Written Statement of
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Thank you Mr. Chairman and Members of the Committee.

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

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

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

government. Indeed, it is in that very conflict that they saw the most important guarantee of constitutional government and liberty.

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

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

1. Suspension of Statutory Requirements.

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

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

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

Parliament, in other words, refused to be reduced to the level of a mere debating society, unable to enact laws the king was required to respect and enforce.

One hundred years later, the Constitution's Framers – with this history very much in mind – made plain that no American president could claim similar power, permitting nullification of the laws by simple executive fiat. Such authority would, of course, cripple the very separation of powers they hoped to achieve. As the Supreme Court noted in an early case, where a presidential suspending power was suggested (although not, significantly, by the incumbent President Martin Van Buren):

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

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

Of course, it has long been recognized that the President and his delegees may exercise a certain level of discretion in determining how best to carry out his constitutional duty to enforce the laws, and especially to establish his

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

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

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

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

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

The President must enforce the law as adopted by Congress, and he must respect the policy choices Congress has made. He cannot, true to his office and oath, work to undermine or nullify the law simply because he disagrees with those

choices, and or seek to substitute his own policy preferences and goals through administrative means. Such changes must be sought and obtained from Congress. Granting assurances to categories of individuals that otherwise applicable law will not be applied to them is an "entirely inadmissible" act of suspension.[1]

2. "Recess" Appointments to Federal Office.

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

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

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

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

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

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

The Constitution does not, of course, define "recess" for purposes of the President's recess appointment power, but the Department of Justice's Office of

Legal Counsel has advised successive presidents that recess appointments are permissible in both intersessional and intrasessional adjournments, so long as these are of "substantial length." *See Recess Appointments*, 13 Op. O.L.C. 325 (1989). In that case, the recess in question was 33 days, but recess appointments have been made during recesses of far shorter duration. Nevertheless, in view of the purpose of this exception to the general rule, a senatorial absence of more than a few days has been considered the minimum necessary requirement to a legitimate recess appointment. *See e.g.*, 33 Op. Att'y Gen. at 25 (suggesting that a 5 or 10 day adjournment is insufficient for a recess); *The Pocket Veto: Historical Practice and Judicial Precedent,* 6 Op. O.L.C. 134, 149 (1982) (advising President to avoid making recess appointments "when the break in continuity of the Senate is very brief.") *See also* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Re: Recess Appointments in the Current Recess of the Senate at 3 (Feb. 20, 2004) (cited in Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions at 9 n.13 (Jan. 6, 2012) (noting argument that a minimum of 3 days is necessary in view of the requirements in Art. I, § 5, cl. 4 that neither house can adjourn for more than three days without the other's consent)) [hereinafter Opinion of January 6, 2012]. And, of course, the Senate must *actually be in recess*.

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

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

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

And, in fact, at the time the January 4 appointments were made, the Senate was capable of transacting business in accordance with its own rules and past

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

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

3. Frustration of Legitimate Congressional Oversight.

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

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

Department's handling of the fallout from Operation Fast and Furious, which the Committee believes may have involved deliberate misrepresentations to Congress.

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

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

the presidential communications privilege. *See In re Sealed Case*, 121 F.3d at 744-45.

In this instance, of course, "the White House has steadfastly maintained that it has not had any role in advising the Department with respect to the congressional investigation." Letter from the Hon. Darrell Issa to the President, June 25, 2012, at pp. 1-2, available at, http://images.politico.com/global/2012/06/issaobamaltr.pdf. As a result, it would not be appropriate for the Administration to assert the strictly constitutionally-based presidential communications privilege.

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

of executive privilege raised in the judicial arena." *In re Sealed Case*, 121 F.3d at 737.[4]

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

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

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

justified and again reveals a determination to ignore or evade the lawful limits on executive authority.

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

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