this interpretation. In 1940, Congress codified a statute, 5 USC 5503, which purports to limit the circumstances under which a recess appointee can be paid from Treasury funds. In general, the statute bars payment to “an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.”

But Congress gave its rule three exceptions. A recess appointee may be paid “if the vacancy arose within 30 days before the end of the session of the Senate.” A recess appointee may be paid, “if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent.” A recess appointee may be paid “if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.”

All of these exceptions – crafted by the legislative branch itself – obviously refer to and acquiesce in recess appointments to positions that became vacant while the Senate was in session. This is nothing less than explicit congressional ratification of the position that the D.C. Circuit rejects. To quote Frankfurter again: “[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents

who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.” The D.C. Circuit ignored this wisdom.

The court also got the first issue wrong in insisting that the only recess to which Article II refers is “the recess” between formal sessions of Congress. This is a plausible reading only if the Framers anticipated how Congress, not yet in existence, would organize its calendar. Nothing in the Constitution suggests that the Framers anticipated that a Congress would organize itself into sessions of any particular length, much less sessions that formally begin with an opening call to order and go into “the recess” only by adjourning sine die.

In addition to the Recess Appointments Clause, references to a “session” of Congress occur in two other places in the original Constitution. Under Article I, section 5, “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.” The most natural reading of this clause is that “the Session” refers to whenever Congress is sitting. Nothing dictates that “the Session” referred to will last a day, a month, or a year.

Indeed, if “the Session” is read to refer to an assembly of specific duration, the most natural reading would equate “the Session” with an entire two-year congressional sitting, what we now call, “a Congress.” Importing that meaning into the Recess Appointments Clause would yield the remarkable result that a recess appointee who takes office early in January of an odd-numbered year might be entitled to serve for nearly four years thereafter.

Section 6 of Article I similarly provides that members of Congress “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their

Attendance at the Session of their respective Houses.” Again, “the Session” appears to refer simply to when a House of Congress is actually meeting.

It would seem to follow most naturally from these references to “the Session” that the article “the” does not really have a limiting semantic function in these clauses. The D.C. Circuit’s obsession with “the” in the phrase, “the recess,” is just nonsense. “The Recess” should be understood in the same informal, functionally sensible way as we understand “the session.” That is, when Congress is assembled to do business, it is sitting in “the Session.” When the Senate is not around to do business, it is in “the Recess.”

The court’s key defense of its interpretation of “recess” to mean only a recess between sessions is that no other interpretation would provide the courts an easy-to-implement bright-line rule. It is worth noting, however, that – like many bright-line rules – this one makes little sense. As recounted by Senate associate historian Betty K. Koed: “At high noon on Dec. 7 1903,” the Senate president pro tem brought down the gavel to end one session of the Senate and then immediately brought a second session to order. “In that moment between sessions,” she wrote, “during that split-second of time it took . . . to wield the gavel, President Theodore Roosevelt made 193 recess appointments.” These appointments would have satisfied the D.C. Circuit’s bright-line rule. Conversely, should the 2013 Senate or any future body, within a single session, leave town for a protracted period with key executive branch positions unfilled, the President – according to the D.C. Circuit – may do nothing. The court’s ruling turns the Senate’s confirmation prerogative – intended to balance the President’s appointments authority – into the power completely to nullify one of the President’s constitutionally weightiest roles.

3. Executive Privilege

Despite his contentious relationship with Congress, President Obama only once exercised executive privilege in order to withhold documents from congressional investigators. On June 20, 2012, he asserted what is essentially deliberative privilege to withhold from Congress certain Justice Department documents regarding the so-called “Fast and Furious” gun running investigation. That operation appears to have been a misbegotten attempt by the ATF to nab drug traffickers in Mexico by allowing lower-level gun traffickers to buy weapons in the United States for the Mexican cartels and then tracing the guns' movement, rather than stopping their export. One of the guns may have been involved in the December 2010 killing of U.S. Border Patrol Agent Brian Terry.

On February 4, 2011, Assistant Attorney General Ronald Weich wrote a letter to Sen. Chuck Grassley of Iowa, the ranking minority member of the Senate Judiciary Committee, which mischaracterized the operation. He incorrectly denied that ATF "knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico." As a result of this misstatement, the House Committee on Oversight and Government Reform, chaired by Rep. Darrel Issa, began investigating not only the original operation but also the circumstances that led to the erroneous February 4, 2011, letter.

For his part, Attorney General Eric Holder publicly denounced the operation in October 2011 as "fundamentally flawed," and directed the Justice Department's Inspector General to investigate Fast and Furious. (The IG's highly critical 500-page report issued on September 18, 2012.) Responding to Rep. Issa's original requests for documents, the Justice Department released to Congress more than 7,600 pages revealing how the operation was initiated and carried out. What the Issa committee then demanded, and what the White House and Justice Department withheld, were documents generated after February 4, 2011, relating to how the

Justice Department handled its responses to Congress regarding Congress's oversight of Fast and Furious, following the erroneous Weich letter.

In a June 19, 2012 letter to the president seeking the invocation of executive privilege, the Attorney General argued that to disclose these documents would "'significantly impair' the Executive Branch's ability to respond independently and effectively to matters under congressional review." More specifically, Holder urged: "Congressional oversight of the process by which the executive branch responds to congressional oversight inquiries would create a detrimental dynamic," which would, in turn, "chill the candor ... of executive branch discussions and 'introduce a significantly unfair imbalance to the oversight process.'"

Congress has long challenged the notion that claims of deliberative privilege could legitimately shield from legislative investigators executive branch documents that involve no presidential participation. The prevailing view, however, seems to be that claims of executive privilege against Congress are permissible, but that the privilege, at least outside the state secrets context, is not absolute. Indeed, in the wake of *United States v. Nixon*, presidents of both parties have conceded that, if another branch of government demands privileged documents within the executive's control, those documents must be released when the demanding branch can articulate a compelling need for the information to fulfill one of its own constitutional functions – a need that outweighs the executive branch's interest in confidentiality.

What seems unusual in the Fast and Furious matter is that the specificity of asserted interests seems greater on the executive than on the congressional side. Where Congress is investigating specific executive branch conduct, either to unearth wrongdoing or in anticipation of possible legislation, it is usually easy enough to state Congress's interests in quite concrete terms. In this matter, however, the documents withheld do not deal with the actual gun running

campaign or even events leading up to the erroneous February, 2011 letter. Rather, the documents would deal with Department deliberations concerning how to respond to Congress after that letter was sent. Committee correspondence does not make clear why that information would fall within the legitimate purview of the Committee's investigation. On the other hand, forced disclosure to Congress of internal deliberations concerning how best to interact with Congress could undermine the executive's capacity to function as a co-equal branch. It would undermine the prospects for future candid deliberations about interactions with the other institutions of government. Although, as of this writing, the House continues to pursue the demanded documents through litigation, release of the Justice Department report, the absence of any evidence of wrongdoing by the Attorney General, and the resignation of key officials implicated in the mismanagement of Fast and Furious has all but removed the controversy from public consciousness.

4. The Debt Limit Debate

As telling as is the relative modesty with which President Obama advanced constitutional claims on behalf of the presidency, what is equally conspicuous is his unwillingness to advance a novel argument that might have significantly strengthened his hand in negotiating with Congress over raising the U.S. debt limit. In Summer, 2011, Congress used the threat of U.S. default on its debts to exact from the President agreement to two things. The first was a set of immediate spending cuts that were not part of his own political agenda. The second was the enactment of a threatened sequestration of funding across the defense budget and most domestic programs should the elected branches not agree to a large-scale deficit reduction plan that would also entail spending cuts Obama would likely not otherwise support. Prior to this negotiation, however, a number of commentators -- most prominently, law professor and journalist Garrett Epps -- urged

President Obama to take the position that he was constitutionally entitled, and perhaps required, to ignore the existing debt limit statute. House and Senate Democrats urged the President to take this legal advice when the debt limit debate was re-ignited in late, 2012.

The argument is based on section 4 of the Fourteenth Amendment, which provides, in part: “The validity of the public debt of the United States, authorized by law, . . . shall not be questioned.” This language can be read to prohibit default on the debt, which implies, to the satisfaction of at least some scholars, that preventing the President from borrowing enough funds to insure the repayment of debt lawfully incurred would be unconstitutional. Former President Bill Clinton has expressly endorsed the idea.

Rather remarkably from a negotiating point of view, President Obama early and publicly eschewed this unilateral end-run around Congress. Reacting to the media attention that the 14th Amendment option elicited in 2011, the President said: “There is a provision in our Constitution that speaks to making sure that the United States meets its obligations and there have been some suggestions that a president could use that language to basically ignore that debt ceiling rule, which is a statutory rule. I have talked to my lawyers, they are not persuaded that that is a winning argument.” His press secretary, Jay Carney, ruled unilateralism off the table again in early January, 2013.

Although political calculation may well have influenced the President’s stance, his explicitness was a significant act of presidential modesty, given that it quite obviously reduced his negotiating leverage. Telling Congress simultaneously that you do not regard default as a permissible option, but that you have no unilateral way to avoid debt, is placing yourself fairly obviously at Congress’s mercy. Obama’s willingness to do so is yet more dramatic because, were the President to assert unilateral authority and, in fact, to act on it, it is hard to see how his

insistence on paying U.S. creditors would have so injured any individual as to create standing to challenge his authority in court. In short, this would have been a claim to power which, even if not well-founded, could not likely have been challenged short of impeachment.

B. Managing the Bureaucracy

1. Directing the Polycentric Executive
 - a. Subordinate Administrators as “Deciders”
 - b. Czars
 - c. Relations with Independent Agencies
2. Prosecutorial Discretion and Immigration
3. Statutory Waivers
4. Abandoning the Defense of DOMA

The centrality of a president’s intended role in advancing the rule of law is confirmed by the explicit and personal constitutional obligation to “take care that the laws be faithfully executed.” When Attorney General Holder informed Congress in September, 2011, that the Obama Administration would no longer argue in court in support of the constitutionality of the Defense of Marriage Act,⁵ critics were quick to complain that the President was abandoning his constitutional role in upholding congressional statutes.

In analyzing this question, it is important to distinguish two very different things: the executive duty to carry out the law and the President’s duty to defend statutes challenged in court. On the first matter, Attorneys General have long set a very high bar before opining that the executive branch can decline to carry out the law. In 1919, Attorney General A. Mitchell Palmer, justly infamous on other grounds, penned a line that Attorneys General have consistently followed on the issue of whether questionable laws should be enforced: “Ordinarily, . . . it is not

⁵ <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>

within the province of the Attorney General to declare an Act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department.” The only likely defensible exception to this stance would occur if Congress were to enact law plainly violating well-established constitutional rights. Thus, for example, if Congress purported to reestablish racial segregation in D.C. public schools, the executive branch could rightly decline implementation.

In reaching this position, Attorneys General – like Presidents – have to take into account two different provisions of the Constitution. One is the “Take Care Clause,” the central purpose of which is to prohibit the executive suspension of statutes, a key protection for the integrity of the legislative process going back to the 1688 Declaration of Rights in England. The other provision, however, is the presidential oath, which requires Presidents to “preserve, protect, and defend the Constitution” – presumably, all of it. In carrying out laws that the President regards as unconstitutional, he might seem to be in violation of this straightforward vow. But, regarding unconstitutional laws, the courts are typically available to protect the public from their operation. The danger to constitutional checks and balances of allowing Presidents simply to refuse the enforcement of laws they disagree with is too obvious and too grave to be ignored. Presidents thus have to strike a balance. And, with regard to legal implementation, the right balance is, almost always, to carry out the laws Congress enacts.

Defending laws in court is a different matter for three obvious reasons. First, the executive is not claiming to have the final say on legal implementation — or even interpretation. The challenged law will remain on the books – and enforced – unless the courts rule otherwise. Second, the executive stance does not deprive the law of defenders. In the case of DOMA, for example, courts allowed Congress to intervene and offer a defense. This is exactly what

happened when the executive branch declined to defend the constitutionality of the legislative veto in the 1983 *Chadha* case. Third, government attorneys are officers of the court. As advocates, they are bound by professional and ethical norms.

An important question, then, for the Justice Department is how far to go in pressing arguments in a judicial forum if the Department does not think the arguments are valid. President Reagan's first attorney general, William French Smith, articulated a very restrictive stance on this question: "In my view, the Department has the duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts." His immediate predecessor, however, Benjamin Civiletti, staked out a position that left more room for discretionary judgment. In a letter to a Senate committee, he wrote: "The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his."

Attorney General Holder's letter explaining the decision not to defend DOMA represented a rigorous and conscientious implementation of the Civiletti view. Holder did not deny, as Civiletti went on to say, that "when the Attorney General is confronted with . . . a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress." But he laid out an analysis as to why the President and he no longer thought DOMA consistent with the Constitution. Indeed, his

confession of error on behalf of the United States was qualified in an important way. It was Holder's analysis (and the President's) that legal developments now required that DOMA be subjected to heightened judicial scrutiny, a standard it could not meet. However, Holder added: "If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3's constitutionality may be proffered under that permissive standard."

Notwithstanding his preferred analysis, Holder also pledged continued enforcement of DOMA. Enforcement, even without defense of DOMA in court, "respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised." Such a stance confirms the ethos of interbranch accountability that the Obama Administration repeatedly emphasizes in its view of the rule of law.

5. Transparency

C. *The Obama Rule of Law Model: A First Take*

III. President Obama and the Rule of Law in Foreign and Military Affairs

A. *The Model Pursued: The Interrogation and Trial of Enemy Combatants*

B. *The Model Strained: Drone Strikes and Targeted Killings*

C. *The Model Disregarded: Libya, Indefinite Detention*

D. *The Obama Rule of Law Model Reassessed*

IV. Executive Discretion and the Rule of Law in an Age of Drones

A. *Why Care About the Rule of Law?*

1. Is the Rule of Law "Just" Rhetorical?

2. The Substantive Commitments of the Institutional Rule of Law

B. *The Obama Model and the Future of Executive Power*

V. **Conclusion**