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Testimony Submitted to

Task Force on Executive Overreach

Hearing on “Executive Overreach in Domestic Affairs Part II –

IRS Abuse, Welfare Reform, and Other Issues”

My recently published book, *Lawless: The Obama Administration’s Unprecedented Assault on the Constitution and the Rule of Law*, provides many examples of the current administration’s lawlessness, far too many to be adequately discussed at this hearing. Today, I will focus on three ways that the Obama administration has not only violated the law, but has done so in ways that circumvent constitutional checks and balances by making it very difficult if not impossible for the judiciary to review the administration’s actions. These actions set very dangerous precedents by leaving the executive branch as the sole judge of the legality of its own actions, contrary to the Constitution’s underlying doctrine of the separation of powers.

I. Regulations Disguised as “Guidance:” The Case of OCR’s Dear Colleague Letter

The Administrative Procedure Act (APA) requires that federal agencies that wish to issue formal, binding regulations based on the agencies’ interpretation of operative statutes go through a formal notice and comment process. Once that process is complete, a regulation is published in the Federal Register and becomes binding, and can thereafter be reviewed by federal courts. The

¹ George Mason University Foundation Professor, George Mason University School of Law. This testimony is based in on material published in David E. Bernstein, *Lawless: The Obama Administration’s Unprecedented Assault on the Constitution and the Rule of Law* (2015), and an article forthcoming in the *Florida International Law Review*.

APA exempts from this process what has come to be known as “guidance,” but which the APA calls “interpretative rules or general statements of policy.”²

Issuance of guidance can have benign purposes: Guidance can “help to keep the public informed about what agency staff are thinking and they are a method for administrative bureau chiefs to control their subordinates’ behavior.”³ But guidance can also be used to in effect impose controversial regulations that agencies prefer not go through the ordinary rulemaking process because the agencies know that the rules they wish to promulgate either have a dubious, at best, legal basis, or because they understand that an attempt at formal rulemaking would draw sufficient political opposition to undermine the effort. Regardless, agency pronouncements that have “the force and effect of law” cannot be deemed to be “guidance.”⁴

The Obama administration has provided us with a perfect example of the use of guidance to evade and subvert the regulatory process. In April 2011, the U.S. Department of Education’s Office of Civil Rights (OCR) sent a “Dear Colleague” letter to institutions of higher education around the country.⁵ The letter demanded that schools change their procedures for investigating sexual assault complaints to comply with detailed and specific OCR dictates.

Despite consistent prescriptive language the Dear Colleague letter describing what schools “should” and “must” do, the OCR disclaimed the notion that it was issuing binding regulations.”⁶ But the letter in fact invented new legal requirements for sexual

² APA, 5 U.S.C. § 553(b)(A).

³ John D. Graham & James. W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 Harv. J. L. & Pub. Pol’y Federalist 31, 38-39 (2015).

⁴ *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199. 1204 (2015).

⁵ U.S. Dep’t of Education Office for Civil Rights, *Dear Colleague Letter, Sexual Violence* (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁶ *Id.*

assault investigations, without going through the notice and comment process, and without citing any existing legal authority justifying the imposition of such requirements.

In the letter and in a followup 2014 “questions and answers” document,⁷ OCR required colleges to lower the level of proof needed to find students accused of sexual misconduct guilty. Most universities had long used a “clear and convincing” evidentiary standard for student disciplinary hearings.⁸ OCR announced that universities would be liable for violating Title IX unless they shifted to a more liberal “preponderance” of evidence standard.

OCR also in effect barred schools from providing accused students with a fair disciplinary process.⁹ Among other things, OCR “strongly discourages” schools from allowing the accused student or his representative to question his accuser, lest it traumatize the accuser. The result of all this has been what one attorney describes as “a shocking lack of ‘process,’ to say nothing of due process, in the way some universities are handling sexual assault complaints.”¹⁰

⁷ Questions and Answers on Title IX and Sexual Violence (April 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁸ James M. Picozzi, Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 Yale L.J. 2132, 2159 n.117 (1987).

⁹ United States Department of Education, Office for Civil Rights, Dear Colleague Letter: Sexual Violence: Background, Summary, and Fast Facts (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.html>; see also Questions and Answers on Title IX and Sexual Violence (April 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁰ Charles M. Sevilla, Campus Sexual Assault Allegations, Adjudications, and Title IX, , The Champion, Nov. 2015, at 16; see also Elizabeth Bartholet et al., Rethink Harvard's Sexual Harassment Policy, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0.

OCR claimed to get authority to impose its guidelines from Title IX of the Education Amendments of 1972, which bans sex discrimination in education. OCR concluded that if Title IX requires universities to combat sexual harassment because it interferes with women's educational opportunities, universities must also punish sexual assault, for the same reason.¹¹ That's fine as far as it goes, but it fails to explain why Title IX requires the specific impositions of the OCR letter. No cases suggest that an investigation of an allegation of sexual assault on campus must adhere to anything like the guidelines OCR is imposing on colleges.¹²

Even if Title IX does give OCR the power to dictate campus disciplinary rules, OCR needed to go through the normal notice and comment regulatory process before making new regulations, rather than just announcing them through a "Dear Colleague" letter that is subject to neither normal administrative safeguards nor to judicial review.¹³ Of course, OCR would argue that the Dear Colleague letter was mere "guidance" without the force of law, but that's an evasion. In addition to the prescriptive language in the letter noted previously, universities around the country understood the guidance to be binding, and scrambled to change their procedures to comport with the guidance.¹⁴ Some, feeling pressure from OCR, reopened past investigations that had exonerated the accused.¹⁵

¹¹ See Dear Colleague Letter, *supra*.

¹² See Hans Bader, Education Department Illegally Ordered Colleges to Reduce Due-Process Safeguards, Wash. Examiner, Sept. 21, 2012, <http://www.examiner.com/article/education-department-illegally-ordered-colleges-to-reduce-due-process-safeguards>.

¹³ Hans Bader, No, OCR's April 4, 2011 Dear Colleague Letter is not Entitled to Deference, Wash. Examiner, Aug. 17, 2013, <http://www.examiner.com/article/no-ocr-s-april-4-2011-dear-colleague-letter-is-not-entitled-to-deference>.

¹⁴ Julie Novkov, EQUALITY, PROCESS, AND CAMPUS SEXUAL ASSAULT, 75 Md. L. Rev. 590 (2016) (noting that the Dear Colleague Letter "has transformed how higher educational institutions address allegations of sexual assault").

¹⁵ See David E. Bernstein, *Lawless* ch.8.

Indeed, Catherine Lhamon, the Department of Education’s Assistant Secretary for the Office for Civil Rights (OCR), testified under oath in 2014 that “she expected institutions of higher education to fully comply with OCR’s guidance.”¹⁶ Needless to say, if the government expects “compliance,” it is in effect regulating the affected parties, even if it purports to only be issuing “guidance.”

Senator Lamar Alexander revisited the issue with Department of Education Deputy Assistant Secretary Amy McIntosh. McIntosh conceded “that guidance that the Department issues does not have the force of law,” and that “guidance under Title IX is not binding.” Senator Alexander responded, “Right. But who is going to tell Ms. Lhamon this?”¹⁷ Eight days later, Senator James Lankford questioned Undersecretary of Education Ted Mitchell, who reiterated, “our guidance does not hold the force of law and our recommendations and illustrations of the ways in which we are interpreting the statute and the regulations.”

So for four years OCR made up rules outside the confines of the APA that applied to almost every institution of higher learning in the United States and treated those rules as binding. These rules created a witch-hunt-like atmosphere on many campuses, with only the barest thread of legal authority to back it up. Only after two U.S. Senators challenged DOE officials did anyone acknowledge publicly that the guidance could legally be deemed only “recommendations” and “illustrations.” Nevertheless, OCR has not sent any follow-up correspondence to universities explaining that its guidance is not binding, suggesting that it still expects compliance!

II. Emergency Economic Measures with no Statutory Authority: GM, Chrysler, and TARP

¹⁶ <https://www.thefire.org/department-of-educations-overreach-questioned-by-senator-lamar-alexander/>.

¹⁷ <https://www.youtube.com/watch?v=dliXuv-Oirw>

The Supreme Court established in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁸ that economic emergency, even in a wartime context, does not give the president authority to go act beyond statutory limits. Presidential power is especially constrained when Congress has explicitly declined to give the president the authority he seeks to exercise. Nevertheless, when economic emergency struck in fall 2008, the Bush administration ignored statutory limits and the expressed will of Congress and chose to exercise authority that Congress had explicitly denied it. The Obama administration, rather than rolling back this improper exercise of executive power, instead expanded it. The end result was that the federal government ran the day to day activities of a major U.S. corporation, General Motors, without any legal authority for doing so.

The George W. Bush administration, with the acquiescence of Congress, established the Troubled Asset Relief Program, or TARP, at the height of the 2008 financial crisis.¹⁹ TARP authorized the Secretary of the U.S. Treasury “to purchase...troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.”²⁰ In December 2008, the Bush administration asked Congress for money to bail out Chrysler and GM. The House went along,²¹ but the Senate refused.²²

In a foreshadowing of Obama administration rhetoric, the Bush administration argued that Congress’s refusal to rubber-stamp the president’s proposal justified what amounted to

¹⁸ 343 U.S. 579 (1952), especially Justice Jackson’s concurring opinion, which has been highly influential.

¹⁹ Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified as amended in scattered sections of the U.S. Code).

²⁰ *Id.* § 101(a)(1), 12 U.S.C. §5211). See Todd Zywicki, *The Auto Bailout and the Rule of Law*, Nat’l Affairs, Spring 2011, <http://www.nationalaffairs.com/publications/detail/the-auto-bailout-and-the-rule-of-law>.

²¹ See Brent J. Horton, *The TARP Bailout of GM: A Legal Historical and Literary Critique*, 14 *Tex. Rev. L. & Pol.* 216 (June 2010).

²² David M. Herszenhorn, Bill Vlasic and Carl Hulse, *Senate Abandons Auto Bailout Bid After G.O.P Balks*, *N.Y. Times*, December 12, 2008, at A1.

unilateral, illegal action by the president. Bush took \$17 billion out of the \$700 billion TARP fund to lend to the car companies, even though the fund was only supposed to be used for “financial institutions.” A White House spokesman justified this presidential power-grab by explaining, “Congress lost its opportunity to be a partner because they couldn’t get their job done.”²³

The government then gave GM and Chrysler ninety days to come up with viable turnaround plans. By the time the deadline arrived, the Obama administration was in office and neither company had made significant progress. Obama’s underlings ordered Chrysler to merge with Italian automaker Fiat. Steven Rattner, Obama’s “car czar,” meanwhile ordered GM CEO Rick Wagoner to resign. Given GM’s dependence on TARP money, Wagoner had no choice. So an unelected government bureaucrat--one not even confirmed by the Senate, even though he pretty clearly qualified as a “principal officer” for constitutional purposes--fired the CEO of a major American company. The Obama administration meanwhile more than tripled the amount of TARP funds available to GM, without Congressional approval.²⁴

Rattner also forced out GM’s acting chairman and personally recruited its new chairman. Rattner and his automobile industry task force made all major business decisions for GM, including which brands to keep and which dealerships it should shed and how quickly it should shed them. For public consumption, the task force pretended that GM was acting autonomously. Rattner later complained that “as we drafted press statements and fact sheets, I would constantly

²³ Quoted in Gene Healy, *The Cult of the Presidency* 304 (2009).

²⁴ Todd Zywicki, *The Auto Bailout and the Rule of Law*, *National Affairs*, Issue 7, at 66, 74-76 (Spring 2011).

force myself to write that ‘GM has done such and such.’ Just once I would have liked to write ‘we’ instead.”²⁵

Needless to say, a law that provided for the bailout of “financial institutions,” however broadly construed, did not give the government the power to make day-to-day business decisions for GM. Rattner not only didn’t care, he reveled in the lawlessness. The auto industry rescue, he wrote, “succeeded in no small part because we did not have to deal with Congress.”²⁶ If he had not been able to act unilaterally, he added, “we would have been subject to endless congressional posturing, deliberating, bickering, and micromanagement, in the midst of which one or more of the troubled companies under our care would have gone bankrupt.”²⁷ Either that, or the Obama administration could have followed the law, and cooperated and compromised with Congress. Given that Congress had a huge Democratic majority inclined to go along with the administration’s initiatives, the Obama administration could hardly blame potential partisan obstructionism for its failure to respect the separation of powers.

III. Refusal to Implement the Law: Obamacare

The Obama administration has faced persistent criticism for allegedly picking and choosing which laws it choose to enforce. Critics have claimed that President Obama has been derelict in his duty to enforce the work requirements of the 1996 welfare reform law, has illegitimately ordered U.S. attorneys to not enforce the federal ban on marijuana in states where it is legal, and, most famously, has illicitly ordered federal officials not to enforce immigration law. The legality of President Obama’s executive order granting de facto (albeit temporary) legal status to millions

²⁵ Steven Rattner, *Overhaul: An Insider’s Account of the Obama Administration’s Emergency Rescue of the Auto Industry* 210 (2011).

²⁶ *Id.* at 187.

²⁷ *Id.*

of undocumented residents of the United States is currently pending before the Supreme Court. In a sign that some Justices are concerned that the president has been derelict in his duty to enforce the law, the Court sua sponte added to its cert. grant the issue of whether the president's order violates the "Take Care clause" of the Constitution, a clause that until now the Court has not been justiciable as a limit on executive discretion.²⁸

With regard to immigration law, the Obama administration has at least a superficially plausible argument that given limited enforcement resources, the president is acting within his discretion by exempting certain classes of undocumented residents from deportation, and that such exemption entitles the adult immigrants in question to receive work permits.²⁹ Much more troubling from a constitutional and rule of law perspective is the administration's refusal to enforce statutory compliance deadlines mandated by the Affordable Care Act, supposedly President Obama's own signature legislative accomplishment. Not only does the administration not have a plausible legal argument for its (in)actions, it has not even attempted to provide any.

Many of these (in)actions were undertaken for transparently political reasons.³⁰ For example, Obamacare requires most employers with more than fifty employees to provide an approved

²⁸ See David Bernstein, Supreme Court bombshell: Does Obama's immigration guidance violate the Take Care Clause?. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/19/supreme-court-bombshell-does-obamas-immigration-guidance-violate-the-take-care-clause/>.

²⁹ See Memorandum from the Office of Legal Counsel to the Sec'y of Homeland Sec. and the Counsel to the President 10 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

³⁰ This has been an Obama Administration *modus operandi* in a variety of contexts. See Josh Blackman, The Constitutionality of DAPA Part II: Faithfully Executing the Law, 19 Tex. Rev. L. & Pol. (forthcoming 2015); Juliet Eilperin, White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy, Wash. Post, Dec. 14, 2013, http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

insurance plan to their workers by January 1, 2014, or pay a fine per uninsured employee. By 2013, it became apparent that many smaller companies were planning to abandon whatever insurance coverage they had previously provided employees, pay the relatively small fine, and dump their employees onto the Obamacare exchanges, where many of them would qualify for federal subsidies.

To avoid this pending political disaster, on July 2, 2013 the Obama administration announced, in a Treasury Department blog post,³¹ that for employers with between fifty and ninety-nine employees the insurance mandate would be postponed until 2015— not coincidentally, after the 2014 midterm elections. Meanwhile, the administration issued rules with absolutely no legal authority to do so requiring any employer who took advantage of the delay to not subsequently reduce or eliminate health insurance and throw its employees on to the exchanges. In March 2014, the administration delayed full implementation of the employer mandate until 2016.³²

Similarly the President’s “if you like your plan you can keep it” lie became a massive political headache for the Democrats in the fall of 2013. Many individuals and businesses who had insured themselves outside of group plans received cancellation notices from their insurance company because their plans did not meet “minimum essential coverage” requirements under Obamacare. On November 14, 2013, the Obama administration issued guidance encouraging state insurance commissioners to allow existing non-Obamacare compliant plans that were in

³¹ Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, Treasury Blog, July 2, 2013, <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>.

³² Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (2014).

effect on October 1, 2013, to continue through October 1, 2014.³³ Remarkably, the Obama administration was asking insurance commissioners to disobey federal law. In December, President Obama announced that the federal government would not enforce the individual mandate in 2014 against people whose insurance policies were canceled due to Obamacare.³⁴ On March 5, 2014, the administration asked state insurance commissioners not to enforce Obamacare rules that would require existing plans to fold until October 1, 2016³⁵—again not surprisingly, well after the 2014 midterm elections. Nothing in the statute gave the president the authority to waive the relevant mandatory deadlines.

South Texas College of Law professor Josh Blackman aptly calls the administration's unilateral announcements of changes to Obamacare "government by blog post," a completely unconstitutional way of governing. Obama preferred governing this way even when Republicans offered to work with him. Before Obama announced that he would ignore the law and allow the grandfathering of otherwise unlawful health care plans, Republicans proposed a bill that would have grandfathered existing plans. The president announced he would veto any such bill.³⁶

Professor Nicholas Bagley, a supporter of Obamacare, acknowledges not just that the Obama administration's have been unlawful, but that the administration has not even tried to publicly

³³ Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs., to State Ins. Comm'rs (Nov. 14, 2013).

³⁴ Ezra Klein, The Individual Mandate No Longer Applies to People Whose Plans were Canceled, Wash. Post, Dec. 19 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/19/the-obama-administration-just-delayed-the-individual-mandate-for-people-whose-plans-have-been-canceled>.

³⁵ See HHS 2015 Health Policy Standards Fact Sheet, Mar. 5, 2014, <http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2014-Fact-sheets-items/2014-03-05-2.html>

³⁶ Justin Sink, White House Threatens Veto of Upton bill, The Hill, Nov. 14, 2013, <http://thehill.com/homenews/administration/190365-white-house-threatens-veto-of-upton-bill>.

defend their lawfulness.³⁷ Bagley argues that one should not consider the Obama administration to more generally be lawless in its implementation of Obamacare, because the administration has enforced many other provisions that it would have preferred to ignore.³⁸ I am inclined, however, to agree with Professor Jonathan Adler, who rejoins, “where Bagley finds admirable restraint, I suspect calculation. It seems to me the administration has strayed from the ACA’s text law when and where it thinks it’s difficult for critics to obtain judicial review.”³⁹

Conclusion

My testimony has reviewed three categories of Obama administration misbehavior that would be difficult or impossible to constrain via judicial review: informally regulating through “guidance” rather than promulgating formal regulations through the notice-and-comment process; ignoring statutory limits and congressional objections in exercising spending and regulatory authority in an economic emergency; and delaying the implementation of duly-enacted legislation for political reasons. I could have also mentioned “sue and settle,” the IRS scandal, the Justice Department’s refusal to defend the Defense of Marriage Act in the Supreme Court, and more. If such lawlessness is allowed to persist and expand, the entire governing structure of the U.S. Constitution, with its checks and balances and separation of powers, will be at risk.

³⁷ Nicolas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. Penn. L. Rev. __ (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721391

³⁸ *Id.*

³⁹ <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/27/the-illegal-implementation-of-obamacare/>.