



COUNCIL FOR NATIONAL POLICY

Remarks

The Honorable Tom Cotton

May 2013

Thank you all for that kind welcome and good morning to you. I want to speak today about the Constitution. I take that document very seriously. I swore an oath to it a few months ago as a Congressman, but also when it really counted, as a soldier. I can't judge that President Obama takes the Constitution as seriously. In fact, the title of my address is *The Anti-Constitutional Excesses of the Obama Administration*. You might ask, "Why that peculiar phrasing? Why not the more common 'unconstitutional'?" Well, let me explain: the prefix "un-" simply means not. An action or law that is unconstitutional is simply and literally not constitutional. The prefix "anti-" on the other hand means opposed to, or hostile to. This term, I think, better captures the attitude of our President, the spirit of his administration, and the spirit of modern liberalism. The proposition that Barack Obama is an anti-constitutionalist is perhaps controversial, so let me offer his own words into evidence. The fundamental truth is that he rejects fundamental truth. He writes in *The Audacity of Hope*, "implicit in the very idea of ordered liberty is the rejection of absolute truth."¹[1] The rejection of absolute truth? Does our President not know that our country is founded on absolute truth, on self-evident truths, the self-evident truth that all men are created equal, and that they were endowed by our Creator with certain inalienable rights? If the President is right, and there is no absolute truth, then there is no liberty; or, at least no fixed basis for liberty. Barack Obama's anti-constitutionalist attitude should come as little surprise then since he denies the morality of the Constitution, our governing charter. For the Constitution, after all, is the frame of silver to the Declaration's apple of gold, to use Lincoln's imagery. The Constitution adorns, embodies, and guards the principles of the Declaration. In fact, the Declaration foreshadows the Constitution's structure. The Constitution's design rests on three basic principles of power. First, power should be limited to preserve the liberty of man. As Reagan said, "Man is not free unless government is limited." That is why the powers of the federal government are limited and enumerated in the Constitution.

Second, power should be repetitive. Regular elections not only provide the consent of the governed but are also the chief mechanism to preserve those limits on government power. And third, power should be separated. Elections are the external means to control the government. The separation of power is the internal mechanism to keep government limited. You find all three ideas in the Declaration's bill of particulars against King George III, in which, the many indictments boil down to his violating the ideas of representation, separation of powers, and limited government. This essential unity between the Declaration and the Constitution mean you can't have one without the other. Or at least one can't survive without

¹[1] Obama, Barack. *The Audacity of Hope: Thoughts on Reclaiming the American Dream*. New York: Crown, 2006.

the other. And if you reject the moral premise of the Declaration, as does President Obama, then you naturally develop anti-constitutionalist attitudes. Again, let's consider some of his own words. A couple of years ago it was reported that President Obama was lamenting "it would be much easier to be the President of China." Well, no doubt. It is much easier not to deal with pesky elections, the people's representatives, an independent judiciary, or equal citizens with individual rights. Of course no sentiment could be further divorced from our first president, a man who had the opportunity to be King but instead retired to his farm. The President has oft-stated his promise (or threat) that if Congress won't act, he will. President Obama isn't talking about the conduct of war or foreign policy, although it might be nice if he paid more attention to those matters; rather, he is indicating his intent to violate the separation of powers by executive fiat, that which he cannot accomplish through the Congress. Maybe he really does want to be the President of China.

These words matter. And the President's words betray his anti-constitutionalist attitude. But actions matter, too. And the picture only gets worse when you take into account his actions. Consider the actions that are his alone, like appointments. Last January President Obama purported to make so-called recess appointments to the National Labor Relations Board and the Consumer Finance Protection Bureau even while the Senate remained in proforma session. Even while the Senate passed significant legislation at his urging while they were in that proforma session. Unfortunately, presidents of both parties over the decades have abused the recess appointment power but none took it so far. In fact, the practice of staying in proforma session to block recess appointments only dates back to the late years of George W. Bush's administration, and President Bush respected that limit. Not so with Barack Obama whose lawless appointments have been ruled unconstitutional by two federal courts of appeals. Similarly, take his refusal to defend the constitutionality of the Defense of Marriage Act. Now, in certain extraordinary cases it is appropriate for the executive branch not to defend a plainly unconstitutional law when there is no reasonable argument that can be made for it. Yet, not only can a reasonable argument be made to prevent DOMA, but it was defended in the courts by both the Clinton and the Bush administrations. For President Obama though, that was politically inexpedient despite his constitutional responsibility to take care that the laws be faithfully executed. One step removed from the President's personal actions are those of his regulatory agencies where we see the anti-constitutionalist spirit spread throughout the government by the people he appoints to run those agencies and implement his policies. Under Obamacare for example, the department of health and human services mandated that employers provide insurance coverage for abortifacients, sterilization, and contraceptives. After intense political pressure and many lawsuits the administration shifted and put the mandate on insurance companies rather than employers. But employers still subsidize that coverage, and the shift does nothing for self-insured organizations. That is why the Conference of Catholic Bishops still oppose the mandate. You don't have to be Catholic, or even pro-life, to see that this kind of gross violation of religious freedom of one imperils the religious freedom of us all. This kind of flagrant disregard for the Constitution is all too common throughout the bureaucracy. To cite just one more example, President Obama's equal employment opportunity commission sued a

Lutheran Church for employment discrimination after the church dismissed a minister for insubordination. The EEOC contended that the government should be able to second guess a church's decision of who will minister to the faithful. The Supreme Court unanimously rejected this theory calling it "extreme, remarkable, and untenable," but it is standard operating procedure for the Obama Administration.

Finally, let's consider the President's landmark laws starting with his namesake: Obamacare. Where to start? Well, one major element of that law, the mandatory state expansion of Medicaid was struck down by the Supreme Court which called it the kind of unconstitutional jargonizing of the states. Regrettably, and wrongly in my opinion, the court contorted itself to uphold the individual mandate to purchase insurance, but only did so as a tax which of course Barack Obama repeatedly insisted during the legislative debates that it wasn't. Obamacare also creates an unaccountable Medicare ration panel called the Independent Payment Advisory Board. Incredibly, the law purports to limit Congress's power to repeal or modify the IPAB to a single seven-month period in 2017, and only then with a three-fifths majority. If that window is missed, Obamacare purports to forbid future Congresses from ever altering IPAB's proposals. No Congress can limit the power of a future Congress. And these attempts to, in effect, amend the Constitution by statute are anti-constitutional to their very core. The only rival to Obamacare in that regard is the Dodd-Frank financial regulatory law which created the Consumer Finance Protection Bureau that I mentioned earlier. Dodd-Frank doesn't just empower the CFPB with unlimited authority to regulate any practice it deems abusive or even "unfair" without defining those terms. It also eliminates any checks and balances on that authority. It removes Congress's power of the purse by funding the CFPB through Federal Reserve fees and it allows the director of the CFPB to decide on his sole authority how much money he will take from the Federal Reserve to fund his own agency. It also severely restricts judicial review of CFPB decisions. It is hard to imagine a worse constitutional monstrosity.

Competing with it though is the newly created Financial Stability Oversight Council. This new interagency council has unlimited power to designate any financial institution as systemically important too big to fail based on criteria of its own making and giving those institutions a competitive advantage of an explicit government guarantee. Moreover, the designation is completely insulated from meaningful judicial review either by an institution so designated or its competitors. Not to worry though, when all this comes to a cropper, Dodd-Frank provides for something called "orderly liquidation authority," an ironically named government power if there ever was one because if it is exercised, the liquidation will be anything but orderly. Actually financial regulators have the authority to do much more than wind down a company, even a solvent company. They can merge it, sell it, transfer the assets and repudiate its contracts, and they can discriminate among its creditors. The law also mandates its process be constructed in secret and severely limits the targeted company the right of judicial review while mandating that the court review be completed in 24 hours. Even worse, the creditors of the company receive no notice and are explicitly prohibited from seeking judicial review, violating their rights of due process, and taking their property much like the creditors of GM and Chrysler in those bailouts.

President Obama's word, actions, agencies, laws, I could go on and on and on to demonstrate the proposition that he is an anti-constitutionalist. But to what end? He has run his last race and his influence is waning every day. He may stop us from passing good laws, but we can stop him from passing bad laws which, as Coolidge said, is just as important. Even after he departs though, this anti-constitutionalist spirit will remain. Think of how deeply it pervades the government. Just last month we learned, or maybe I should say we had our suspicions confirmed, that the IRS targets political opponents of the government for harassment and intimidation. What would be worse: if political appointees of this administration gave such direction to IRS employees or if career IRS employees simply share this attitude and didn't need any direction? It is hard to say. The EPA's regional administrator from my home state once said that his approach to regulation was like the Romans who would crucify innocent persons to pacify the people as a whole. How many regulators and bureaucrats throughout the government share this attitude? We know that many legislators share it, starting with Nancy Pelosi, who famously responded to a question about Obamacare's constitutionality by saying, "Are you serious?" Are *you* serious? Barack Obama may be the culmination of modern liberalism's anti-constitutionalist spirit, but he won't be the end of it. Not unless we work to end it. The federal government's regulatory apparatus will continue to violate the principles of the Declaration and the Constitution by granting unlimited authority to unaccountable officials with legislative, executive, and judicial powers.

Human beings being what we are can't help but lead to anti-constitutionalist attitudes and abuses. Remember Madison's admonition, "men are not angels?" We can change these arrangements in simple Madisonian ways. For instance, we can require up and down votes on major regulations in the Congress before they take effect, or mandatory sunsets on such regulations. We can rewrite regulatory laws to divest agencies of their vast and vague digressions, and power strip the Lois Lerner's of the government of their ability to do harm to their fellow citizens. We can reform civil service laws to hold the Lois Lerner's of the government accountable when they misbehave rather than putting them on paid leave. But more than anything to accomplish any of this what we need to do is elect constitutional conservatives who understand the founding principles of our country and to take their oaths with utter seriousness. We have more of those in Congress now than in recent memory, but still not enough. So if I could make one request, in conclusion, it would simply be this, send reinforcements. The battle for liberty continues as ever. It is not lost but we need your help. Thank you, God bless you, and God bless our country.
