

The PRESIDING OFFICER. Without objection, it is so ordered.

COMMENDING JERALD D. LINNELL
ON HIS SERVICE TO THE UNITED
STATES SENATE

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of S. Res. 584, which was submitted earlier today.

The PRESIDING OFFICER. The clerk will report the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 584) commending Jerald D. Linnell on his service to the United States Senate.

There being no objection, the Senate proceeded to consider the resolution.

Mr. REID. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and the motions to reconsider be laid upon the table with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 584) was agreed to.

The preamble was agreed to.

(The resolution, with its preamble, is printed in today's RECORD under "Submitted Resolutions.")

ORDERS FOR THURSDAY,
NOVEMBER 20, 2014

Mr. REID. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 9:30 a.m. on Thursday, November 20, 2014; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day; that following any leader remarks, the Senate be in a period of morning business until 2 p.m., with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. REID. For the information of Senators, there will be up to five roll-call votes at 2 p.m. on confirmation of the Pepper, Sannes, Arleo, Beetlestone, and Bolden district judicial nominations.

I would ask of my friend, the Senator from Iowa, how long he is going to speak.

Mr. GRASSLEY. I will speak for 20 to 25 minutes.

Mr. REID. For up to 30 minutes.

ORDER FOR ADJOURNMENT

Mr. REID. If there is no further business to come before the Senate, I ask unanimous consent that it adjourn under the previous order, following the remarks of Senator GRASSLEY.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Iowa.

EXECUTIVE ORDERS

Mr. GRASSLEY. Mr. President, in his State of the Union Address last January, President Obama announced what he called a year of action. Armed with pen and phone, he promised to take action where Congress wouldn't. At the time, I warned that these threats were a gathering danger to the separation of powers established in our Constitution.

The President is now threatening to implement a mass amnesty from our immigration laws by Executive fiat. He plans to act without the support of Congress or the American people. In fact, he has conveniently waited until after the recent elections to do so in order to avoid being punished at the ballot box. This Executive order will be the culmination of his self-proclaimed year of action.

The President may think of this Executive action as a political victory in a year filled with so many failures and defeats for him and his party, but history will surely view it as a serious blow to the systems of checks and balances established by the Framers. In reality, this was a year in which the President's abuse of Executive power came into clear focus.

Today I would like to review President Obama's pattern of unconstitutional Executive action this year. I would like to explain why the mass amnesty he has been threatening is merely the latest in a long list of abuses of his Executive authority. And I would like to offer a few thoughts about what the Senate can do about these kinds of abuses.

After the President's State of the Union Address, I wrote to the Attorney General on January 31. I wrote that I was "gravely concerned that the system of checks and balances enshrined in the Constitution [was] threatened by the President's determination to take unilateral action." In short, I made clear that "while the President has a pen and phone, we have a Constitution that places limits on his use of them to issue Executive Orders." Indeed, my concern about the President's threat to take action on his own was "heightened by the administration's record of failing to discharge his constitutional duties to 'take Care that the Laws be faithfully executed.'"

By then, President Obama had already failed to execute the laws in many areas. For example, the administration was rewriting ObamaCare's deadlines at will and was making little effort to enforce the Controlled Substances Act in some States. These abuses rang like alarm bells—alarm bells in the night—even before the so-called year of action began.

Indeed, in December of 2013 a liberal law professor testified before the House Judiciary Committee that "despite the

fact that I once voted for President Obama, personal admiration is no substitute for the constitutional principles at stake in this controversy."

The professor went on:

When a President claims the inherent power of both legislation and enforcement, he becomes a virtual government unto himself. He is not simply posing a danger to the constitutional system; he becomes the very danger that the Constitution was designed to avoid.

Against this backdrop, I asked the President to defend the legal basis for the actions he was threatening. In my letter I asked the Attorney General to direct the Justice Department's Office of Legal Counsel to publicly disclose its opinions concerning the lawfulness of the Executive orders proposed by the President. That is what the Office of Legal Counsel does—it reviews all Executive orders to determine whether they are constitutional and lawful. Many of its opinions have been made public in the past. I hoped this transparency would allow Congress and then the American people to better understand the alleged legal basis for these orders and challenge them, if necessary.

Providing Congress and the American people with the legal opinions supporting his unilateral actions seemed like a reasonable request of a President who had claimed to support "an unprecedented level of openness" and transparency in government. But February passed, March as well, April came and went, winter turned into spring, and summer was around the corner. Finally, on May 20 I received a response from the Justice Department. In summary, the Department told me no, they wouldn't disclose these opinions to the public. However, the Department assured me that if I had questions about particular Office of Legal Counsel advice documents, it would assist me in understanding them—in their words—to the fullest extent possible. In short, the administration stonewalled legitimate questions from Congress, as it often does, and stymied this Congress from carrying out its constitutional responsibility of oversight.

As it turned out, within a few weeks I and many others in Congress had very serious questions about a specific Executive action and its effect on our national security, and we had questions about the advice provided by the Office of Legal Counsel. The American people had the same questions as well.

In early June the President decided to release five Taliban detainees held at Guantanamo Bay in exchange for SGT Bowe Bergdahl, a U.S. soldier who had been captured in 2009. The detainees were reportedly senior-level Taliban commanders. Some had direct links to Al Qaeda, and all were reportedly determined to be a high risk to the United States and were recommended for continued detention. Nonetheless, President Obama decided to free these prisoners from Guantanamo.

There was one problem, however: The National Defense Authorization Act required the administration to notify Congress 30 days before any detainee could be transferred from Guantanamo. Under this statute, the notification was required to include lots of detailed information about the basis for the transfer—why it was in our national security interests and any actions taken to prevent detainees from returning to the battlefield. In fact, none of this information was provided to the Congress before these detainees were released, as the very law requires. And perhaps not coincidentally, this was information that Members of Congress and the American people were very interested in learning. There were and still are serious questions about whether releasing these detainees from Guantanamo was a good idea.

So the President decided to act alone, without regard to Congress's role in our system of checks and balances and directly contrary to a law the President had recently signed.

Then the administration began changing its story about why it broke the law. First, they said it was Sergeant Bergdahl's health that required his release—his release without notifying Congress. Then they said it was operational security surrounding the release itself. Then they said it was the nature of the negotiations with the Taliban.

But there was one point administration officials were clear about—the Department of Justice had provided legal advice that justified transferring these detainees from Guantanamo without informing Congress as the law required. This was difficult to square with the limited powers of the Executive established in the Constitution.

In *Youngstown Sheet & Tube Company v. Sawyer*, otherwise known as the steel seizure case, the Supreme Court set a clear precedent establishing what a President can and cannot do. In that case the Supreme Court held that President Truman's Executive order seizing steel mills to avoid a strike during the Korean war was unconstitutional. In doing so, the Court emphasized that the Executive isn't above the law as written by Congress.

The Founders of this Nation entrusted the lawmaking powers to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

Moreover, Justice Jackson emphasized that point here:

When the President takes measures incompatible with the expressed or implied will of Congress, the authority of the President is at its lowest [ebb].

Just as the Supreme Court held that President Truman had unlawfully seized the steel mills, President Obama's release of the Taliban detainees without a required notification effectively rewrote the law contrary to the will of Congress.

In short, there didn't seem to be a lawful basis for what the President had done. In fact, it seemed plainly illegal.

So I took the Department up on its offer. In a letter to the Attorney General dated June 5, I requested that he direct the Office of Legal Counsel to make public "its opinions, analyses, and conclusions concerning the lawfulness" of the transfer without compliance with the statute that required congressional notification. I went on to say:

It is obviously too late for Congress to express its concerns about these transfers in time to prevent them. However, this measure of transparency will at least allow the American people to better understand the Administration's purported basis for ignoring the legal requirement that Congress be notified in advance, and shed additional light on this controversial decision.

It is now 6 months later, and the Attorney General hasn't given me the courtesy of a response to my letter. We still don't know how the Department justified the release of these detainees. We don't know the legal basis or the underlying facts that were relied upon. That should not be acceptable to anyone, but sadly it has become commonplace with the Obama administration.

It turns out that to this Justice Department, assisting me "to the fullest extent possible" is actually indistinguishable from ignoring my request completely.

Shortly thereafter, in August, the Government Accountability Office concluded that the administration acted illegally when it released these senior-level Taliban commanders from Guantanamo without notifying Congress, as the law recently signed by the President demanded.

Let's be clear. That wasn't a Member of Congress reaching that conclusion. It wasn't a political operative or a talking head on television. It was an independent, nonpartisan government agency. So the GAO effectively said: President Obama, you broke the law.

So perhaps it makes sense that the Department of Justice couldn't respond to my letter. Maybe even the very smart lawyers in the Office of Legal Counsel couldn't come up with a justification for what happened that could pass the laugh test.

But that wasn't the only rebuke the President suffered this year after trampling on Congress's role under the Constitution. The Supreme Court was forced to rein in President Obama as well in a dispute over his powers to make recess appointments.

Article II, section 2 of the Constitution provides for only two ways in which Presidents may appoint certain officers. First, it provides that the President nominates and, with the advice and consent of the Senate, appoints various officers. Second, it permits the President to make temporary appointments when a vacancy in one of those offices happens when the Senate is in recess.

Back in 2012, President Obama made four appointments to various executive

branch positions. They were purportedly based on the recess appointments clause. But he took this action even though they weren't made, in the words of the Constitution, "during the recess of the Senate" because the Senate was still in session.

No President in history had ever tried to make recess appointments when the Senate said it was in session, but this President once again decided to go around Congress.

In June of this year, the Supreme Court struck down these appointments as unconstitutional. It wasn't a split decision. It wasn't 5 to 4 along party lines. It was unanimous. Every Justice agreed—those appointed by both Republicans and Democrats. That included two Justices appointed by President Obama himself. It was the Supreme Court's biggest rebuke to any President since 1974, when it ordered President Nixon to produce the Watergate tapes.

This was a case where the Office of Legal Counsel's opinion didn't pass the laugh test again. So the Supreme Court unanimously said: President Obama, you broke the law.

So this purported year of action has brought into focus a President with little respect for the roles of the coequal branches of government, unwilling to explain the legal basis for his actions, and rebuked by the courts and independent agencies for overstepping his bounds—quite out of character with somebody who proudly says he is a professor of constitutional law.

Now, again, the President is threatening to act unilaterally on immigration. If we thought this year's events so far would have given the President pause about his "go it alone" approach, apparently we would be wrong.

Of course one of the reasons I oppose mass amnesty is because it is bad policy. Immigration reform should begin with securing our borders. Border security is among the most basic responsibilities of any country and somewhat the definition of what sovereignty is all about.

But this administration hasn't done that. To the contrary, according to recent news reports it has freed alleged kidnappers, rapists, and murderers into communities in the United States rather than deport them. It has sacrificed public safety in order to provide relief for people who are here illegally.

But the President's unilateral action on immigration isn't just bad policy, it is contrary to the rule of law. It is unconstitutional for the executive branch to nullify or even unilaterally rewrite the immigration laws that the people of the United States through their elected representatives have chosen to enact.

We have been hearing about the possibility of an Executive action on immigration for many months. It will apparently involve steps to allow millions of people illegally present in the United States to live, work, and collect benefits here.

The Democratic leadership wants to compare what is being threatened here to the Executive actions of past Presidents on immigration, but the actions of Presidents Reagan and Bush were merely tying up loose ends, carrying out a law Congress at that time had just passed. They established policies that were later put in the statute in 1990. President Obama is threatening to act directly against the wishes of Congress and on a far greater scope and scale. That is why I and 21 other Senators wrote to the President on April 24 to express our grave concerns about the lawfulness of what was reportedly under consideration, and apparently our warnings were not heeded.

Now, if the President acts after repeated calls by congressional leaders not to do so, it will severely damage his relationship with the new Congress elected by the American people.

But the core issue is this: Under our Constitution, the Congress makes the law. Under article II, section 3, the President is charged with taking care that these laws are faithfully executed. But if President Obama effectively legalizes people who are here unlawfully, no one will be able to reasonably argue that he is faithfully executing our laws. Once again, that doesn't pass the laugh test.

So, like the Government Accountability Office and the Supreme Court earlier this year, I say: President Obama, if you take this Executive action on immigration, you will be breaking the law, and even more than that, you will be violating the Constitution.

And the President knows this. Just a few years ago he conceded:

This notion that somehow I can just change the laws unilaterally is just not true. The fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting . . . comprehensive [immigration] legislation passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true. We live in a democracy. We have to pass bills through the legislature, and then I can sign it.

That is the end of a quote of the President that speaks to exactly what the responsibilities of a President happen to be and how they should be viewed and how he ought to be acting now. The President was right then, even if he doesn't want to live by his own words now. There are no shortcuts to following the Constitution.

Now what we are likely to hear from the administration is that this Executive action is simply a lawful exercise of enforcement discretion. It is not. It is simply not an exercise of enforcement discretion. Lawful enforcement discretion is exercised on an individual case-by-case basis. So whether enforcement action takes place is informed by a careful evaluation of the facts in a particular case as each case presents itself. Lawful enforcement discretion isn't selecting entire categories of individuals and telling them that going

forward the law won't be applied to them. That is what President Obama is threatening to do.

This shouldn't only concern constitutional scholars and lawyers. It is no exaggeration to say that the freedom of the American people is at stake. That is what the Framers believed. Listen to Federalist Paper 51. James Madison wrote that "separate and distinct exercise of different powers of government" is "essential to the preservation of liberty."

Moreover, in the Steel Seizure case I quoted, Justice Frankfurter warned that "the accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

President Obama's actions this year wreak of unchecked disregard for the restrictions of his authority. In his remarks after the recent elections, President Obama repeatedly emphasized that his Executive actions would be lawful, but, as this year has shown, he has repeatedly acted illegally even though the Department of Justice evidently had assured him otherwise. The Office of Legal Counsel doesn't appear to be providing independent legal advice to the President; it is simply rubberstamping whatever he wants to do. So it is cold comfort for the President to assure us that anything he will do is legal.

Let's go back to the bedrock principles of our country's Founders. The Framers of the Constitution knew an abusive Executive when they saw one. They sent the Declaration of Independence to a King who had ignored and abused their legislatures and laws. The Framers would also have recognized the specific kinds of Executive abuses as reflected in President Obama's mass amnesty. They would have referred to them as the royal suspending and dispensing powers. But George III didn't even try to abuse colonists with these powers. Why? Because Parliament had denied them to the King 100 years before the American Revolution.

You see, the Kings of England had traditionally asserted the power to suspend the operation of certain laws or to grant dispensations prospectively excusing particular individuals from compliance. But as deference to the King's authorities eroded, these powers became more controversial.

As part of the Glorious Revolution in the late 17th century, these royal powers were terminated. The first two articles in the English Bill of Rights of 1689 made it illegal for the King to exercise the "pretended power of suspending the laws and dispensing with the laws." This happened a century before our own Constitutional Convention. So when the Framers met in Philadelphia, these were abuses long since remedied in England. Instead, the Framers charged the President with the constitutional duty to take care that the laws are faithfully executed.

With his talk now of mass amnesty, President Obama is threatening to abandon his constitutional duty. He is threatening to reassert royal powers that even the Framers thought were long abolished. He is threatening to take our country backward a century before the American Revolution.

When talking about immigration policy, the President has acknowledged that he isn't a King, so common sense tells me he shouldn't act like one.

During the President's remaining 2 years in office, how should the Senate respond to his illegal Executive action on immigration or any other Executive abuses? In some cases we can use the power of the purse to defund them. In other cases we may use our congressional oversight tools to expose them. In still other cases, we may be able to pass legislation to do away with them completely. These tools have been available to the Senate since President Obama was elected. It should come as no surprise that the Democrats in the majority didn't use them to confront his abuses of power. So in the 114th Congress, we Republicans intend to use that.

The best course of action for the President is this: Learn from President Clinton. He lost control of the Congress 2 years after he became President. He decided to show leadership and work with the Congress of the United States. Great things happened with a Republican Congress and a Democratic President. We had welfare reform. We had 40 percent of the people leave the welfare rolls. We had tax reform. We had budgets that were balanced and paid down \$568 billion on the national debt. There are things we can do together very early.

The President wants patent trolling and corporate tax reform. There are a lot of things we can work on together.

I have been led to believe that the President is very much a free trade person, and I believe he is. We could pass trade promotion authority. We could work together with the President in the early months of next year and we could gain credibility. Under his leadership, we could reform an immigration system that needs reform. But, no, I think the President is going to take another route and retard the co-operation that is potentially available to him just as it was when President Clinton was President.

I hope the President will rethink what he wants to do and show the same leadership that President Clinton did so we can get off to a very good start next year.

I yield the floor.

ADJOURNMENT UNTIL 9:30 A.M.
TOMORROW

The PRESIDING OFFICER (Mr. HEINRICH). Under the previous order, the Senate stands adjourned until 9:30 a.m. tomorrow.

Thereupon, the Senate, at 7:11 p.m., adjourned until Thursday, November 20, 2014, at 9:30 a.m.