Testimony of William Yeatman
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on
"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program"
Before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Judiciary Committee

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Chairman Marino, Ranking Member Johnson, Members of the Subcommittee, thank you for inviting me to testify before you as part of your oversight of the Justice Department's Environment and Natural Resources Division. My name is William Yeatman, and I'm a Senior Fellow at the Competitive Enterprise Institute. We are a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI specializes in regulatory policy. We accept no government funding and rely entirely on individuals, corporations, and charitable foundations for our financial support.

My testimony today regards a judicial settlement proposed on 28th June by the Department of Justice, the U.S. Environmental Protection Agency, and Volkswagen to partially resolve the automaker's Clean Air Act violations associated with the sale of almost 500,000 2.0 liter diesel engines that were equipped with "defeat devices." In particular, my testimony addresses the serious constitutional concerns raised by a stipulation in the proposed partial consent decree for an EPA-approved plan to spend $1.2 billion over ten years "to support increased use of zero emission vehicle technology" ("National ZEV Investment Plan").

To be sure, there is no authority in the Clean Air Act for the EPA to oversee risky investments in nascent automotive technologies. Nor did the Congress appropriate $1.2 billion for the EPA to invest in electric vehicle infrastructure and marketing. In fact, the National ZEV Investment Plan ***conflicts*** with the Congress's intent. In 2011, after promising to put one million electric cars on the road, the White House requested from Congress $300 million to spend on ZEV infrastructure. Congress demurred. And in 2016, the President once more sought federal spending to support increased usage of ZEVs through a program called the "21st Century Transportation Initiative." Again, Congress refused.

Instead of acting on the President's proposals, Congress passed its own plan that the President signed into law. The 2015 Fixing America's Surface Transportation Act (FAST) Act directs the Secretary of Transportation to establish "National electric vehicle charging and hydrogen, propane, and natural gas fueling corridors." Rather than direct infrastructure investments, as sought by the Obama administration, the FAST Act program is limited to "identify[ing] the near- and long-term need for, and location of" fueling and charging infrastructure "at strategic locations along major national highways." More importantly, the Congress's plan is far more inclusive; whereas the President's proposals focused on ZEVs, the FAST Act program includes alternative hydrocarbon fuels such as propane and natural gas.

Having failed to persuade Congress, the administration now seeks to co-opt the judiciary's injunctive and contempt powers to advance the President's failed legislative agenda. The proposed partial consent decree would give EPA control of $1.2 billion in ZEV investments, which is four times what the administration unsuccessfully sought for effectively the same purpose in 2011.

Furthermore, the settlement would conflict with rather than complement Congress's plan. The FAST Act goal to promote infrastructure for a diversity of alternative technologies is undermined by a shadow program that promotes only ZEV technologies. Another tension between the settlement and FAST Act is the fact that the parallel policies would create duplicative administrative processes. Under the FAST Act, the Secretary of the Transportation must solicit input from States and other stakeholders regarding the need for infrastructure; likewise, the settlement stipulates that VW must undertake an EPA-approved "national ZEV outreach plan" to solicit input from States and other stakeholders regarding the need for infrastructure. Such wasteful redundancy is irrational. It is further an intra-executive-branch power-grab: Congress and the President agreed to locate this decision-making authority within the Transportation Department, and the EPA now seeks to use an enforcement proceeding to sidestep Congress's preferences and usurp its Cabinet rival.

There are other separation of powers concerns raised by the settlement. For example, the Miscellaneous Receipts Act derives from and vouchsafes Congress's power over appropriations. With one inapplicable exception, the law requires that whenever a government agent or official receives money "from any source," he or she "shall deposit the money in the Treasury as soon as practicable." It is a violation of this law for the settlement decree to transfer monies functionally within the government's control to third-parties as the National ZEV Investment Plan proposes to do.

In light of the foregoing, the proposed partial consent decree plainly entails usurpation of the Congress's lawmaking and appropriations power. Famously, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that President Truman's seizure of the nation's steel mills during the Korean War was unlawful because it was not authorized either by statute or by the Constitution. Instead, the seizure amounted to "lawmaking"" by the President, which is a power residing in Congress under the Constitution. The same sort of unconstitutional executive lawmaking is afoot in the proposed partial consent decree negotiated by the Department of Justice. Regardless of one's personal politics, all lawmakers should be concerned with this blatant aggrandizement of presidential power at the expense of Congress.

If the Justice Department can negotiate a billion dollar industrial policy into a settlement agreement to enforce the Clean Air Act, it is fair to ask: Are there ***any*** limits on what a President could achieve through consent decree negotiations?

It would seem that the only limiting principle in the Volkswagen settlement was that the remedy might result in a net reduction of fleet vehicle emissions at some point in the future. This is an impossibly loose standard. Were it allowed to stand, the President would have a powerful means to create his or her own "power of the purse." All a President would have to do is pour resources into regulatory enforcement, and then pursue settlements whereby the regulated target agrees to spend money in accordance with the President's policy priorities. After all, any rational business would

prefer to make an upfront payment when the alternative is an interminable battle with the vast resources and machinery of the federal government.

In addition to the constitutional concerns raised above, the settlement also defies common sense. There is no reason to believe that an environmental regulator, with no experience as a carmaker or a venture capitalist, could wisely exercise approval authority of a $1.2 billion investment in emerging automotive technologies. In support of this contention, it is worth noting the dismal results of the Obama administration's first investment into ZEV infrastructure, a $115 million stimulus grant to ECOtality to install electric vehicle chargers in home garages. Within 3 years, ECOtality went bankrupt, stranding 13,000 charging docks. Investors subsequently sued company officials for fraud.

In sum, the Justice Department-EPA-Volkswagen settlement agreement includes $1.2 billion to implement a presidential policy priority that Congress twice has rejected. Members of both the majority and minority parties should be troubled with this unconstitutional lawmaking by the executive and judicial branches.