Written Statement
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"Gridlock and Executive Power"

Introduction

Chairman Goodlatte, Ranking Member Conyers, and members of the Task Force on Executive Overreach, my name is Josh Blackman, and I am a constitutional law professor at the South Texas College of Law in Houston. I am honored to have the opportunity to testify about executive overreach and the Constitution, an area I have studied very carefully. First, with respect to the Affordable Care Act, I am the author of *Unraveled: Obamacare, Executive Power, and Religious Liberty*, which will be published by Cambridge University Press.[1] I have also filed amicus briefs before the Supreme Court in *King v. Burwell* and *Little Sisters of the Poor v. Burwell* on behalf of the Cato Institute.[2] Second, I have published several articles on the constitutionality of DAPA,[3] and have filed amicus briefs in *Texas v. United States*, also on behalf of Cato.[4] I have included copies of each in my prepared testimony.

In my brief time, I will make three points concerning how the President has seized upon congressional gridlock to aggrandize the executive's power. First, after Congress rejected the President's immigration agenda, he took unilateral executive action to grant lawful presence to millions of aliens, failing to take care that the laws are faithfully executed. Second, even where bipartisan consensus emerged to minimize the harmful effects of the Affordable Care Act, the

[1] *See also Unprecedented: The Constitutional Challenge to Obamacare* (Public Affairs 2013).
[2] Brief for the Cato Institute and Independent Women's Forum, Zubik and Little Sisters of the Poor et all v. Burwell, On Writs of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth and District of Columbia Circuits (Jan. 11, 2106); Brief for the Cato Institute as Amicus Curiae in Support of Petitioners, Little Sisters of the Poor v. Burwell, On Petition for a writ of certiorari to the U.S. Court of Appeals for the Tenth Circuit (Aug. 24, 2015); Brief for the Cato Institute and Prof. Josh Blackman as Amici Curiae Supporting the Petitioners in King v. Burwell, et al, before the United States Supreme Court (14-114) (12/29/14).
[3] *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown Law Journal Online 96 (2015); *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 Texas Review of Law & Politics 215 (2015); Immigration Inside The Law, 55 Washburn Law Journal 31 (2016).
[4] Brief for the Cato Institute and Law Professors as Amici Curiae Supporting Plaintiffs in Texas v. United States, before the Southern District of Texas (1:14-cv-245) (1/7/15); Brief for the Cato Institute and Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellee in Texas v. United States before the Fifth Circuit Court of Appeals (May 11, 2015).

President has unilaterally modified, delayed, and suspended Obamacare's mandates. Finally, I will sound an alarm—executive law-making poses an encroaching threat to the separation of powers and the rule of law, that Congress, not just the courts, must take steps to halt.

I. The President Has Unilaterally Modified, Delayed, and Suspended the Affordable Care Act's Mandates

In what has become a troubling pattern of abuse, the executive branch has modified, delayed, and suspended the Affordable Care Act's employer and individual mandates. What makes these alterations particularly egregious is that bipartisan support existed to amend the ACA to ameliorate the harmful effects of these mandates. However, the President rejected the legislative process. Through a series of memoranda, regulations, *and even blog posts*, executive officials have disregarded statutory text, ignored legislative history, and remade the law on their own terms.

The Affordable Care Act's employer mandates requires businesses with more than 50 employees to provide their workers with health insurance, or else pay a penalty. Congress scheduled the mandate to go into effect on January 1, 2014. Throughout 2012 and 2013, businesses lobbied the White House, warning that full-time employment would be cut if the mandate went into effect. He listened. On July 2, Mark Manzur, the assistant secretary for tax policy, took to social media to update the ACA's status. In a blog post titled *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, the Obama administration nonchalantly suspended the employer mandate till 2015.[5] What makes this unilateral delay all the more remarkable is on July 17, two weeks after the Treasury Department shared its new posting, the House of Representatives passed the "Authority for Mandate Delay Act."[6] The two-page bill would have delayed the implementation of the employer mandate until 2015.[7]

That is *precisely* what the blog post accomplished, except it had the backing of the legislative branch. It was enacted on a 264-161 vote, with 35 Democrats voting yea. In response to this bill, which would have unequivocally given him the authority to delay the mandate, the President issued a veto threat. The White House said it was "unnecessary."[8] Seven months after the initial blog post, the Treasury Department postponed the full implementation of the employer mandate until 2016.[9]

A similar pattern played out with respect to the ACA's individual mandate, which requires most Americans to carry health insurance that provides "minimum essential coverage." Failure to do so after January 1, 2014, results in the payment of a penalty, or if you ask the Supreme Court, a "tax." In June 2010, the Obama administration forecasted that "50 to 75 percent of the 14 million consumers who buy their insurance individually" would have their

[5] Treasury Notes (July 2, 2013), http://goo.gl/WQKJ7C.
[6] http://clerk.house.gov/evs/2013/roll361.xml
[7] https://www.congress.gov/bill/113th-congress/house-bill/2667
[8] http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf
[9] Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12; 2014).

insurance policies cancelled.[10] Yet, regulations were issued to make it even harder for some plans to maintain grandfather status.[11]

In 2013, as millions of Americans received cancellation notices, a bipartisan consensus emerged that the individual mandate had to be delayed, and that people could keep the plans they liked. In July, the House of Representatives passed the *Fairness for American Families Act*, which would have delayed the individual mandate for a year.[12] President Obama threatened to veto it, claiming it would "would raise health insurance premiums and increase the number of uninsured Americans." In October, Sen. Mary Landrieu (D-LA) introduced *The Keeping the Affordable Care Act Promise Act*.[13] The bill—whose title was a direct rebuke to the President's broken promise—would have grandfathered all active plans that were valid on December 31, 2013. On November 15, the House of Representatives passed the *Keep Your Health Plan Act of 2013* on a bipartisan vote, 261-157.[14] The one-page bill—similar to Sen. Landrieu's proposal—would have allowed any plan that was valid in 2013 to be grandfathered into 2014.[15] Fearing that the House bill could pass the Senate, which already had backing for Sen. Landrieu's bill, the President issued a veto threat to the House bill.[16] Obama claimed that it would "allow[] insurers to continue to sell" inadequate plans, and would "sabotage the health care law."[17]

On November 14—one hour before the House of Representatives voted on the *Keep Your Health Plan Act*—the President announced what would become known as the *administrative fix*.[18] HHS would "extend" the ACA's "grandfather clause" to "people whose plans have changed since the law took effect." The decree permitted "insurers [to] extend current plans that would otherwise be canceled into 2014, and [allowed] Americans whose plans have been cancelled [to] choose to re-enroll in the same kind of plan." Ironically, this executive action mirrored the *Keep Your Health Plan Act*—the same bill that Obama threatened to veto earlier that day because it would "sabotage" the ACA. Now, Obama was unilaterally implementing virtually the same reform, without the benefit of congressional support.

II. The President Has Disregarded Congress's Rejection of His Immigration Bills and Unilaterally Enacted His Own Preferences Through Executive Action

Much like with the Affordable Care Act, for immigration the President has transformed congressional defeat into executive action. The DREAM Act would have provided a form of permanent residency for certain immigrants who entered the United States as minors. Though the

[10] Obama Admin. Knew Millions Could Not Keep Their Health Insurance, NBC News (Oct. 28, 2013), http://goo.gl/daZAJY. Indeed,
[11] See 45 C.F.R. § 147.140(g) (2010).
[12] https://www.govtrack.us/congress/bills/113/hr2668#
[13] http://thomas.loc.gov/cgi-bin/query/z?c113:S.1642:
[14] https://www.govtrack.us/congress/votes/113-2013/h587
[15] H.R. 3350, 113th Cong. (2013).
[16] Justin Sink, *White House Threatens Veto of Upton Bill*, The Hill (Nov. 14, 2013), http://goo.gl/wbxTmb.
[17] Statement of Administration Policy (Nov. 14, 2013), http://goo.gl/NA0dz7.
[18] Statement by the President on the Affordable Care Act (Nov. 14, 2013), http://goo.gl/6c3utS.

bill passed the House of Representatives, it was defeated in the Senate.[19] Shortly, after the bill was defeated, the President took matters into his own hand. As part of his "We Can't Wait" campaign,[20] the President announced the Deferred Action program.[21] DACA ("Deferred Action for Childhood Arrivals"), as it came to be known, in effect, sough to accomplish several of the key the statutory objectives of the DREAM Act——a law Congress expressly declined to enact—without the benefit of a statute.

Two years later, this pattern would repeat itself. On June 30, 2014, Speaker John Boehner announced that the House would not bring to a vote the comprehensive immigration bill that had passed the Senate a year earlier.[22] Within hours of learning that the bill was dead, the President announced that he would act alone. The President explained that "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as I can on my own, without Congress."[23]

That declaration commenced an eight-month process where the White House urged its legal team to use its "legal authorities to the fullest extent."[24] By one account, the President reviewed "more than [60] iterations" of the proposed executive action, expressing his disappointment because they "did not go far enough."[25] Finally, on November 20, 2014—two weeks *after* the mid-term elections—he revealed DAPA. Like the mythical phoenix, DAPA arose from the ashes of congressional defeat. Like with DACA before it, DAPA accomplished several of the key statutory objectives of the comprehensive immigration reform bill that was defeated. The President has not acted as a faithful executor of the the laws.

III. Executive Lawmaking Irreparably Weakens Separation of Powers and Rule of Law

Executive lawmaking—which has alas become commonplace—poses a severe threat to the separation-of-powers principles that undergird the Constitution and ultimately the rule of law itself. The pattern has unfortunately become all too clear: (1) Congress passes a statute, (2) the statute is inconsistent with the president's evolving policy preferences, so (3) the administration

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[19] Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration ("Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it.").

[20] Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR (Jun. 15, 2012, 3:52 PM), http://www.npr.org/blogs/itsallpolitics/2012/06/15/155106744/with-dream-order-obama-did-what-presidents-do-act-without-congress ("And like the other actions the president has increasingly taken as part of his "We Can't Wait" initiative, the decision announced Friday was characterized by Obama's political opponents as an abuse of power and violation of congressional prerogatives.").

[21] Preston & Cushman, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, Jun. 16, 2012, p. A1.

[22] Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL, June 30, 2014

[23] Remarks on Immigration (June 30, 2014), Available at www.washingtonpost.com/politics/transcript-president-obamas-remarks-on-immigration/2014/06/30/b3546b4e-0085-11e4-b8ff-89afd3fad6bd_story.html.

[24] Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan,* N.Y. Times, Nov. 28, 2014, Available at www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html.

[25] Carrie Budoff Brown, *How Obama Got Here,* Politico, Nov. 20, 2014, available at www.politico.com/story/2014/11/how-obama-got-here-113077.html.

modifies or suspends enforcement of the law to achieve a result inconsistent with what Congress designed.

President Obama has opined that "in a normal political environment," Congress could have easily passed a "technical change" to the ACA that did not "go to the essence of the law."[26] But, the president parried, "we are not in a normal atmosphere around here when it comes to 'Obamacare.' We did have the executive authority to do so, and we did so."[27] But it is entirely beside the point that a gridlocked Congress refuses to enact the laws the executive desires. Gridlock does not license the president to transcend his Article II powers and subjugate congressional authority. The separation of powers remain just as strong whether the relationship between Congress and president is symbiotic or antagonistic.

In the words of James Madison, the only way to keep the separation of powers in place is for "ambition . . . to counteract ambition."[28] Although the Courts play an essential role to serve as the "bulwarks of a limited Constitution,"[29] our Republic cannot leave the all-important task of safeguarding freedom to the judiciary. To eliminate the dangers of non-enforcement, the Congress must counteract the President's ambition.[30] The failure to do so will continue the one-way ratchet towards executive supremacy, and a dilution of the powers of the Congress, and the sovereignty of the people. The rule of law, and the Constitution itself, are destined to fail if the separation of powers turn into mere "parchment barriers"[31] that can be disregarded when any President deems the law "broken."

Thank you, and I welcome your questions.

[26] Remarks by the President in a Press Conference (Aug. 9, 2013), http://goo.gl/2sGYTa.
[27] *Id.*
[28] Federalist No. 51 (J. Madison).
[29] Federalist No. 78 (A. Hamilton).
[30] Josh Blackman, "Obama's overreach? Look in the mirror, Congress," Los Angeles Times, November 22, 2014, http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html.
[31] Federalist No. 48 (J. Madison).