

Law Professor Says U.S. At A 'Constitutional Tipping Point'



George Washington University Law School Professor Jonathan Turley testifies before the House Judiciary Committee (Chip Somodevilla/Getty Images)

Constitutional expert **Jonathan Turley** says a “massive gravitational shift” of power to the presidency has created a “constitutional crisis” for the U.S.

In his testimony at a [House Judiciary Committee hearing](#) yesterday, Turley said this shift did not begin with President Obama, but that “it has accelerated at an alarming rate under this administration.” Turley emphasized that he does not view the president as a dictator, but he does think the problem is urgent.

The following is an excerpt of his [prepared remarks](#):

As someone who voted for President Obama and agrees with many of his policies, it is often hard to separate the ends from the means of presidential action. Indeed, despite decades of thinking and writing about the separation of powers, I have had momentary lapses where I privately rejoiced in seeing actions on goals that I share, even though they were done in the circumvention of Congress. For example, when President Obama unilaterally acted on greenhouse gas pollutants, I was initially relieved. I agree entirely with the priority that he has given this issue. However, it takes an act of willful blindness to ignore that the greenhouse regulations were implemented only after Congress rejected such measures and that a new sweeping regulatory scheme is now being promulgated solely upon the authority of the President. We are often so committed to a course of action that we conveniently dismiss the means as a minor issue in light of the goals of the Administration. Many have embraced the notion that all is fair in love and politics. However, as I have said too many times before Congress, in our system it is often more

important *how* we do something than *what* we do. Priorities and policies (and presidents) change. What cannot change is the system upon which we all depend for our rights and representation.

Interview Highlights: Jonathan Turley

On President Obama's role in the power shift

"This certainly did not begin with him. We've seen a gradual sort of gravitational shift of power from the legislative to the executive branch. It was prominent during the Bush years, where I was also very critical, but it certainly accelerated under President Obama. And the most serious violations, in my view, are various cases when he went to Congress, as in the immigration field, as in the healthcare field, as for very specific things, and was rejected, and then decided just to order those on his own. He's also been accused of shifting large amounts of money from their appointed or appropriated purpose to other purposes. These really drive at the heart of the separation of powers."

On the acceleration of this power shift

"These are really sort of Fellini-esque moments for someone who studies the Constitution. The framers assumed — most famously, James Madison — that ambition would check ambition in our system. But the legislative branch, for the last two presidents, has been virtually inured. It's gotten to the point where the shift of power is so significant that I think we have to stop and take notice. There's no question that previous presidents abused their power, but what we're seeing with the Obama administration is really a systemic circumvention of Congress, and remarkably, he's doing that with the applause of his own party, members of the legislative branch."

On how he feels the American people should be reacting

"People need to understand, policies change and even presidents change. But these powers are hard to get back, and I think that people will rue the day when they were silent as we created this über-presidency, this massively powerful presidency, and created this instability within the system. Because what Madison really foresaw was that the three branches were like orbs or planets, that were locked in orbit by their self interest, by their checks and balances. That's a very unstable orbit now, because of this shift of power. And the problem that we have is this concept of 'all is fair in love and politics,' that people can't see beyond how they feel about immigration, and how they feel about environment, or more importantly, how they feel about President Obama. And that's very short-sighted. They have to see a farther horizon that's going to affect our children when we change the system."

Transcript

JEREMY HOBSON, HOST:

Well, now let's get to Washington, where the question is not about vetoing legislation, which the president does have the constitutional authority to do, it's about whether he has the authority to not enforce or not defend existing laws that he doesn't agree with.

There was a big hearing about that yesterday in the House chaired by Congressman Bob Goodlatte, that's a Republican from Virginia.

REPRESENTATIVE BOB GOODLATTE: From Obamacare to welfare and education reform to our nation's drug enforcement and immigration laws, President Obama has been picking and choosing which laws to enforce. But the Constitution does not confer upon the president the executive authority to disregard the separation of powers and write or rewrite acts of Congress.

HOBSON: Well, joining us now for more on this is someone who testified at yesterday's hearing, constitutional law expert Jonathan Turley. He's a professor of law at the George Washington University, and he's with us from Washington. Jonathan, welcome back.

JONATHAN TURLEY: Thank you.

HOBSON: Well, this whole argument really heated up when the administration decided not to defend the Defense of Marriage Act back in 2011. There have also been complaints about whether they are enforcing the immigration laws. In your view, is there anything the president is doing that is unconstitutional?

TURLEY: I'm afraid I think he is violating the Constitution. He's certainly violating the separation of powers. This certainly did not begin with him. We've seen a gradual sort of gravitational shift of power from the legislative to the executive branch. It was prominent during the Bush years, where I was also very critical, but it certainly accelerated under President Obama.

And the most serious violations, in my view, are various cases where he went to Congress, as in the immigration field, as in the health care field, asked for very specific things and was rejected and then decided just to order those on his own. He's also been accused of shifting large amounts of money from their appointed or appropriated purpose to other purposes.

These really drive at the heart of the separation of powers. And what concerns me, even though I happen to agree with many of his priorities, is that people are so caught up in this poisonous political environment that there's not even a whimper of concern or opposition as

we see our system change fundamentally, and I think it is changing. I think that we're seeing an imbalance of power in a system based on three equal branches.

HOBSON: But you say this has been done before. So tell us about the precedent for this? Because a lot of people just hearing the setup to this story will say wait a minute, why are you picking on President Obama? He's just doing things that have been done before.

TURLEY: Well certainly I was critical of his predecessor, but President Obama has taken it to a new level. I mean, when he went to Congress and said that he was going to go it alone, it was an amazing moment where various members of Congress cheered. It reminded me of when Holder went to an audience of lawyers and told them of the kill list policy, where the president was asserting the right to kill a citizen without a charge or conviction, and he received applause.

These are really sort of Felliniesque moments for someone who studies the Constitution. The framers assumed, most famously James Madison, that ambition would check ambition in our system. But the legislative branch for the last two presidents has been virtually inert. It's gotten to the point where the shift of power is so significant that I think we have to stop and take notice.

And there's no question that previous presidents abused their power. But what we're seeing with the Obama administration is really a systemic circumvention of Congress. And remarkably he's doing that with the applause of his own party, members of the legislative branch.

HOBSON: But the White House would say, and they have said, that as you say, Congress is not acting right now. They're not doing very much at all. And the president says it's his responsibility to act. And so he's doing what he can through his executive authority.

TURLEY: Well, I'm afraid I'm not convinced by that argument, quite frankly. It's not enough to say that he wouldn't do this if you simply did what he wanted you to do. The framers didn't guarantee that we would reach compromise. There's a very good reason why we're having difficulty today. This country is deeply divided.

And as representatives of the people, you find that Congress is divided. But people need to understand policies change. And even presidents change. But these powers are hard to get back. And I think that people will rue the day when they were silent as we created this uber-presidency, this massively powerful presidency and created this instability within the system because what Madison really foresaw was that the three branches were like orbs or planets that were locked in orbit by their self-interest, by their checks and balances.

That's a very unstable orbit now because of this shift of power. And the problem that we have is this concept of all is fair in, you know, love and politics, that people can't see beyond how they feel about immigration or how they feel about the environment or more importantly about how they feel about President Obama. And that's very short-sighted. They have to see a farther horizon that's going to affect our children when we change the system.

HOBSON: Well, is it constitutional, for example, for Eric Holder, the attorney general, to do what he just did, which is to tell his state counterparts, attorneys general in the states, that they are not obliged to defend bans on gay marriage?

TURLEY: I thought that was a serious mistake in one respect. I understand that he felt he could not support DOMA. I don't support DOMA. I thought, however, he acted inappropriately when he pulled out from the defense of a duly enacted law signed by President Clinton and did not appoint a special counsel or a third party, someone who could represent the United States.

When Windsor and Hollingsworth, the two cases that went to the Supreme Court, went before the court, much of this confusion existed as to whether they could even hear the case. And in the California case, the court found that there was no standing because the attorney general(s) in that case - the attorney general had withdrawn.

I don't think that advances the rule of law. I mean, there are good-faith arguments on both of these cases. I happen to agree with the president on them. But we should want them argued, and we should want them argued well and not pull the ladder up after refusing to defend these laws.

HOBSON: Well Jonathan Turley, what do you suggest should be done at this point? And is there a role for the courts?

TURLEY: Well, I think the most important thing is to try to reinforce the concept of member standing. That's the reason I was very happy that this hearing focused on that. A lot of the problem that we're having in Washington is not because of the politics. The framers lived in this period. They foresaw this period.

I mean, they used to call - I mean, Jefferson called the Federalists the reign of the witches. They were trying to kill each other literally during that period. So there's nothing new about our politics. But what the framers gave us was a system by which we could harness the energy, even the division, and come out with compromise.

But that's not going to happen unless the courts step up to the plate and in my view do their job. The courts have essentially removed themselves from this process and are refusing to

deal with separation of powers questions, and that has left the two branches in this sort of raw power play that we see every day.

HOBSON: Jonathan Turley, professor of law at the George Washington University. Thanks so much.

TURLEY: My great pleasure.

HOBSON: This is HERE AND NOW. Transcript provided by NPR, Copyright NPR.