

Attorney General Eric Holder can't explain constitutional basis for Obama's executive orders

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Attorney General Eric Holder couldn't explain the constitutional basis for executive orders such as President Obama's delay of the employer mandate because he hasn't read the legal analysis -- or at least, hasn't seen it in a long time.

"I'll be honest with you, I have not seen -- I don't remember looking at or having seen the analysis in some time, so I'm not sure where along the spectrum that would come," Holder replied when Sen. Mike Lee, R-Utah, asked him to explain the nature of Obama's constitutional power to delay the mandate.

Lee had based his question on a standard legal test, first described by Supreme Court Justice Robert Jackson, who said the president's authority to issue executive orders is strongest when he does so with the

backing of Congress (category one), more dubious when he issues an order pertaining to a topic on which Congress has not passed a law (category two), and weakest when the executive order is "incompatible with a congressional command" (category three), to use Lee's paraphrase.

Holder assured Lee that Obama's team accounts for Jackson's three-part analysis, but said he couldn't use that test to explain in any detail what kind of authority the president wielded when he delayed the employer mandate.

"I've not had a chance to look at, you know, for some time, exactly what the analysis was there, so I'm not sure that I would be able to put it in what category," Holder told Lee. He believes that Obama "is probably at the height of his constitutional power" in issuing an executive order to raise the minimum wage for workers who do business with the federal government, though, and concluded that the same is true for the employer mandate delay.

"I would think that given that we're talking about a statute passed by Congress that delegates or devolves to the executive branch certain authorities, I would think that you're probably in category one there as well," Holder said of the delayed employer mandate, which the text of Obamacare says should have taken effect Jan. 1, 2014. "But, again, I have not looked at the analysis in some time."

When Holder suggested that Obama had made less use of unilateral executive authority than past presidents, Lee disagreed.

"When you look at the quality, not just the quantity but the quality, the nature of the executive orders that he has issued, he has usurped an extraordinary amount of authority within the executive branch," Lee countered. "This is notprecedented, and I point to the delay — the unilateral delay, lawless delay, in my opinion — of the employer mandate as an example of this. And so, at a minimum, I think he owes us an explanation as to what his legal analysis was."

A little while before Lee questioned Holder, Rep. Ron DeSantis, R-Fla., introduced a bill that would require the executive branch to explain to Congress the reasoning behind every decision not to enforce a law.

"President Obama has not only failed to uphold several of our nation's laws, he has vowed to continue to do so in order to enact his unpopular agenda," DeSantis said in a the press release. "The president assured the public that his administration would be the most transparent in history, and while the president has fallen woefully short on this promise, my bill will be a step in the right direction. The American people deserve to know exactly which laws the Obama administration is refusing to enforce and why."

The bill is called the Faithful Execution of the Law Act, an allusion to Article II, Section 3 of the Constitution, which obligates the president to "take Care that the Laws be faithfully executed."

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