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A Part-time Law Lecturer vs. the Constitution

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It's a lie often repeated that Obama was a Constitutional law professor at the University of Chicago law school. In fact, he was just a lecturer there for a short time who never much impressed his colleagues. Watching this administration in action one wonders what, if anything, he understands about the Constitution at all. His is an administration based on flouting it.

It's true that the judicial process moves slowly and such conduct can continue for a while until halted, but repeatedly the courts are catching up.

In fact, the Supreme Court has ruled unanimously against the administration 20 times. As Ted Cruz noted:

> President Obama has seen 20 unanimous defeats before the Supreme Court during the five and a half years of his presidency, a pace that outstrips former presidents George W. Bush and Bill Clinton, according to a review of his record since 2009 by Senator Ted Cruz (R., Texas). "President Obama's unanimous Supreme Court loss rate, for the five and half years of his presidency, is nearly double that of President Bush and is 25 percent greater than President Clinton," Cruz notes in a survey of how Obama's lawyers performed before the high court. Bush lost 15 cases unanimously, while Clinton lost 23 -- but those defeats came over an eight-year period. When Cruz released his first report on the topic in April of 2013, he pointed out that Obama had lost nine cases unanimously since January of 2012. This latest installment takes account of the four most recent unanimous rulings against Obama, and the seven handed down by the court before 2012. The defeats include cases such: as *Judalang v. Holder*, when the court faulted the Obama team for making an "arbitrary and capricious" attempt to rewrite the rules governing who is eligible for relief from deportation; Henderson ex rel. *Henderson v. Shinseki*, in which Obama's lawyers argued wrongly "that the Department of Veterans Affairs can wholly ignore a veteran's appeal of a VA regional office's benefits ruling when the appeal was not filed within the 120-day deadline"; and *Bond v. United States*, in which the "DOJ argued that an international treaty gave Congress the power to create federal criminal law for wholly local conduct."

The range of the administration's abuse of its powers is substantial.

Thus, by way of example, one court has held that funneling payments to insurers to cover co-pays by insured low-income people which funds were never authorized by Congress, could be the subject of a Congressional lawsuit challenging the disbursements.

> "Only Congress can appropriate funds for federal programs and so Congress faces a unique institutional injury when the executive branch decides to take that particular prerogative upon itself," according to a blog post from Ilya Shapiro, a legal scholar for the libertarian think tank Cato Institute and an outspoken Obamacare critic.

States have rights to set their own laws and are mounting a fight over the bathroom edict.

The Little Sisters of the Poor dug in their heels at the administration's commands respecting birth control insurance coverage for their employees and won in the Supreme Court:

Courts have ruled against the SEC for violating the appointments clause of the Constitution (Article II of the U.S. Constitution).

They ruled against Obama's "intrasession appointments" to the NLRB:

> The Supreme Court ruled unanimously Thursday that President Obama exceeded his constitutional authority in making high-level government appointments in 2012 when he declared the Senate to be in recess and unable to act on the nominations.
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> Obama made appointments to the National Labor Relations Board (NLRB) at a time when the Senate was holding pro forma sessions every three days precisely to thwart the president's ability to exercise the power.
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> "The Senate is in session when it says it is," Justice Stephen G. Breyer wrote for the court, stressing that if the Senate is able to conduct business, that is enough to keep the president from making recess appointments.

More extraordinary than the overt overreaching has been the perversion of the judicial process itself, and this week it came to a head in Texas where a federal district court judge caught the Justice Department lawyers lying to the court, not only a violation of their ethical responsibility, but a new low for DoJ lawyers who, when I first came here fifty years ago, were the models of probity, carefully supervised to see no one overstepped their obligations for truthful representations in court. One might -- and I do -- date the corruptionof the Department of Justice to their behavior in the case against Senator Ted Stevens, when the Court threw out his career-ending conviction and ordered an investigation into the prosecutors by his own appointed prosecutor, not trusting the department to do the job:

> During and after the trial, the judge reprimanded prosecutors several times for how they had handled evidence and witnesses. He chastised prosecutors for allowing a witness to leave town. He grew more agitated when he learned that prosecutors had introduced evidence they knew was inaccurate, and he scolded them for not turning over exculpatory material to the defense.
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> After the trial, an FBI agent came forward to complain about the conduct of prosecutors and another agent. And in February, Sullivan held three prosecutors in contempt for not

> complying with an order to produce documents connected to an investigation of the FBI agent's allegations. The judge said the most recent allegation linked to prosecutors' notes was "the most shocking and serious" so far.

Despite the investigation, the lawyers involved suffered no serious consequences of which I am familiar. To the contrary, they continued to handle high-profile cases for the department.

This week, one court went further. Faced with incontrovertible evidence that department prosecutors had deliberately lied to the court, affecting the plaintiff's right to injunctive relief (Eric Holder was the attorney general during this misconduct, not Attorney General Lynch) Judge Andrew Hanen struck back hard.

The latest case involved the president's grant of executive amnesty to President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Twenty-six states brought suit against the program and won an injunction, which was upheld by the Fifth Circuit upon the government's appeal.

The case awaits Supreme Court action.

The plaintiff states were eligible for temporary injunctive relief pending the initial hearing for a permanent injunction, but were foreclosed from doing so when the government lawyers lied and represented that the program would be halted until the case was resolved. In fact, more than 100,000 were allowed to take advantage of this deferred deportation program during the pendency of proceedings before Judge Hanen.

Lyle Denniston at Scotus Blog details the judge's reprimand and order.

> The misconduct in this case was intentional, serious and material. In fact, it is hard to imagine a more serious, more calculated plan of unethical conduct."
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> So as not to interfere with the Justices' review, he said, he had decided not to impose a remedy that otherwise might have been justified for "blatant misconduct" of "such magnitude" -- that is, an order to strike all of the government's legal filings in the case. Doing so apparently would have brought the case to an abrupt end, with a default ruling in favor of the twenty-six states who sued to challenge the Obama policy.
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> He found that those attorneys had repeatedly assured him and lawyers for the suing states that the Obama administration was not doing anything to put the new policy into effect. The judge said he and the states had relied upon those assurances in working out procedural steps in the case, including the timing of his order to block enforcement.
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> He said that he had found that those very attorneys were aware that government officials had already given the benefit of the new policy to more than 100,000 young people who were scheduled to be covered under the program if it were allowed to go into effect.
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> The judge noted that the Justice Department had apologized for having provided misinformation, but he went on to conclude that the attorneys' behavior could not be treated as merely a mistake or an inadvertence. The misconduct was done intentionally, he ruled.

In deciding upon remedies, the judge said he had taken off the table not only the option of striking of all of the government's legal filings, but also any assessment on the federal government of the states' fees for their attorneys and court costs. That remedy, he said, would only shift the burden onto the taxpayers and would leave the Justice Department "unscathed," even though it was "actually responsible for this mess." He added: "Clearly, there seems to be a lack of knowledge about or adherence to the duties of professional responsibility in the halls of the Justice Department."

In detail, here is what he imposed as an ethical remedy:

First, to make sure that any Justice Department attorney who "appears or seeks to appear" in any court in any of the twenty-states that have been harmed by the misconduct he found is aware of his or her ethical duties, each must attend a legal ethics course every year for the next five years.

Second, those courses in "ethical training" are to be at least three hours in length each year and must include the ethical requirements for candor to a court and truthfulness to "third parties" as spelled out in the code of each court where the attorneys would appear in those states.

Third, the training is to be provided by at least "one recognized ethics expert" not affiliated with the Justice Department.

Fourth, the attorneys must attend that training in person, and cannot do so online or through "self-study."

To carry out these requirements, Judge Hanen ordered Attorney General Loretta Lynch to name a compliance officer within her department, who must file an annual report with the judge listing the Washington-based attorneys who took the required training with details of their appearances and of the training they received. The first such report is due by the end of this year, and reports will continue to be due until the end of 2021, according to the order.

Going even further, the judge told Lynch to file within sixty days a "comprehensive plan to prevent this unethical conduct from ever occurring again." And, within sixty days, she must also inform the judge of steps she will take to make sure that the department's own internal Office of Professional Responsibility polices the conduct of attorneys and disciplines them for misconduct.

The judge added another sanction that appears to have the potential to withdraw any benefits to the young immigrants who received them between November 20, 2014, and March 3, 2015 -- the period during which he said such benefits were wrongly provided without disclosure at the time by the government attorneys. He gave the Justice Department until June 10 of this year to provide a full list of each person who benefited during that time span.

The judge conceded that he did not have the authority to disbar the lawyers involved, but he asserted that he did have the authority to revoke the temporary permission he had given them to appear in his court. He said he had done the latter in a separate order, which is still under seal.

The time for granting prosecutorial immunity from prosecution has long passed and it might not be a bad idea to begin by changing the rule as it applies to Department of Justice counsel.

One wonders how it is possible, with law firms cutting back and experienced, conscientious professionals out of work, that the department seems to be stuck with so many who seem unable to follow basic rules. On the other hand, looking at the conduct of so many departments in the executive, it's impossible to ignore that the rot began at the top.