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Lamar Smith, Chairman

The Obama Administration's Disregard of the Constitution and Rule of Law

CHAIRMAN'S REPORT
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Introduction

Ignoring the Constitution to Impose a Partisan Agenda

The Attorney General is responsible for enforcing the laws of the United States and defending the Constitution. The office of the Attorney General was created by the First Congress of the United States in 1789, and since that time the Attorney General has been one of the most senior and important officials in the Republic. As the head of the Department of Justice, the Attorney General leads the agency responsible for enforcing the laws of the United States, prosecuting federal criminals, and rendering legal guidance to the President and the entire Executive branch.

Of all agencies in the federal government, the Justice Department, because of the great power it holds over Americans' Constitutional rights, should not impose their own partisan agenda. Unfortunately, under the Obama Administration, the Justice Department has become more partisan than ever.

Rather than fulfilling the Attorney General's oath to "support and defend the Constitution of the United States" and the President's Constitutional responsibility to "take care that the laws be faithfully executed," the Justice Department in the Obama Administration, under the leadership of Attorney General Eric H. Holder, Jr., has repeatedly put its partisan agenda ahead of its Constitutional duties. The pattern of pushing partisan ideology rather than neutrally enforcing the law began nearly as soon as the Administration took office and has continued unabated since.

The House Judiciary Committee has jurisdiction over the Justice Department and oversees the actions of the Agency. The following report outlines a few high profile examples of how the Justice Department has ignored the Constitution to impose the Administration's partisan agenda on the American people.

I. Stalling Investigation of Operation Fast & Furious

Since the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) Operation Fast and Furious first became public in January, 2011, the Department has responded with a consistent focus on avoiding responsibility rather than addressing institutional flaws.

In October 2009, ATF's Phoenix Field Division started an investigation that would become Operation Fast and Furious. Fast and Furious relied on a controversial law enforcement technique known as "gunwalking," in which agents would allow illegal firearms sales to traffickers so that ATF could chart the flow of guns to Mexico. In all, ATF allowed traffickers to bring more than 2000 guns to Mexico as part of Fast and Furious.[1]

From the outset, ATF agents, trained to stop illegal gun sales, feared the gunwalking strategy would end in catastrophe. Their fears were realized on December 14, 2010, when investigators found guns linked to Fast and Furious at the murder scene of United States Customs and Border Patrol Agent Brian Terry.[2]

After Agent Terry's murder, frustrated ATF agents could no longer remain quiet. ATF Agent John Dodson raised concerns within ATF and to the Department's Inspector General. When he did not receive an immediate response, Agent Dodson reached out to Senator Chuck Grassley, the Ranking Member on the Senate Judiciary Committee.

On January 27, 2011, Senator Grassley wrote to ATF's Acting Director Kenneth Melson and asked whether the allegations that ATF allowed guns to walk to Mexico were true.[3] On February, 4 2011, Assistant Attorney General for Legislative Affairs Ronald Weich responded: "The allegation — that ATF 'sanctioned' or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico — is false."[4] Assistant Attorney General Weich also wrote that under long-standing practice, the Department would not release investigative documents to Senator Grassley because he was not the chairman of the Judiciary Committee.

Department of Justice officials defended this statement even as evidence of gunwalking mounted. After direct evidence of gunwalking was made public, Department officials argued that the statement was technically correct because the straw purchasers transferred the weapons to middlemen and did not take the guns to Mexico themselves.

On May 3, 2011, Attorney General Eric Holder testified to the House Judiciary Committee that he "probably heard about Fast and Furious for the first time over the last few weeks."[5]

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[1] *A Gunrunning Sting Gone Fatally Wrong*, Sara Horwitz, Washington Post (July 25, 2011), *available at* http://www.washingtonpost.com/investigations/us-anti-gunrunning-effort-turns-fatally-wrong/2011/07/14/gIQAH5d6YI_story_1.html.
[2] *Id*.
[3] Letter, Senator Chuck Grassley to ATF Acting Director Kenneth Melson (January 27, 2011).
[4] Letter, Assistant Attorney General Ronald Weich to Senator Chuck Grassley (February 4, 2011).
[5] *Oversight Hearing on the Department of Justice, House Judiciary Committee*, 112 Cong. (May 3, 2011) (Testimony of Attorney General Eric Holder).

The Attorney General's testimony raised immediate concerns. Senator Grassley had personally handed the Attorney General a copy of his January 27 letter, months before the May 3 hearing. In the fall of 2011, the Department produced documents that included memos to Attorney General Holder that included synopses of Fast and Furious.

On October 4, 2011, Chairman Smith wrote the President and raised the possibility that the Attorney General's May 3 testimony was false.[6] The Chairman requested that the President appoint a special counsel to investigate when Attorney General Holder first learned of Operation Fast and Furious. Neither the President nor the Department responded to this request.

On October 7, the Attorney General wrote to Chairman Smith and other prominent Members of Congress and maintained that his responses related to Fast and Furious had been "truthful and consistent."[7]

On November 8, 2011, six months after his testimony to the House Judiciary Committee, the Attorney General conceded that his May 3 testimony was inaccurate.[8] He said that he knew about Fast and Furious when Senator Grassley raised the issue in January, 2011 and he should have said "a few months" instead of "a few weeks." He also conceded that the February 4 letter contained inaccuracies. On December 2, 2011, the Department took the unusual step of officially retracting its February 4, 2011 letter.

[6] Letter, Chairman Lamar Smith to President Barack Obama (October 4, 2011).
[7] Letter, Attorney General Eric Holder to Chairman Lamar Smith, et. al. (October 7, 2011).
[8] *Oversight of the U.S. Department of Justice*, *Senate Judiciary Committee*, 112 Cong. (November 8, 2011).

II. Failing to Enforce Immigration Laws

The Justice Department is selectively enforcing the law, based on partisan ideology. It is rushing to court to oppose state laws aimed at improving immigration enforcement while ignoring sanctuary cities and other policies which explicitly violate federal immigration law.

Not only does this represent a failure of the Department's duty to enforce the law, it is a failure to protect the American people from illegal immigration. As the Supreme Court recognized in 1976: "Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; [and] can seriously depress wage scales and working conditions . . . ."[9]

For example, the Justice Department is challenging Arizona's enforcement statute SB1070 for, among other things, directing police to contact federal authorities if they believe a person in their custody may be illegal. The Department argues this violates 8 U.S.C. 1357 which provides for detailed cooperation agreements between federal and state authorities on immigration enforcement. DOJ essentially claims these provisions are the exclusive avenue of such cooperation and show Congress intended for states to be involved in the enforcement of immigration laws only under the Attorney General's close supervision. But this entire argument seems utterly refuted by a provision of that law stating explicitly that such agreements are not the exclusive means of cooperation:

> Nothing in this subsection shall be construed to require an agreement . . . in order for any officer or employee of a State . . . to communicate with the [authorities] regarding the immigration status of any individual . . . or . . . otherwise to cooperate . . . in the identification, apprehension, detention, or removal of aliens not lawfully present.[10]

In response, the Justice Department offers a strained explanation the crux of which is that this provision, which would devastate the Department's argument, cannot possibly mean what it plainly says.

Even if the Department's argument were not entirely frivolous, it is a much weaker case than could be mounted against states like New York, Massachusetts, and Illinois that openly violate their duty to support federal immigration enforcement. While Arizona's law complements and strengthens federal immigration policy, the laws of these states and some of the cities within them explicitly violate the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996—yet DOJ refuses to take any action against them.[11]

[9] De Canas v. Bica, 424 U.S. 351 at 356-57 (1976).
[10] 8 U.S.C. § 1357(g)(10) (2006).
[11] Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 505 of division C.

So-called "sanctuary cities" essentially prohibit their employees such as police from communicating with federal authorities for information about potential illegal immigrants they encounter. These rules are an unambiguous violation of federal law. Section 642 of IIRIRA bars any State or local government from "prohibit[ing], or in any way restrict[ing], any government entity or official from sending to, or receiving from" DHS "information regarding the citizenship or immigration status, lawful or unlawful, of any individual."

Similarly, Section 505 of IIRIRA bars illegal immigrants from being eligible for college tuition breaks or any other "postsecondary education benefit" available only to state residents. Yet many states provide just such scholarships to illegal immigrants.

The Department has not brought a single case seeking a court injunction blocking sanctuary cities or tuition breaks for illegal immigrants even though these are flagrant violations of federal law. Instead, it busies itself making the strained argument that state laws designed to aid immigration enforcement are somehow incompatible with federal immigration law.

The Department does not have unlimited resources and cannot pursue every case. That is precisely why one would expect it to focus on the strongest legal cases. Instead one sees just the opposite. The glaring inconsistency can best be explained by highly partisan decision making influencing which cases to pursue.

The Justice Department claims to be acting to protect the interests of Congress, arguing that except in narrow circumstances only Congress can legislate immigration enforcement. In truth, the Department ignores Congress except when it can help the Administration achieve its partisan goals, in this case its fiercely anti-enforcement immigration agenda.

III. Challenging Voter ID Laws

The Justice Department's partisan ideology is driving it to waste taxpayer dollars fighting the very laws that promote fair and accurate elections. This is especially problematic because the Constitution generally gives states the right to set their own election procedures.

The foundation of our democracy rests on secure and fair elections. Unfortunately, voter fraud undermines the electoral process and can sway the ultimate outcome of elections. Illegal votes negate the votes of legal voters. Voter ID laws help ensure the integrity of our elections and protect the rights of lawful voters. Thirty-two states have some form of voter ID law, in half of those states the ID must include a photo.[12]

The Department's arguments opposing these laws are unsupported by common sense, the facts or the precedent. Voter ID opponents insist that voter fraud is not a serious problem. But most voters disagree. The majority of Americans overwhelmingly support laws that require people to show photo identification before voting. A recent Rasmussen Reports national telephone survey found that 64% of likely U.S. voters agree that voter fraud is a serious problem, while just 24% disagree. And 73% of respondents believe that a photo ID requirement before voting does not result in discrimination.[13]

The Supreme Court in a 6 to 3 decision, authored by Justice John Paul Stevens, rejected the argument that voter ID laws are discriminatory when it upheld Indiana's strict voter ID law in 2008.[14] In upholding the Indiana law, the Court cited flagrant historical examples of in-person voter fraud as well as the state's administrative interest in carefully identifying who has voted. The Court also noted the state may have a legitimate interest in requiring photo IDs for voters even without evidence of widespread fraud.

The Court's opinion quoted the report for the bipartisan Commission on Federal Election Reform, co-chaired by former President Jimmy Carter, which stated:

> The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.[15]

Most forms of voter fraud are difficult to detect, especially if photo IDs are not required. That same Commission report found voter fraud does occur and could affect the outcome in a close election.

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[12] National Conference of State Legislatures, *Voter Identification Requirements* (April 12, 2012), available at http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx.

[13] Press Release, Rasmussen Reports, 73% Think Photo ID Requirement Before Voting Does Not Discriminate (Apr. 16, 2012), available at http://www.rasmussenreports.com/public_content/politics/general_politics/april_2012/73_think_photo_id_requirement_before_voting_does_not_discriminate.

[14] Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

[15] *Id*. (quoting "Building Confidence in U.S. Elections" 5 2.5 (Sept. 2005), App. 136-137 (Carter-Baker Report)).

Having lost in both the federal courts and the court of public opinion, partisan voter ID opponents might be expected to move on to a more promising issue. But just last month, in March 2012, the Obama Administration announced that it will challenge the Texas voter ID law, which is based on the Indiana law and was overwhelmingly supported by Texas voters. The Justice Department also seeks to challenge a similar law in South Carolina.

The Department claims that the laws are discriminatory because minorities are less likely to have the required IDs. But a closer look at the Department's math shows how weak the argument is.

The Justice Department claims that in South Carolina minorities are 20 percent more likely than whites to lack photo ID. This sounds significant until you examine the original data. 90% of minorities have photo IDs compared with 91.6% of whites. The Department's presentation is mathematically true (because 10% is technically 20 percent more than 8.4%) but it masks that in reality, the Department is battling over a difference of less than 2%.[16]

The Department's case against the Texas voter ID law is equally troubling. Assistant Attorney General for the Civil Rights Division Thomas Perez claims that the disparity between photo ID possession of non-Hispanics and Hispanics is statistically significant. That data shows 93.7% of Hispanic voters have photo ID as do 95.7% of non-Hispanics.[17] Once again, the disparity is only two percentage points. Even that slight difference may be within the margin of error since Texas, in gathering some of the data, had to guess who is Hispanic based on surname.

Ironically, the Justice Department's own policy requires visitors to show valid photo ID before being allowed to enter its buildings. If it takes valid identification to walk the halls of the Justice Department, then it should take at least that much to determine the outcome of our elections. By continuing to oppose tested laws requiring voters to present photo identification the Department is prioritizing ideology over Supreme Court precedent and the rights of states.

The interference with state sovereignty appears to be a significant issue for the Supreme Court. A 2009 case noted members of the Court had expressed, "serious misgivings" about the constitutionality of the Justice Department blocking changes to state election procedures.[18] The Department does have authority to block changes to election procedures in certain states with a history of discrimination. However, by using this authority to block valid, common sense voter ID laws, the Department risks being seen as abusing its authority which could lead the Court to strip the Department of its so called pre-clearance authority altogether.

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[16] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, to C. Havird Jones, Jr., Assistant Deputy Attorney General, Office of the South Carolina Attorney General (Dec. 23, 2011), available at http://www.scribd.com/doc/76397189/Justice-Department-Letter-To-South-Carolina-Blocking-Voter-ID-Law.

[17] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State (Mar. 12, 2012), available at http://www.scribd.com/doc/85051426/DOJ-Letter-To-Texas-On-Voter-ID-Law.

[18] Northwest Austin Municipal Utility District No. 1 v. Holder, 129 S.Ct. 2504, 2511 (2009).

IV. Blocking Congressional Inquiries

The Department of Justice's partisanship in the healthcare context is not just leading it to defend the unconstitutional individual mandate, it is driving it to ignore its Constitutional obligation to respond to Congressional oversight requests in a matter that risks damaging the reputation of the Supreme Court.

For ten months, the Justice Department has refused to cooperate with legitmitate and repeated oversight requests from the House Judiciary Committee regarding what role Supreme Court Justice Elena Kagan may have played in the development of the President's health care bill (ACA).

Prior to her nomination to the Supreme Court, Justice Kagan served as the Justice Department Solicitor General. In this capacity, it was her job to provide legal advice to the Administration in preparing to defend the constitutionality of Obamacare. If Justice Kagan was involved in preparing the legal case for Obamacare, as internal Department of Justice emails suggest, then her ability to rule on the case impartially is in question and she should recuse herself.[19] The credibility of the decisions of the Supreme Court depends on the impartiality of the Justices.

Since July, 2011, the Judiciary Committee sent Attorney General Holder five separate letters requesting that the Justice Department provide relevant documents and emails and produce witnesses for interviews regarding then-Solicitor General Elena Kagan's involvement in preparing to defend the healthcare law.[20] But instead of working to quiet questions by disclosing the facts about Justice Kagan's prior health care reform-related work, the Department ignored Congress, fueling speculation that there is something to hide.

Public records make clear that further inquiry is rational and required. The ACA became law on March 23, 2010, and legal challenges to the law were filed almost immediately. At the time, Justice Kagan was serving as the Administration's chief legal advisor on challenges to federal law, especially Supreme Court challenges. It would have been her job to consult with and advise the Administration on how best to defend the new law.

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[19] "Any Justice . . . shall . . . disqualify himself . . . . Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455 (2012).

[20] Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Jul 6, 2011) (on file with the House Judiciary Committee); Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Oct. 28, 2011) (on file with the House Judiciary Committee); Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Nov. 22, 2011) (on file with the House Judiciary Committee); Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Dec. 13, 2011) (on file with the House Judiciary Committee); Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Jan. 17, 2012) (on file with the House Judiciary Committee).

Nevertheless, the Administration claims that Justice Kagan was kept out of discussions and therefore is eligible to hear the case.[21] But emails and documents released last year draw the Administration's assertions into question.

For example, there is a publicly released chain of then-Solicitor General Kagan's emails dated March 21, 2010, under the subject line "Health care litigation meeting."[22] There is also material from *Golden Gate*, a case with a "possible nexus to the Health Care bill" in which Justice Department lawyers have acknowledged that Justice Kagan "substantially participated" when she served as Solicitor General.[23] But the Administration has refused to release the content of the March 21 email chain because it "includes a DOJ attorney's thoughts on a legal issue . . . regarding the expected [healthcare] litigation."[24] Saying these emails should be withheld because they include legal deliberations over health care directly contradicts the Attorney General's claims that Justice Kagan was not involved with discussions on the topic.

Given such materials, not only is it perfectly reasonable for the Committee to inquire further into the issue, failing to do so would be a dereliction of duty. Under the rules of the House, it is the Committee's role to ensure that the laws it passes are adequate and enforced.[25] The current federal recusal law, enacted in 1974, bars Justices from hearing certain cases in which they were involved as government lawyers.[26] The intent of recusal is to prevent any personal or professional bias that may impact a Justice's decision.

The Department has offered no valid reason for refusing to comply. It appears to concede it must comply with valid oversight requests, but insists that the Committee has no legitimate legislative interest in the material.[27] This is demonstrably false. As the Committee pointed out in a January 17, 2012, letter the Department has yet to answer, it is studying the Justice Kagan issue to ensure that the federal law governing judicial recusals is adequate, obeyed and effective in inspiring public confidence in the judicial system.[28]

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[21] Bill Mears, *Should three key Supreme Court justices bow out of health care ruling?*, CNN, (Nov. 29, 2011), *at* http://www.cnn.com/2011/11/29/politics/scotus-health-care/index.html.

[22] Email from Neal Katyal, Principle Deputy Solicitor General, U.S. Department of Justice, to Elena Kagan, Solicitor General, U.S. Department of Justice (Mar. 21, 2010) (on file with the U.S. Department of Justice); Email from Elena Kagan, Solicitor General, U.S. Department of Justice to Neal Katyal, Principle Deputy Solicitor General, U.S. Department of Justice (Mar. 21, 2010) (on file with the U.S. Department of Justice).

[23] Email from Edwin S. Kneedler, Deputy Solicitor General, U.S. Department of Justice, to Neal Katyal, Principle Deputy Solicitor General, U.S. Department of Justice (May 11, 2010) (on file with the House Judiciary Committee);Memorandum from Neal Katyal, Principle Deputy Solicitor General, U.S. Department of Justice, to Elena Kagan, Solicitor General, U.S. Department of Justice (May. 13, 2010) (on file with the U.S. Department of Justice).

[24] Declaration Of Valerie H. Hall, Executive Officer of the Office of the Solicitor General ("OSG"), United States Department of Justice, In Support Of Defendants' Motion For Summary Judgment, Media Research Center v. U.S. Dep't Of Justice, Civil Action No. 10-2013, Appendix A (D.D.C. Mar. 15, 2011).

[25] Rule 10(1)(l)(1) of the rules of the U.S. House of Representatives (112th Congress).

[26] 28 U.S.C. § 455(b)(3) (2012).

[27] Letter from Ronald Weich, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to Lamar Smith, Chairman, House Judiciary Committee (Jan. 6, 2012) (on file with the House Judiciary Committee).

[28] Letter from Lamar Smith, Chairman, House Judiciary Committee to Eric H. Holder, Jr., Attorney General of the United States (Jan. 17, 2012) (on file with the House Judiciary Committee).

There is always tension between the Justice Department and its Congressional overseers. That tension is built into the separation of powers. What is especially problematic in this instance is that the Department's refusal to air all the facts risks harming the Judicial branch. The Department's unjustified refusal to release all the relevant information risks calling into question the legitimacy of the Court's ultimate decision, undermining public faith in the rule of law and the Constitutional principle of Judicial review.

The Administration's lack of cooperation only heightens concerns that they have something to hide. Unfortunately, the Administration's stonewalling of Congress could result in an unconstitutional law being upheld.

V. Refusing to Defend the Defense of Marriage Act

The Justice Department has refused to defend a valid federal law, the Defense of Marriage Act, in order to advance its partisan agenda promoting same-sex marriage.

The Justice Department is the attorney for the federal government. This generally means that the Justice Department defends the laws passed by Congress, regardless of the political views of the President. Past administrations of both parties have adhered to a policy of defending every federal statute for which a reasonable argument can be made.[29]

This practice is founded on the principle that under the Constitution it is the role of Congress to make the law and the role of the Executive branch to enforce the law.[30] Due respect for Congress as a coequal branch of the federal government precludes the Executive branch from choosing which Congressionally enacted laws to defend on the basis of its own policy preferences.

The Defense of Marriage Act (or "DOMA")[31] is a federal law passed by overwhelming bipartisan majorities of both Houses of Congress and signed into law by then-President William Jefferson Clinton.[32] Section 3 of the Defense of Marriage Act defines the word "marriage" for purposes of federal law as "only a legal union between one man and one woman as husband and wife," and defines the word "spouse" as only "a person of the opposite sex who is a husband or a wife."[33]

This definition of marriage merely restates the definition of marriage that has prevailed throughout American and human history, including at the time of the adoption of the Constitution and each of its amendments.[34] This definition is based on society's interest in fostering responsible procreation and the rearing of children in two-parent homes.[35]

The Defense of Marriage Act has been upheld and enforced by various courts of the United States.[36] This clearly demonstrates that not only are the arguments in favor of DOMA's constitutionality reasonable, they are persuasive, winning arguments.

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[29] *See Testimony of Edward Whelan at 3, Hearing on "Defending Marriage," House Judiciary Committee, Subcommittee on the Constitution*, 112 Cong. (April 15, 2011) (hereinafter "Whelan Testimony"); s*ee also Elena Kagan to be Solicitor General of the United States Department of Justice, Senate Judiciary Committee*, 111 Cong. (Feb 10, 2009) ("I would apply the same standard to defending the Defense of Marriage Act . . . as to any other legislation: I would defend [it] if there is any reasonable basis to do so.")

[30] *See* Office of Legal Counsel Memorandum from Walter Dellinger to Abner Mikva, Nov. 2, 1994 (concluding that "a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.").

[31] Pub. L. 104-199, *codified at* 1 U.S.C. §7 (1996) and 28 U.S.C. § 1738c (1996).

[32] The House vote was 342-67 and the Senate vote was 85-14.

[33] 1 U.S.C. §7 (1996).

[34] Testimony of Maggie Gallagher at 2, *Hearing on "Defending Marriage," House Judiciary Committee, Subcommittee on the Constitution*, 112 Cong. (April 15, 2011); Whelan Testimony at 9.

[35] *Id*. at 2-3; *see also House Judiciary Committee, Defense of Marriage Act: Report Together with Dissenting Views*, Report 104-664 at 13 (July 9, 1996).

[36] *See, e.g.* Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (applying Eleventh Circuit precedent that "encouraging the raising of children in homes consisting of a married mother and father is a legitimate state

In a letter dated February 23, 2011, the Attorney General informed Congress that the Department of Justice would no longer defend DOMA in court.[37] Specifically, the Attorney General's letter argued that the President, after reviewing a recommendation from the Attorney General, had determined that Section 3 of DOMA, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.[38]

In order to reach this determination, the Administration found that DOMA should be subject to heightened scrutiny under the Supreme Court's equal protection doctrine. But every federal circuit court that had previously considered the question found that distinctions based on sexual orientation were subject to rational-basis review rather than strict scrutiny.[39]

In his letter the Attorney General stated that the Administration would continue to enforce Section 3 of DOMA but not defend it in court, a tenuous position intended to limit political accountability for the decision rather than to faithfully execute the law, because if the President's belief in the law's unconstitutionality were sincere he presumably would not enforce the law.[40]

The unprecedented nature of the Attorney General's arguments and the evasion of accountability represented by continuing to enforce the law while not defending it combine to support the inference that the Administration's stance is based on its partisan agenda rather than on a sincere analysis of the Constitution and, as such, the Administration's non-defense of the Defense of Marriage Act is a usurpation of Congress's legislative function.

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interest"); *In re* Kandu, 315 Bankr. R. 123, 146 (2004) (applying authorities recognizing that "the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern"); *see also* Baker v. Nelson, 409 U.S. 810 (1972) (finding no "substantial federal question" raised by an equal protection challenge to Minnesota's state law limiting marriage to opposite-sex couples).

[37] Attorney General Eric H. Holder, Jr. to Speaker of the House John Boehner (Feb. 23, 2011).

[38] *Id*.

[39] *See* Defendant-Intervenors-Appellants' Opening Brief, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. Sept. 17, 2010), at 70-71.

[40] *See* Whelan Testimony at 11-12.

VI. Ignoring the Constitution's Limited Recess Appointment Power

The Obama Administration, acting on the partisan legal advice of the Holder Justice Department, has attempted to install several officers in important Executive Branch positions in a manner that bypasses the Senate's power of advice and consent to nominations.

On January 4, 2012, the President invoked his recess appointment power to install three people on the National Labor Relations Board and another as director of the Consumer Financial Protection Bureau.[41]

The Constitution provides that the President may only appoint officers of the United States "by and with the advice and consent of the Senate."[42] This "general mode of appointing officers of the United States" was purposely given by the Framers of the Constitution "to the President and Senate jointly."[43] The Constitution provides an exception, however, allowing the President to make temporary appointments only "during the Recess of the Senate."[44]

Although the Constitution does not define what constitutes a "recess" for purposes of the recess appointments clause, several provisions of the Constitution indicate it is up to the Congress to determine when it is in recess. Article I, Section 5, grants each House wide latitude to determine how it will operate and function, including the handling of such matters as elections and qualifications of its members, what constitutes a quorum necessary to transact business, and how to compel the attendances of absent members. Clause 2 of Section 5 specifically provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly behavior and, with the Concurrence of two thirds expel a Member."

On January 4, 2012—the day that the President purported to exercise his recess clause power—the Senate, by its own rules, was not in recess. Between December 17, 2011, and January 23, 2012, the Senate held a series of pro forma sessions designed to break the holiday period into three-day adjournments in order to comply with its constitutional obligation not to adjourn for more than three days during a Congressional session without the consent of the House of Representatives.[45] The order that scheduled these pro forma sessions was entered by unanimous consent and provided that there was to be "no business conducted."[46]

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[41] Melanie Trottman, Wall Street Journal, "Obama Makes Recess Appointments to NLRB" (Jan. 4, 2012*), available at* http://online.wsj.com/article/SB10001424052970203513604577141411919152318.html.
[42] U.S. Const. Art. II, § 2, cl. 2.
[43] *The Federalist* No. 67 (Alexander Hamilton).
[44] U.S. Const. Art. II, § 2, cl. 3.
[45] U.S. Const. Art. I, § 5, cl. 4.
[46] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

The Department of Justice, through the Office of Legal Counsel ("OLC"), wrongly advised the President that these appointments were consistent with the Constitution.[47] OLC concluded that the President "has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."[48] Thus, OLC is, in effect, concluding the President has an open-ended, unilateral authority to determine that the Senate is in recess and to appoint nominees pursuant to the recess appointments power, notwithstanding the Senate's own judgment and the factual realities. When Congress makes rules that govern its proceedings, the President should, like the courts, defer to the legislative branch.[49]

OLC's claim that the Senate was unavailable to perform its advise-and-consent function was false. While the Senate's scheduling order directing that no business be conducted during pro forma sessions was entered by unanimous consent, there can be no doubt that the Senate was free to overrule it, and to conduct business, by another unanimous consent agreement.[50] So not only was the Senate not in recess, it was able to process the President's nominees through the advice and consent process. Indeed, on December 23, 2011, during the same period that the OLC claimed the Senate was incapable of conducting business, the Senate lifted the Unanimous Consent Agreement to pass H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011 under a subsequent unanimous consent agreement.

The Senate's power of advice and consent is an essential part of the Constitution's system of checks and balances, which the Framers "built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[51] The invocation by the President of the recess appointment power when the Senate was not in recess was an unconstitutional evasion of the Senate's power of advice and consent. It encroached upon the Senate's constitutional prerogatives and aggrandized power to the President.

These unconstitutional appointments represent a unilateral imposition of the Administration's partisan agenda on the American people, unrestrained by the Constitution's limits. The President, acting upon the Department of Justice's advice, evaded the Constitution's limits on his power and installed nominees who would advance his partisan agenda.

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[47] Memorandum Opinion for the Counsel to the President, *Re: Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* at 4, 23 (Jan. 6, 2012).
[48] *Id*.
[49] *See* Mester Mfg. v. INS, 879 F.2d at 571 (9th Cir. 1989) ("The Constitution . . . requires extreme deference to accompany any judicial inquiry into the internal governance of Congress.").
[50] *See Testimony of Charles Cooper*, *Hearing on "Executive Overreach: The President's Unprecedented 'Recess' Appointments"*, *House Judiciary Committee*, 112 Cong. (Feb. 15, 2012).
[51] Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

Conclusion: Promises Broken

Just over three years ago, as the Obama Administration was entering office on a cloud of hope and change, Attorney General Holder testified at his Senate confirmation hearing that the Attorney General is the guardian of the Constitution of the United States. [52]

He promised that under his leadership, the Department of Justice would be free from partisanship. He testified that in his tenure "law enforcement decisions must be untainted by partisanship."[53]

He promised to respect the balance of powers established in the Constitution, and that President Obama and he would "carry out [their] constitutional duties within the framework set forth by the founders and with the humility to recognize that Congressional oversight and judicial review are necessary."[54]

The reality has been different from the promise.

Rather than respect for the constitutional system of checks and balances, the reality has been disregard for Congressional oversight and contempt for judicial review.

Rather than law enforcement untainted by partisanship, the reality has been partisanship trumping law, even to the point of refusing to enforce laws that do not match the Department's political agenda.

The Constitution has not been guarded with care.

[52] *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States Before the Senate Judiciary Committee*, 111th Cong. (2009).
[53] *Id*.
[54] *Id*.