

Written Statement of

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

I cannot imagine a topic of greater concern to the Congress, this nation, and its citizens than the possibility (or fact) of a president's or his administration's abuse of power. As you know, this is not a new subject for me. For more than 20 years, I have studied the impeachment process and presidential misconduct. I take the possible occurrence of official misconduct quite seriously, and I have thought long and hard – and written one book and numerous articles – on the constitutional issues arising from the misconduct of high-ranking officials, including the President. Although I have had the privilege of advising members of Congress on various issues relating to official misconduct in the past, I of course speak today only for myself and not for anyone else or my home institution, the University of North Carolina, where I have the privilege of teaching constitutional law and professional responsibility.

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

The first guiding principle is recognizing and abiding by the all-important distinction between politics and the Constitution. I say "all-important" because it is so easy to forget and confuse political with constitutional choices. Yet, they are distinct, even though they frequently overlap. For years, many scholars rightfully criticized the Supreme Court for sometimes confusing political decisions with constitutional law; they argued, persuasively I thought, that the Court should not strike down a political decision with which it disagreed but only those things that violated the Constitution. A similar principle applies to presidents, or, for that matter, members of this august institution: The fact that we disapprove of something does not make it unconstitutional. Not every action with which we might disagree, or with which we might disapprove, is unconstitutional. Most of what a president does involves political choices; it involves making choices about policy. I do not come before you to discuss politics or policy, and I have nothing to say about the President's political choices, nor any of yours, except to say that the Constitution allows for national political leaders to make a wide range of political, even partisan, decisions.

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

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

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

You may use this same test for any of the officials whose legal or constitutional judgments you may question. I know many members of this Committee may not, for instance, agree with the President's, the Attorney General's, and the Office of Legal Counsel's judgment that executive privilege may be extended

to cover documents that were produced in internal deliberations within the executive branch. Would you reach the same conclusion and hold the same kind of hearing if the President, the Attorney General, and the Office of Legal Counsel had different political affiliations? The judgment about whether executive privilege applies is, at bottom, a constitutional choice, albeit one that obviously has political ramifications. I think there is credible support for the President's and administration's judgment on executive privilege, including historical and judicial precedents, and this credible support would exist, regardless of the President's party or the political affiliation of the people who lead his Justice Department.

The second principle I follow is affirming the Constitution's establishment of a robust system of checks and balances. I believe that the Constitution vests Congress with substantial responsibilities, including oversight. In virtually all of my publications and prior testimony before Congress, I have expressed this belief, indeed, this conviction. You certainly have the power and opportunity to second-guess the President's constitutional choices, and of course you may subject him or other department heads to rigorous oversight. You may urge close scrutiny of the constitutional and legal judgments of these officials and question them. At the same time, the President undoubtedly has the authority by virtue of the Constitution, and I believe the prerogative, to push back, to defend himself, to explain his constitutional reasoning and of course to stand his ground. For example, many of you may argue that Congress and Congress alone has the authority to determine when a recess occurs, including how long it may last. At the same time, the President may argue that he is not bound by this judgment, just as President Andrew Jackson argued that he was not bound by the Supreme Court's decision in *McCulloch v. Maryland* because he was entitled, by virtue of his oath, his election, and his stature within the constitutional scheme, to make his own, unilateral judgments about the Constitution's meaning and scope. President Obama is entitled, in my opinion, like Jackson, Lincoln, and every other president, to make independent constitutional judgments, just as each of you is entitled to push him hard to defend or explain those judgments.

As a constitutional law professor, I appreciate the robust system of checks and balances the founders gave us in the Constitution. Today's hearing is plainly an exercise in checks and balances in practice. Of course, this system does not always require, or entail, conflict, but conflict is inevitably a dynamic within it. Another, critical feature of this system is the accountability of the officials who serve in our government: High-ranking executive officials serve at the pleasure of the President and are subject to congressional oversight and subject to the impeachment process, and national political leaders are all electorally accountable. The same check applies to congressional and presidential overreaching – the fact that members of Congress and the President require the public's approval in order to continue in office. Ours is of course a government of laws not men (or women), which means that everyone who serves in government should abide by the law and is subject to the accountability that the law – the Constitution -- provides. Whatever you may think of the President's constitutional choices, he now stands politically accountable

for all of them before the American people. This is true for recess appointments and every other matter we may discuss at today's hearing. For, as you well know, it is not just constitutional law professors, members of Congress, or presidents who get to interpret the Constitution and debate its meaning; the American people get to do that as well. Indeed, I think that is a major reason we are here today – to educate the public. I expect that the Constitution will be discussed a good deal over the next several weeks. I look forward to that discussion and to what it will teach us about the Constitution and the President's constitutional record.