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THE EXECUTIVE BRANCH: TOO MUCH POWER?*

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I. INTRODUCTION

It is a real pleasure to be at the Duncan School of Law and to share some insights with you on how the relationship between the various branches of government has evolved and changed in recent months, days, and years.

Just as a point of background, a little more about me—I am a native Washingtonian (I actually grew up in Washington, D.C.). So, politics have been a big part of my life. Watching

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the evolution of politics is a sport for many of us in that part of the world. I went to Johns Hopkins for undergraduate and Georgetown for law school. In between undergraduate and law school, I entered an Augustinian monastery where I studied for the priesthood for a number of years. I wore the habit, and lived a life of poverty, chastity, and obedience. But as with all vocations, one evolves and remains open to other opportunities. After much reflection, I wound up coming back to Washington, D.C., settling down, going to law school, getting married, raising a family, and entering politics. The rest as they say is still unfolding.

II. A LAWYER'S ROLE IN THE SCHEME OF POWER

When asked to come to the Duncan School of Law and talk a little bit about the subject of the separation of powers, the use of executive power, and the like, I reached out and grabbed one of my old law books, which I had not opened in a long time. I am sorry I did, because it brought back some scary memories.

However, I did stumble across an interesting description of lawyers, for those of you who are about to enter into the profession and those of you who are already practicing: hopefully you will be able to appreciate this. It said: "Lawyers, more than the members of any other profession, enjoy power, prestige, income and the genuine affection of both clients and non-clients."¹ Wow. Really? Who knew, right? Wait, there is more. It continues, "also probably more than any other profession, lawyers are the target of some

¹ Charles W. Wolfram, *Modern Legal Ethics* §1.1, at 1(1986).

of the most cutting, wide-sweeping, and relentless criticism.”² That sounded more like it.

Lawyers occupy a very special place. It may be one of ambivalence, but it is a very special place in America’s public life. Your work, our work, makes us indispensable to so many people and what they do at work, what they do at home, and what they do in their business. The impact that we have, that you have, and that you will have, is enormous. The work that we do, while it may make us loathed by many, is also what makes us appreciated by so many more. We may not believe that half the time, because there are some really good lawyer jokes out there. However, the reality of it is simply this: the impression and the impact that you have in moving the country’s agenda, supporting the Constitution, and making the argument on behalf of freedom and individual liberties is important. We are definitely a challenged species. Ours is also a special “calling”, to use a theological term. That calling is purely to defend our civil liberties under the law, to ensure our freedoms granted by the Constitution, to protect the rights of every citizen, and to enforce the rule of law.

Now, why is this important? It is important precisely because our nation was founded on the ideals of liberty and justice. This class of individuals—current and future lawyers—is specifically charged under our Constitution, to defend and protect those liberties at all costs. Consequently, as Frederick Douglass noted: “Human law may know no distinction between human men in respect of rights, but human practice may.”³ What does that mean? Basically, it says that as a lawyer, or even as a judge, you will have a very distinct role to play in protecting our citizens when the law appears on its face ready to deprive them of their fundamental rights as established by the Constitution.

² *Id.*

³ See JAMES MONROE GREGORY, FREDRICK DOUGLASS THE ORATOR, 150 (1893).

Similarly, your role will be equally important when human practice denies our citizens those same rights. This is why, for example, an independent judiciary is so important to how we govern ourselves, and how the three branches of our government work together.

III. THE EXECUTIVE BRANCH: TOO MUCH POWER

It is with particular interest that attention has been paid to actions taken by the executive branch of government in recent years. In most of these skirmishes, the nature and extent of executive power has centered on actions or decisions largely affecting foreign affairs and national security. For example, President Bush's claim of unlimited executive power to detain terrorist suspects⁴ or President Obama's pursuit of military action in Libya without so much as an e-mail to members of Congress, are very good examples of this growing tension between the executive branch and the legislative branch in trying to maintain that balance of power.⁵

But the order of things has changed. The reach of executive power is no longer limited to the ethereal world of clandestine operations with names that make no sense, but

⁴ E.g. *Authorization to Use Military Force (AUMF)*, 107-40, 115 Stat. 224 (2001); On Feb. 7, 2002, President Bush issued an executive order determining that members of al Qaeda and the Taliban are unlawful enemy combatants who are not entitled to the protections of the Third Geneva Convention. The full text of the executive order can be seen at: http://lawofwar.org/Bush_torture_memo.htm.

⁵ See Charles Savage, *Attack Renews Debate Over Congressional Consent*, N. Y. TIMES, Mar. 21, 2012, <http://www.nytimes.com/2011/03/22/world/africa/22powers.html>, (last visited 7/10/2012); see also Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J., March 30, 2012, <http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html> (last visited July 10, 2012).

now claims, with greater frequency the upper hand over the legislative branch in domestic matters as well.

We all remember the now-infamous battle with the U.S. Senate over President Bush's recess appointment of John Bolton as United Nations ambassador, during which then-Senator Barack Obama made clear that Mr. Bolton will have less credibility to do his job without Senate approval.⁶ But what you say as a Senator may not be what you do as President. President Barack Obama breached that very wall of separation of powers by his decision not only to make recess appointments but to do so as the Wall Street Journal noted by telling the Senate that it was in recess even though those very Senators said they were not.⁷ Now, *that's* what I call executive power.

For a president, executive power can be a very sexy thing. Now, you have probably never thought of executive power as a sexy thing, but look at it this way—it is a lot like having a sledgehammer with lingerie on it. There's a visual for you. The point is, something may look appealing, but when it hits you, it hurts. That is how presidents have come to use executive power over the last ten or fifteen years. And that is part of the problem. James Madison once said: "There can be no liberty where the legislative and executive powers are united in the same person ... or if the power of judging be not separated from the legislative and executive powers."⁸ What

⁶ See Trish Turner, *Obama Administration Tests Constitutional Power after Controversial Appointment*, FOX NEWS, Jan. 4, 2012, <http://www.foxnews.com/politics/2012/01/04/obama-administration-tests-constitutional-power-after-controversial-appointment/> (last visited July 10, 2012).

⁷ *Contempt for Congress*, WALL ST. J., Jan. 12, 2012, <http://online.wsj.com/article/SB10001424052970203471004577140770647994692.html> (last visited July 10, 2012).

⁸ THE FEDERALIST NO. 47, 194 (Alexander Hamilton, John Jay, and James Madison) (Hayes Barton Press, 2007) (Originally published under the pen name Publius in 1788).

he was basically saying is that there is a reason we designed the system the way we did. There is a reason why these checks and balances were put in place.

Our Founding Fathers immortalized the principle in the very framework of our Constitution by implementing a self-enforcing system in which each branch of government is given the means to participate and, when necessary, to temporarily obstruct the workings of the other branches. All of the Washington power plays resulting in gridlock that people like to complain about—why don't they do this or that or why can't they just get in a room and work it out—is in many ways part of the orchestration of our Constitution. It is the very art of the legislative and executive branches, and, to some extent the judiciary, working out what the law is going to be, what the impact of that law will be; how that law will be enforced; and, who is subject to that law—in other words, what is its reach. Keep that in mind—what is its reach—because that is at the core of the clash we see between the White House and the Congress.

When you step back and look at the Ninth Amendment to the Constitution, it clearly states that: “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁹ Now, let's see how that has worked out.

a. EXECUTIVE POWER POST 9/11

I think you will find it interesting that in the months following the terrorist attacks of September 11, 2001, several questions were raised concerning issues of law and justice in the United States in response to terrorism. How would our

⁹ U.S. CONST. amend. IX.

legal, political and judicial systems respond to the human toll Americans now had to confront? Democrats looked at terrorism as a criminal act no different than someone robbing a store or killing someone in a neighborhood; while Republicans saw a broader, more global threat that would require a much greater response. Both political parties had to answer the question to what extent are we prepared to go to protect the American people? The threat of terrorist attacks within our borders had become a new reality that ultimately required government intervention and thus, the Patriot Act¹⁰ was born.

The Patriot Act came enhanced surveillance procedures and expanded the government's authority to intercept wire, oral, and written communications including mail, email, voicemail, and telephones as well as making it easier for our criminal justice system, whether it was law enforcement, at the local level or at the federal level, to obtain search warrants with a broader scope.¹¹ This authority was vested in the executive branch, through the Federal Bureau of Investigation.¹² This was our response to the fear of terrorism. For many, the Patriot Act was a necessary evil, very much akin to the steps taken by President Lincoln to detain individuals by suspending habeas corpus during the Civil War in order to protect the Union and to keep it together. The same arguments used to justify Lincoln's actions were not that dissimilar from the arguments made when the Patriot Act came into place.

More recently, in keeping with his personal opposition to the Defense of Marriage Act, for example, President Obama declared that the Justice Department would no longer defend

¹⁰ Pub.L. 107-56, 115 Stat. 272 (2002).

¹¹ *Id.*

¹² *Id.* at 115 Stat. 287-88.

the statute in court.¹³ Here is a bold example of the executive branch saying, not just to the American people, but to its co-equal branches in particular: “we will no longer defend the law because we don’t like the law.” Really? Try this the next time the IRS shows up because you have not paid your taxes. “Well, I’m not paying my taxes because I just don’t like the law.” Yet, in the broader scope of the use of executive power, we are seeing the administration—and not just this administration—cherry pick where they are willing to push the bounds of constitutional powers, in order to obtain a political or policy objective.

Similarly, to address the growing concerns of the No Child Left Behind Act (“NCLB”),¹⁴ the Obama Administration effectively used administrative authority to rewrite the law. Again: “We don’t like this provision; we do not like the law.” Remember my reference to the impact of a law and who it touches? The Administration’s actions in this case illustrate its conclusion that it did not like the administrative impact of NCLB, nor did they like who it touched. So, guess what? The Administration decided it was just not going to work with Congress, because “they are not going to work with us so we will just rewrite it ourselves.” Interesting.

Now the question becomes: What impact has the use of executive power to breach the separation between the various branches had on how we govern ourselves and on how we look at these respective branches?

**b. MANIPULATING THE SYSTEM TO GAIN POWER IS
NOT A NEW SCHEME.**

¹³ Statement of Attorney General Eric Holder on behalf of President Obama Feb. 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (last visited July 10, 2012).

¹⁴ Pub. L. 17-110, 115 Stat. 1425, (2002).

It's important to keep in mind that these presidential breaches are not alien to the separate branches of government. It is a bit like a yo-yo in the sense that the President wants to extend the reach of executive power and authority, and the other two branches want to pull it back.

However, it is not always the executive branch taking power from the other branches, but rather the other branches relinquishing authority that constitutionally belongs to them. In other words, one branch says: "Not my problem. I do not want to deal with it; you deal with it."

The two most egregious examples of this are the Patient Protection and Affordable Care Act,¹⁵ which we lovingly refer to as ObamaCare, and the Dodd-Frank Reform and Consumer Protection Act,¹⁶ both of which provide a broad statutory framework for governing the single largest component of the economy (healthcare) and a critical sector of the economy (financial services). In each case, the legislative branch deferred to the executive branch the responsibility to fill in the details through regulations that were ultimately developed by bureaucrats, not elected representatives. Remember the famous quote by Speaker Pelosi on healthcare? "But we have to pass the bill so that you can find out what is in it."¹⁷ You cannot make this stuff up. In short: the legislative branch punted on the hard work of developing the mandate, outlining the scope of the regulations, and putting in

¹⁵ Pub.L. 111-148, 124 Stat. 119, to be codified as amended into sections of the Internal Revenue Code as well as in section 42 of the United States Code.

¹⁶ Pub. L. 111-203 (2010).

¹⁷ Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010), available at <http://pelosi.house.gov/news/press-releases/2010/03/releases-March10-conf.shtml> (last visited July 10, 2012).

place the restrictions that the Congress would want to see in place.

Our national legislature has reached the point where it simply creates broad packages of legislation that are weak on substance and lack direction. This in turn gives the executive branch the ability to actually shape the implementation law, which is not their responsibility. Why has this slow but steady slide into blurring, if not outright disregarding the otherwise very bright lines separating the branches of government been allowed to occur? Is it just about aggregating power to the executive branch or is it something more?

The evidence seems to suggest that we are witnessing the “Red State-Blue State” politics of our times redefine how each branch views its role of shaping the law of the land. The real danger, however, is inherent in congressional and presidential actions that stretch the reach of executive power or abandon legislative authority, resulting in an unprecedented encroachment upon the liberties of private citizens and religious institutions.

Case in point: the recent Department of Health and Human Services mandate requiring employers, including religious institutions, to cover procedures for sterilization, in vitro fertilization, and some contraception and abortion drugs, despite the theological mandate that these institutions follow for themselves;¹⁸ or the unprecedented effort to have the government direct a church whom to appoint to a ministerial position within that church.¹⁹ Fortunately, this effort was

¹⁸ See *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

unanimously rejected by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*.²⁰

These are just two examples of how important it is to establish important thresholds for stopping the steady erosion of individual liberty. For example, in the case of *Hosanna-Tabor*,²¹ the judiciary pushes back, unanimously, against an apparent executive power grab making clear it would not allow the federal government to direct a church whom it should hire, whom it should fire, and under what conditions such employees could work for that church.

Liberal and conservative judges unanimously concluded that was a reach too far. The challenge, then, that lies ahead is a daunting one as more and more efforts are undertaken that narrows the constitutional definition of what separates the three branches. Oddly enough, it may fall to the Supreme Court, in a sort of modern day *Marbury v. Madison*-style²² ruling, to begin to put this genie back in the bottle after the executive and legislative branches have so egregiously distorted the balance between freedom, privacy, and security.

After all, if the government is allowed to become unnecessarily intrusive and authoritative in its exercise of power, who will protect the interests and the rights of the nation and its citizens?

IV. CONCLUSION

As this new era unfolds, the role of those who are members of the bar, those who are in this system to defend and protect personal rights, are to make the argument for the

²⁰ See *id.* at 707-10.

²¹ See *id.*

²² See generally *Marbury v. Madison*, 5 U.S. 137 (1803).

limitation of government power and its intrusiveness upon those rights, liberties, and freedoms, will increase in importance. As Justice Kennedy noted during the oral arguments on the Affordable Care Act, “When you are changing the relation of the individual to the government in this way . . . a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?”²³

That sounds a lot like *Marbury v. Madison* 2.0 to me.

²³ See Transcript of Oral Argument at 11, *Dept of Health and Human Svs. v. Florida*, 132 S. Ct. 2566 (2012) (No. 11-398), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf (Paul Clement for respondents Florida et al.).