

**EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS
(PART II)—IRS ABUSE, WELFARE REFORM,
AND OTHER ISSUES**

HEARING
BEFORE THE
EXECUTIVE OVERREACH TASK FORCE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
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OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Report titled “No Evidence of White House Involvement or Political Motivation in IRS Screening of Tax-Exempt Applicants,” submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Executive Overreach Task Force. This report is available at the Committee and can also be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104807>

EXECUTIVE OVERREACH IN DOMESTIC AFFAIRS (PART II)—IRS ABUSE, WELFARE REFORM, AND OTHER ISSUES

TUESDAY, APRIL 19, 2016

HOUSE OF REPRESENTATIVES
EXECUTIVE OVERREACH TASK FORCE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 2:29 p.m., in room 2141, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King, Goodlatte, Issa, Gohmert, Jordan, Poe, Gowdy, Labrador, DeSantis, Buck, Bishop, Cohen, Conyers, Johnson, and Deutch.

Staff Present: (Majority) Paul Taylor, Chief Counsel, Subcommittee on the Constitution and Civil Justice; Zachary Somers, Parliamentarian & General Counsel, Committee on the Judiciary; Tricia White, Clerk, Subcommittee on the Constitution and Civil Justice; (Minority) James Park, Minority Counsel, Subcommittee on the Constitution & Civil Justice; Susan Jensen, Senior Counsel; Matthew Morgan, Professional Staff Member; and Veronica Eligan, Professional Staff Member.

Mr. KING. The Executive Overreach Task Force will come to order. Without objection, the Chair is authorized to declare a recess of the Task Force at any time.

And I'll begin with my opening statement.

At our first Task Force hearing, we explored how Congress itself, over the past many decades, has acted or not acted in ways that have tended to cede its legislative power to the executive branch.

Contrary to our Founders' original intentions, our second hearing focused on just—on just some of the many examples in which the President has exercised sometimes sheer will to wrest legislative authority from the United States Congress.

Our third hearing today explores even more such abuses. One of the most egregious abuses in the executive branch's handling of the Internal Revenue Service, which was used to restrict the ability of organizations dedicated to educating people on the Constitution and the Bill of Rights to obtain task-exempt status that they are allowed by law.

A report by the Treasury Department's own Inspector General found that organizations that were involved in educating on the Constitution and the Bill of Rights were singled out for adverse tax treatment by the Internal Revenue Service. Other groups with the term "progressive" in their name were not subject to the same adverse treatment.

Adding to the horror of the IRS' abuse of its regulatory authority to favor political supporters of the President is research indicating that politically biased favorable treatment may have significantly affected the 2012 Presidential election. Researchers at the American Enterprise Institute and the Harvard Kennedy School of Government found that Republican candidates in the 2010 elections enjoyed huge success when organizations educating people on the Constitution and the Bill of Rights were left unfettered by the IRS.

That cycle brought the Republican party some 3 million to 6 million additional votes in House races. As the researchers concluded, that success was not the result of a few days of work by an elected official or two, but it involved activists all over the country who spent the year-and-a-half leading up to the midterm elections by volunteering, organizing, donating, and rallying.

Much of these grassroots activities were centered around 501(c)(4)s, which, according to our research, were an important component of Republican success at cycle. The researchers concluded that if those grassroots activities had continued to grow at the pace seen in 2009 and 2010 and had their effect on the 2012, it would have been similar to that seen in 2010. They would have brought the Republican party as many as 5 to 8½ million votes compared to Obama's victory margin of 5 million. But that didn't happen.

Instead, in March of 2010, the IRS decided to single out for special adverse treatment groups that educated citizens on the Constitution and the Bill of Rights that contained the word "patriot" in their names or that otherwise indicated subjects unappealing to the current Administration. For the next 2 years, the IRS approved the applications of only four such groups, delaying all others while subjecting the applicants to highly intrusive, intimidating requests for information regarding their activities, their membership, their contacts, their Facebook posts, and private thoughts.

As the researchers found, "As a consequence, the founders, members, and donors of these adversely affected groups found themselves incapable of exercising their constitutional rights, and their impact was muted in the 2012 election cycle."

The IRS abuse had cost these organizations thousands of dollars in legal fees and swallowed the time these all-volunteer networks could have devoted to voter turnout, to outreach in Black and Latino neighborhoods, and other events to educate the public on the Constitution and the basic concept of political and individual liberty.

Adding insult to injury, a Federal lawsuit brought by organizations harmed by the IRS' misconduct has been marred by delays on the part of Federal Government attorneys so unreasonable that the Sixth Circuit Court of Appeals wrote as follows, in an opinion issued just last month. Because of its significance, I will quote it

in length: “Among the most serious allegations a Federal court can address are that an executive agency has targeted citizens for mistreatment based on their political views. Not—no citizen, Republican or Democrat, Socialist or Libertarian, should be targeted or even have to fear of being targeted on those grounds. Yet in this lawsuit the IRS has only compounded the contact that gave rise to it.

“The plaintiffs seek damages on behalf of themselves and other groups whose applications the IRS treated in the manner described by the Inspector General. The lawsuit has progressed as slowly as the underlying applications themselves.

“At every turn, the IRS has resisted the plaintiffs’ request for information regarding the IRS’ treatment of the plaintiff class, eventually to the open frustration of the District Court. At issue here are the IRS be-on-the-lookout lists of organizations allegedly targeted for unfavorable treatment because of their political beliefs. The District Court ordered production of those lists and did so again over an IRS motion to reconsider.

“Yet almost a year later, the IRS still has not complied with the court’s orders. The lawyers in the Department of Justice have a long and storied tradition of defending the Nation’s interests and enforcing its laws, all of them not just selective ones, in a manner worthy of the Department’s name. The conduct of the IRS’ attorneys in the District Court falls outside that tradition.”

Those are chilling words—close quote. Those are chilling words from a Federal appeals court which found the Justice Department under this Administration has failed to enforce the Nation’s laws and fairly—and has failed in a manner unworthy of the Department’s name.

I look forward to hearing from all our witnesses here today on these and other issues.

The Chair would now recognize the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

Today’s Executive Overreach Task Force, or President Obama’s still President—we shall continue the lashings—hearing is to congressional hearings what a clip show is to a television series. In the absence of original idea or coherent focus, we simply go and re-air snippets of tired old story lines from long ago, past episodes; Seinfeld Part 1, or TBT, hash tag.

It is simply sad that at a time when our Nation and our world face a host of daunting challenges, the Zika virus, problems in the Middle East, this Congress has chosen to spend its time and taxpayer money on political theater.

It is telling that today’s hearing has no focal point. Its only purpose appears to be to give conservative critics the opportunity, once again, to assert that President Barack Obama has acted beyond the law. And as part of a longstanding pattern of attempts to paint this President, in particular as somehow illegitimate, goes all the way back to the 2008 campaign.

This is the week that Passover starts on Friday, and we say why is this night different from all other nights? Why is this President different from all other Presidents? I think we all know why. Sim-

ply too bad for the critics that the facts do not support their arguments.

On the alleged targeted conservative groups by the Internal Revenue Service, extensive investigations by two Congressional Committees, the Department of Justice and the Treasury, have concluded the IRS did not break the law.

Indeed, the Justice Department wrote to the Committee on October 23, 2015. Its conclusion's worth noting at some length. We conducted more than 100 witness interviews, collected more than 1 million pages of IRS documents, analyzed almost 500 tax exemption applications, examined the role and potential culpability of scores of IRS employees, and considered the applicability of civil rights tax administration and obstruction statutes.

Our investigation uncovered substantial evidence of mismanagement, poor judgment, and institutional inertia, leading to the belief by many tax-exempt applicants the IRS targeted them based on their political viewpoints. But poor management is not a crime. We found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives to help support a criminal prosecution. We also found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice.

I'd like to ask unanimous consent to include the Justice Department's October 23, 2015, letter in the record.

Mr. KING. Hearing no objection, so ordered.

[The information referred to follows:]

**U.S. Department of Justice**

Office of Legislative Affairs

*Office of the Assistant Attorney General**Washington, D.C. 20530*

October 23, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Congressman Conyers:

We write to inform you about the Department of Justice's criminal investigation into whether any IRS officials committed crimes in connection with the handling of tax-exemption applications filed by Tea Party and ideologically similar organizations. Consistent with statements from the Department of Justice (the Department) throughout the investigation, we are pleased to provide additional information regarding this matter now that we have concluded our investigation. In recognition of not only our commitment to provide such information in this case, but also the Committee's interest in this particular matter, we now provide a short summary of our investigative findings.

In collaboration with the FBI and Treasury Inspector General for Tax Administration (TIGTA), the Department's Criminal and Civil Rights Divisions conducted an exhaustive probe. We conducted more than 100 witness interviews, collected more than one million pages of IRS documents, analyzed almost 500 tax-exemption applications, examined the role and potential culpability of scores of IRS employees, and considered the applicability of civil rights, tax administration, and obstruction statutes. Our investigation uncovered substantial evidence of mismanagement, poor judgment, and institutional inertia, leading to the belief by many tax-exempt applicants that the IRS targeted them based on their political viewpoints. But poor management is not a crime. We found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support a criminal prosecution. We also found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice. Based on the evidence developed in this investigation and the recommendation of experienced career prosecutors and supervising attorneys at the Department, we are closing our investigation and will not seek any criminal charges.

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The Investigation

The Department's probe began in May 2013, following a TIGTA audit report revealing the IRS's mishandling of tax-exempt applications filed by groups it suspected to be involved in political activity. See TIGTA Audit Report, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Ref. No. 2013-10-053 (May 14, 2013). TIGTA's audit report revealed that the IRS coordinated the review of applicants for tax-exemption under Internal Revenue Code Sections 501(c)(3) and 501(c)(4), which limit the amount of political activity in which such groups can engage. According to the audit report, one way in which the IRS identified groups for coordinated review was through politically focused keywords, such as "Tea Party," "9/12 Project," and "Patriots," and the inventory of applications identified for coordinated review was internally referred to as the "Tea Party cases." These applications were subjected to heightened scrutiny, including burdensome and unnecessary information requests, which caused significant processing delays. Although TIGTA's audit report detailed no evidence or allegation of discriminatory intent, its findings were unsettling and prompted the Department of Justice to initiate a criminal investigation. Our probe, which was managed by an experienced team of career prosecutors and supervising attorneys from the Criminal Division's Public Integrity Section and Civil Rights Division's Criminal Section, in partnership with seasoned law enforcement agents from the FBI and TIGTA, spanned the better part of two years. As explained below, our investigation confirmed the TIGTA audit report's core factual findings and examined in detail what motivated the decisions leading to the IRS's handling of these tax-exempt applications.

At the investigation's outset, the Department took careful steps to preserve the possibility of criminal prosecution in the face of potential Fifth Amendment issues. Under the Fifth Amendment, statements obtained from federal employees under threat of termination—a common occurrence in administrative investigations like the TIGTA audit—as well as evidence derived from those statements, cannot be used against such employees in a criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967); *Kastigar v. United States*, 406 U.S. 441, 460 (1972). We therefore formed two teams – a prosecution team principally responsible for the criminal investigation, and a filter team responsible for shielding the prosecution team from statements and information that risked contaminating an otherwise viable criminal prosecution. Before the prosecution team was given access to fruits of the audit report, the filter team reviewed prior statements by IRS employees to TIGTA auditors to assess whether a court might deem them compelled under the Fifth Amendment, and evaluated the statements and evidence derived from these prior statements to determine whether they could be traced to sources independent from any potentially compelled statements. This prophylactic measure was further necessitated by IRS leadership's order to its employees to cooperate in the parallel Congressional investigation, raising concerns that a court could deem statements given to Congressional committees to have been compelled. In early October 2013, we determined that the filter procedure was no longer necessary and that any potential prosecution supported by the evidence would not be frustrated by a Fifth Amendment challenge.

The prosecution and filter teams conducted over 100 interviews. Top-level IRS officials, including former IRS Commissioner Douglas Shulman, former Acting IRS Commissioner

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Steven Miller, and former Exempt Organizations Director Lois Lerner, voluntarily participated in extensive interviews with the prosecution team, as did their close advisors and career managers and line-level revenue agents directly involved in processing tax-exempt applications. Some key witnesses were interviewed multiple times. No person interviewed during the investigation was made promises of non-prosecution in order to obtain their statements.

Throughout the investigation, not a single IRS employee reported any allegation, concern, or suspicion that the handling of tax-exempt applications—or any other IRS function—was motivated by political bias, discriminatory intent, or corruption. Among these witnesses were several IRS employees who were critical of Ms. Lerner's and other officials' leadership, as well as others who volunteered to us that they are politically conservative. Moreover, both TIGTA and the IRS's Whistleblower Office confirmed that neither has received internal complaints from IRS employees alleging that officials' handling of tax-exempt applications was motivated by political or other discriminatory bias.

In addition to conducting interviews, we also collected and reviewed voluminous relevant documents. On May 31, 2013, the Department served the IRS with a demand that it preserve all documents potentially material to the investigation, with the same obligations and subject to the same potential sanctions that would apply had the IRS been served a federal grand jury subpoena. The IRS produced more than one million pages of unredacted documents and asserted no privileges against disclosure. The Department shared Congress's frustration with the IRS's revelation in June 2014 that its document collection and preservation process was susceptible to potentially catastrophic loss. Specifically, the IRS revealed that its electronic backup system for emails was vulnerable to the crash of a single employee's hard drive, which could result in the permanent loss of that employee's email archive. Indeed, this is what occurred with respect to Ms. Lerner, whose hard drive crashed in June 2011, causing the destruction of her email archives. Our confidence in the IRS's data collection process was further undermined by the four-month delay in its disclosure of this information, as well as TIGTA's discovery that, in March 2014, IRS information technology employees inadvertently destroyed more than 400 electronic backup tapes that may have contained copies of Ms. Lerner's emails.

Despite these shortcomings, we are confident that we were able to compile a substantially complete set of the pertinent documents. The IRS collected documents from more than 80 employees—many more employees than were regularly and directly involved in the matters under investigation—making exceedingly remote the chance that a hard drive crash or other technical failure experienced by any particular employee could cause the permanent loss of any relevant email or other document. Moreover, we did not rely exclusively on the IRS to collect documents. We also searched Ms. Lerner's entire computer and Blackberry, obtained the complete email boxes of IRS employees central to the investigation (as opposed to obtaining only those emails the IRS deemed responsive), and performed office searches of some officials. We also obtained documents directly from several witnesses. Our extensive witness interviews revealed no indication of any missing material documents, and no IRS witness reported seeing any documents that have since gone missing or are otherwise unaccounted for. Finally, as discussed more below, our investigation revealed no evidence that the IRS's document collection

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and retention problems, Ms. Lerner's hard drive crash, or the IRS's delayed disclosure regarding these matters were caused by a deliberate attempt to conceal or destroy information.

The Department also obtained and reviewed the IRS's tax-exempt-application files for nearly 500 groups that applied for status between 2009 and the release of the Audit Report in May 2013, which were subject to the IRS's coordinated review regarding political activity. According to an analysis by the FBI, nearly 70 percent of the applications coordinated for review were submitted by right-leaning groups, including the Tea Party, confirming the TIGTA audit's finding that such groups were disproportionately impacted by the IRS's coordinated review of applications. We identified groups suffering the most significant of the impacts of these procedures and obtained interviews with representatives of eleven of them. Some of these interviews were obtained through lawyers, including a firm representing as many as 50 individual organizations. Although not all of these represented organizations agreed to be interviewed, their lawyers either informed us that the information provided by organizations whose representatives did agree to be interviewed was sufficient to further the Department's criminal investigation, or provided detailed information about their clients' interactions with the IRS. In addition, we had the benefit of reviewing the detailed complaints filed in civil cases lodged in the District of Columbia and Southern District of Ohio, as well as reviewing public testimony from applicants who appeared before Congress to describe their interactions with the IRS.

Investigative Findings

In order to bring criminal charges, we must have evidence of criminal intent. The Department searched exhaustively for evidence that any IRS employee deliberately targeted an applicant or group of applicants for scrutiny, delay, denial, or other adverse treatment because of their viewpoint. Intentional viewpoint discrimination may violate civil rights statutes, which criminalize acting under color of law to willfully deprive a person of rights protected by the Constitution or federal law. *See* 18 U.S.C. §§ 241, 242. Intentional viewpoint discrimination may also violate criminal tax statutes that prohibit IRS employees from committing willful oppression under color of law, for example by deliberately failing to perform official duties with the intent of defeating the due administration of revenue laws, or by corruptly impeding or obstructing the administration of the Tax Code. *See* 26 U.S.C. §§ 7214(a)(1), 7214(a)(3), 7212(a). These statutes require proof beyond a reasonable doubt that an IRS official specifically intended to violate the Constitution, Tax Code, or another federal law.

As applied to this case, a criminal prosecution under any of these statutes would require proof that an IRS official intentionally discriminated against an applicant based upon viewpoint. It would be insufficient to prove only that IRS employees used inappropriate criteria to coordinate the review of applications, acted in ways that resulted in the delay of the processing applications, or disproportionately subjected some applicants to burdensome or unnecessary questions. Instead, we would have to prove that such actions were undertaken for the very purpose of harassing or harming applicants. Proof that an IRS employee acted in good faith would be a complete defense to a criminal charge; and proof that an IRS employee acted because

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of mistake, bad judgment, ignorance, inertia, or even negligence would be insufficient to support a criminal charge.

Our investigation found no evidence that any IRS employee acted with criminal intent. We analyzed the culpability of every IRS employee who played a role in coordinating for review applications or handling them afterwards, from line-level revenue agents and managers in the Cincinnati-based Determinations Unit, to tax law specialists and senior executive officials based in Washington, D.C. Apart from the belief by many tax-exempt applicants affiliated with the Tea Party and similar ideologies that they had been targeted, we found no evidence that any IRS employee intentionally discriminated against these groups based upon their viewpoints. To the contrary, the evidence indicates that the decisions made by IRS employees, though misdirected, were motivated by the desire to treat similar applications consistently and avoid making incorrect decisions. Their plans to treat applications consistently were poorly implemented, due to a combination of ignorance about how to apply section 501(c)(4)'s requirements to organizations engaged in political activity, lack of guidance from subject matter experts about how to make decisions in an area most witnesses described as difficult, and repeated communication and management issues. Moreover, many employees failed to engage in critical thought about the effect their actions (or inactions) would have upon those who applied for tax-exempt status. We found that many IRS employees' failure to give adequate attention to the applications at issue was caused by competing demands on their time and an unwillingness to be held accountable for difficult decisions over sensitive matters. We did not, however, uncover any evidence that any of these employees were motivated by intentional viewpoint discrimination.

As noted above, no IRS employee we interviewed, from those directly involved in decision making to those who were primarily witnesses to the conduct of others, reported having any information suggesting that any action taken by any person in the IRS was done for the purpose of harming or harassing applicants affiliated with the Tea Party or similar groups. These witness accounts are fully supported by contemporaneous internal IRS documents, which do not suggest that there was a partisan political motive for any of the decisions made during the handling of the applications. Moreover, any inference of specific intent that might be drawn from the length of the delay in processing applications, the burdensomeness of the information requests, or the fact that Tea Party and ideologically similar organizations were disproportionately affected by the IRS's coordination efforts, is contradicted by witnesses' explanations of why IRS employees made the decisions that they did, all of which—even if misguided—are inconsistent with criminal intent.

Importantly, our investigation revealed that this was not the first time that the IRS had used inept labels in organizing their review of applications. Prior to the IRS procedures that were the subject of our investigation, the IRS had historically coordinated review of applications based on the applicant's name and affiliations, including using keywords such as "progressive" and "ACORN." This historical practice creates a substantial barrier to establishing criminal intent, and bolsters the conclusion that IRS employees did not believe that coordinating for review applications using words like "Tea Party" could potentially violate the Constitution or the Tax Code, or that this method of coordinating applications for review was discriminatory or

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otherwise inappropriate. Moreover, the decision to coordinate the review of applications and the discussions about how to handle them were conducted openly across multiple IRS components and among many different employees with a range of political views, including some who voluntarily identified themselves in interviews as conservative or Republican. Such open discussion of planned actions is inconsistent with criminal intent.

The evidence that we developed demonstrated a disconnect between employees in Cincinnati, who were principally responsible for identifying the applications for review and crafting the burdensome information requests, and employees in Washington, D.C., who were principally responsible for the delay and failure to provide guidance on how to handle the application backlog despite repeated requests that they do so from revenue agents and their supervisors in Cincinnati. As a result, no one person (or group of people) was responsible for the chain of events that resulted in the manner in which applications were ultimately coordinated for review and then delayed. Instead, we found overwhelming evidence that the ill-advised selection criteria, burdensome information requests, and application delays were the product of discrete mistakes by line-level revenue agents, technical specialists, and their immediate supervisors, and that those mistakes were exacerbated by oversight and leadership lapses by senior managers and senior executive officials in Washington, D.C. We developed no evidence that the decisions IRS employees made about how to handle applications, either in Cincinnati or Washington, were motivated by discriminatory intent or other corrupt motive.

The one official who, by virtue of her role as Director of the IRS's Exempt Organizations Division, arguably had the most oversight responsibility for all tax-exempt applications, was Ms. Lerner. Due to her position, and because the U.S. House of Representatives Ways and Means Committee referred civil rights allegations against her to the Department on April 9, 2014, we took special care to evaluate whether Ms. Lerner had criminal culpability. The need for scrutiny of Ms. Lerner in particular was heightened by the discovery and publication of emails from her official IRS account that expressed her personal political views and, in one case, hostility towards conservative radio personalities. We therefore specifically considered whether Ms. Lerner's personal political views influenced her decisions, leadership, action, or failure to take action with respect to tax-exempt applications or any other matter. We found no such evidence.

Our conclusion regarding Ms. Lerner is supported by several factors. First, not a single IRS employee that we interviewed, some of whom were critical of Ms. Lerner's leadership and general management style, and some of whom volunteered that they consider themselves politically conservative, witnessed, alleged, or suspected that Ms. Lerner acted with a political, discriminatory, corrupt, or other inappropriate purpose.

Second, our investigation revealed that when Ms. Lerner became fully aware of and focused on the Cincinnati-based Determinations Unit's use of inappropriate criteria, she recognized that it was wrong, ordered that it stop immediately, and instructed subordinates to take corrective action. In fact, Ms. Lerner was the first IRS official to recognize the magnitude of the problem and to take concerted steps to fix it. To the extent that Ms. Lerner mishandled the oversight of how these tax-exempt applications were processed, it resulted from her failure to digest materials available to her from which she could have identified the problem sooner, and

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her delegation of corrective action to subordinates whom she did not adequately supervise to assure that her directions were implemented sufficiently.

Third, although Ms. Lerner exercised poor judgment in using her IRS email account to exchange personal messages that reflected her political views, we cannot show that these messages related to her official duties and actions with respect to the handling of these tax-exempt applications. In fact, we uncovered no email or other communication showing that Ms. Lerner exercised her decision-making authority in a partisan manner generally, or in the handling of tax-exempt applications specifically, and no witness we interviewed interpreted any email or other communication they exchanged with Ms. Lerner in such a manner.

Finally, our investigation uncovered no evidence that Ms. Lerner intentionally caused her hard drive to crash or that she otherwise endeavored to conceal documents or information from IRS colleagues or this investigation. Moreover, it bears noting that Ms. Lerner cooperated fully with our investigation, voluntarily sitting for approximately 12 hours of interviews with no promise of immunity, producing emails and documents upon request, and disclosing passwords to her IRS Blackberry to assist in searching its contents.

We also carefully considered whether any IRS official attempted to obstruct justice with respect to their reporting function to Congress, the collection and production of documents demanded by the Department and Congress, the delayed disclosure of the consequences of Ms. Lerner's hard drive crash, or the March 2014 erasure of electronic backup tapes. *See, e.g.*, 18 U.S.C. §§ 1503, 1512, 1515, 1519. At a minimum, these statutes would require us to prove a deliberate attempt to conceal or destroy information in order to improperly influence a criminal or Congressional investigation. We uncovered no evidence of such an intent by any official involved in the handling of tax-exempt applications or the IRS's response to investigations of its conduct.¹ Although the IRS's decision to delay the disclosure of the consequences of Ms. Lerner's hard drive crash for more than four months undermined confidence in its judgment, it was not criminal. The evidence shows that IRS attorneys and officials spent that time exercising due diligence to determine what had occurred, mitigating heavily against criminal intent. Similarly, the evidence shows that IRS officials in Washington were unaware of the March 2014 erasure of electronic backup tapes until it was brought to their attention by TIGTA in June 2015. Although those backup tapes should have been protected from erasure due to the Department's preservation demand, there is no evidence that any IRS employee intended to conceal the backup tapes from our investigation or realized that erasing them might violate the preservation demand.

¹ TIGTA has developed evidence that, in June 2015, GS Grade 4 employees and their supervisor working at the IRS's Enterprise Computing Center may have made misleading statements to TIGTA about the manner in which electronic server hard drives were inventoried. There is no evidence suggesting that the employees were involved in the handling of tax-exempt applications, intended to conceal information about the IRS's handling of tax-exempt applications, or that they acted at the behest of any of the IRS employees involved in the handling of tax-exempt applications. Rather, the evidence suggests that the employees failed to inventory the server hard drives properly and later sought to avoid being held accountable for that failure. The Criminal Division's Public Integrity Section and the Civil Rights Division's Criminal Section determined that the possibly misleading statements had no adverse impact on the Department's criminal investigation of the handling of tax-exempt applications. TIGTA has informed the Department that it intends to refer this matter to a U.S. Attorney's Office.

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There is no basis for any obstruction of justice charge arising from the IRS's data collection and preservation protocol.

Conclusion

The IRS mishandled the processing of tax-exempt applications in a manner that disproportionately impacted applicants affiliated with the Tea Party and similar groups, leaving the appearance that the IRS's conduct was motivated by political, discriminatory, corrupt, or other inappropriate motive. However, ineffective management is not a crime. The Department of Justice's exhaustive probe revealed no evidence that would support a criminal prosecution. What occurred is disquieting and may necessitate corrective action – but it does not warrant criminal prosecution.

We hope this information is helpful. We have made a substantial effort to provide detailed information regarding our findings in this letter, and would be pleased to offer a briefing to address any questions you may have on this matter. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik". The signature is written in a cursive, somewhat stylized font.

Peter J. Kadzik
Assistant Attorney General

Mr. COHEN. Thank you. Thank you.

Our Democratic colleagues in the Oversight and Government Reform Committee reached similar conclusions after that Committee's extensive investigation into this matter. The Committee staff report prepared by Ranking Member Elijah Cummings concluded that after "detailed lengthy transcribed interviews of 39 witnesses, including Republicans and individuals who have no political affiliation," there was "no evidence of White House involvement," and "no evidence of political motivation on the IRS' part."

Unanimous consent to place into the record the Democratic staff report on the Committee of Oversight and Government Reform entitled "No Evidence of White House Involvement or Political Motivation in IRS Screening."*

Mr. KING. Also hearing no objection, so ordered.

Mr. COHEN. Thank you, Mr. Chair.

The majority has picked the wrong President to pick on with the IRS. It's a long time ago, but all we've got to go back to is Richard Nixon. He was real good at using the IRS to punish his opponents, and it would be real bipartisan agreement that we could have examined him and said, that was a bad time, and the IRS was used by Richard Nixon.

It is taxpayer money that pays for this national defense. It is taxpayer money that pays the salaries of Federal law enforcement and intelligence officers. It's taxpayers' money that pays down the national debt. Taxpayer money that pays for Medicare, Medicaid, and Social Security, and crop subsidies. And it is the men and women of the IRS that ensure that millions of Americans get the refunds and tax credits. And it's the men and women of the IRS that ensure that we have the money to discuss these and many other critical things.

As Justice Oliver Wendell Holmes said, taxes are what you pay to live in the civilized society. And taxes are fine. You've got to have an IRS. The whole idea of abolishing is poppycock.

Like the IRS matter, the litany of other issues the majority raises in today's hearing is just to repeat the past complaints about agency action. The fact of the matter is the administrative process includes numerous checks, including judicial review, on an agency's actions and its interpretations and authority to act, and critics offer no credible evidence that these checks have failed.

Instead of wasting time, limited time, that we have on a hearing about these nonissues, we should be considering substantive issues, like how to tackle over-incarceration, how to end gun violence, how to help students managing crushing student loan debt, and how to help people be part of the American Dream, and have a right to vote. Regrettably, these issues sit by the wayside while we engage in this purely political exercise.

Further deponent sayeth naught, I yield back the balance of my time.

Mr. KING. I thank the Ranking Member of the Task Force.

And I now yield to the Chairman of the full Judiciary Committee, Mr. Goodlatte, from the Commonwealth of Virginia.

*Note: The material referred to is not printed in this hearing record but is on file with the Task Force, and can also be accessed at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104807>

Mr. GOODLATTE. Thank you, Chairman King, for convening this third hearing of the Task Force on Executive Overreach.

Following up this last hearing, the topic today includes more recent case studies of the abuse of Executive power. And I'll focus my remarks on the President's actions regarding the implementation of the work requirements and the bipartisan welfare reform laws and its unilateral rewriting of Federal energy laws.

In 1996, President Clinton and a Republican Congress signed into law the Bipartisan Personal Responsibility and Work Opportunity Reconciliation Act, which created the Temporary Assistance for Needy Families program, or TANF. This program was designed to discourage dependency and encourage employment by placing certain restrictions on welfare. TANF provided that individuals could only receive benefits for up to 5 years and also require recipients to engage in work within 2 years of receiving benefits.

The work requirements in particular were recognized as the reason for TANF's success in helping millions of Americans get back to work. Welfare roles were decreased by half, and the poverty rate for African-American children reached its lowest point in U.S. history. Researchers studying the self-reports of happiness by former welfare recipients have shown that these work requirements increased the happiness of single mothers taking part in the program, concluding that "the package of welfare and tax policy changes targeting single mothers and generally promoting work increased single mothers' happiness. The observed increase in happiness result—appears to result from both an increase in single mothers reporting a high level of happiness and a decrease in single mothers reporting a low level of happiness. The magnitude of the effect appears quite large."

These new workers confirm what many studies of human happiness have shown, and that is that one of the best means of achieving happiness is through earned success. As other researchers have shown, paid work activities provide social contact, a means of achieving respect, and a source of engagement, challenge, and meaning.

The Obama administration, however, in a mere memorandum issued by the Department of Health and Human Services, deemed it that States no longer had to follow TANF's work requirements and could dispense welfare, even if recipients didn't meet the TANF's statutory standards.

In the 1996 welfare reforms, Congress provided a list of which statutory provisions the Federal Government could waive, and TANF's work requirements in section 407 were not listed as waiveable. In the many years since the 1996 act was passed, no Administration had ever asserted this authority because the statute's clear text allows for no waivers of TANF's work requirements. The result, if TANF's—if waivers were fully implemented, would be more dependency and less of the sort of earned success that leads to greater happiness.

The Obama administration has also attempted to unilaterally impose energy use rules on the States without congressional authorization. Initially, 26 States, and now 29 States, asked the Chief Justice of the Supreme Court to intervene immediately to stop this abuse, and the Supreme Court promptly stayed the enforcement of

the President's plan pending a resolution of the constitutional challenges against it.

Even prominent liberal law professor, Laurence Tribe, who taught President Obama constitutional law at Harvard Law School, wrote the following about President Obama's clean power plan: "After studying the only legal basis offered for the EPA's proposed rule, I concluded that the Agency is asserting Executive power far beyond its lawful authority. Even more fundamentally, the EPA, like every administrative agency, is constitutionally forbidden to exercise powers Congress never delegated to it in the first place. The brute fact is that the Obama administration failed to get climate legislation through Congress. Yet the EPA is acting as though it has the legislative authority anyway to reengineer the Nation's electric generating system and power grid. It does not."

I look forward to hearing from our witnesses today who will discuss these and other abuses of Executive power and the means of preventing them.

Thank you, Mr. Chairman.

Mr. KING. I thank the Chairman, the gentleman from Virginia.

And now I yield to the Ranking Member of the full Committee from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman King.

Members of the Subcommittee, when the Committee first established this Task Force, I expressed hope that we could work in a substantive and bipartisan manner to address serious questions about relationship between the executive and legislative branches. I continue to hold out that hope, but I am disappointed that so far the Task Force, to me, seems mostly to have been the kind of partisan political exercise that I was afraid it might be.

This is especially so coming after hearings attacking the President on the Patient Protection and Affordable Care Act and immigration and attacking the very notion of regulatory agencies themselves. Today's grab bag collection of topics, which appear only intended to support the claim that the Obama administration is lawless, only deepens my disappointment. To begin with, none of the investigations into the actions of the Internal Revenue Service in assessing the applications for tax-exempt status by certain conservative groups has identified any illegal conduct.

In short, despite numerous hearings, witness interviews, and document reviews, including by Congressional Committees and by the Departments of Justice and the Treasury, no one found that the IRS or its employees broke the law. Yet just last week, we heard at least two Members of this Task Force call for the impeachment of the IRS Commissioner from the House floor. And this week, the House will be devoting much of its floor schedule to legislation designed to impugn and undermine the IRS.

The real scandal here is the waste of taxpayer money in the majority's continued pursuit of this nonscandal. Likewise, today's hearings also raises, to me, the unsubstantiated specter of the undeserving welfare recipient. Denigrating the poor as undeserving is a way to score points, I suppose, with some conservative voters, notwithstanding the fact that the Administration has the authority to waive work participation requirements of the Temporary Assistance to Needy Families program.

Section 1115 of the Social Security Act specifies that the Secretary of Health and Human Services may waive certain of the requirements for State welfare programs, including those requirements the States themselves claim are onerous and may even undermine the goals of the welfare amendments enacted in 1996.

Indeed, 3 years ago, the House passed legislation to prohibit the Secretary of Health and Human Services from granting such waivers. That bill, by prohibiting such waivers, implicitly acknowledged that the Secretary had such waiver authority. But my deeper concern is with this line of attack that is that it is simply intended to impugn the most disadvantaged in our society for political gain.

Finally, today's hearings also assail the Environmental Protection Agency's authority under the Clean Air Act to regulate carbon dioxide emissions by power plants. It's clear that section 111(d) of the Act gives the EPA broad authority to address not just pollutants that were known at the time of the Act's passage, but also new problems as they arose. In fact, Congress intentionally gave the EPA the discretion, as the expert agency, to elaborate on these criterias and to resolve ambiguities in them.

As protestors in front of the Capitol remind us, particularly during an election year, we should be using the Committee's time to consider measures that provide real solutions. These include, for example, H.R. 885, the "Voter Rights Amendment Act," which would help restore fundamental protections for voters. And we should address the flood of corporate money in our political system as legitimized by the Supreme Court's Citizens United decision.

Nevertheless, I look forward to hearing our witnesses today. I welcome them all and I thank them for appearing.

And I yield back, Mr. Chairman.

Mr. KING. Nevertheless, I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

Let me now introduce our witnesses. Our first witness is Cleta Mitchell, a partner in the Washington, D.C., office of Foley and Lardner, LLP. And our second witness is Mr. David Bernstein, a George Mason University Foundation professor at the George Mason University School of Law. He's the author of the book *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law*. It was published in November last year. And then our third witness is Emily Hammond, professor of law at George Washington University School of Law. Welcome. And our fourth and final witness is Andrew Grossman, a partner at the D.C. office of Baker and Hostetler.

And we welcome you all here today and we look forward to your testimony.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there's a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness's 5 minutes have expired.

Before I recognize the witnesses, it's a tradition of the Task Force that they be sworn in. Please stand to be sworn in.

Thank you.

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth so help you God?

Let the record reflect that the witnesses have answered in the affirmative.

I now recognize our first witness, Ms. Mitchell, for her 5-minute testimony.

**TESTIMONY OF CLETA MITCHELL, PARTNER,
FOLEY AND LARDNER**

Ms. MITCHELL. Thank you, Mr. Chairman, and Members of the Task Force. Thank you for the opportunity to appear here today on this very important issue of executive branch overreach.

And I think it's important, even though there are some specific agencies that are listed as the topics about which we're to discuss today, and I could spend the rest of the day detailing to you the experiences that I've had with and for my clients and their experiences with the IRS and the targeting. And just to put it in perspective, Congressman Cohen, I've been doing this for a long time, helping organizations receive tax-exempt status from the IRS.

And in a nutshell, what happened beginning in 2009, that's the first client that I had that I realized—began to realize something had changed in the fall of 2009. The IRS took what used to be a process that lasted 3 to 4 weeks and changed it, without any notice to the public, based on targeting and selection and really rounding up and branding of applicants, and turned it into a process that took 3 to 4 years and created burdensome, intrusive, multiple levels and layers of inquiries about every internal aspect of the organization's operations, such that it chilled the First Amendment rights of hundreds of citizen groups and tens of thousands of citizens in the United States.

And I have attached to my testimony today testimony which I provided to the House Oversight and Government Reform Committee in July of 2014, which conducted a hearing on how to keep it from happening again. And I'll just mention three of those items, but there are other suggestions in there. And Congress has enacted a couple of those things, but there is more that needs to be done.

First, Congress should repeal the requirement that exempt organizations disclose their donor list to the government. It's a private schedule. It's not public. There's no public policy reason for citizens groups to have to turn over their donor lists to the Federal Government, to the IRS. And we would urge you to please repeal the Schedule B donor disclosure filing requirement.

I would urge you to also enact legislation that creates a permanent protection so that the IRS is not—and any IRS employee is prohibited by law from utilizing the publicly filed campaign finance reports and published reports of donor information as a basis for targeting citizens and taxpayers for audit. That is—the Supreme Court has recognized the First Amendment rights of Americans to make contributions to organizations, candidates, and parties of their choice. And disclosure is required by law. The IRS should not be allowed to use that public disclosure as the basis for targeting

people for audit or adverse tax activity. So we would urge Congress to make that clear in the statute that that is prohibited.

And, finally, I would urge the Committee and the Congress to enact something that the Supreme Court said existed but which courts throughout the country have resisted giving life to, and that is to provide an individual cause of action that citizens and taxpayers would have to pursue individual IRS employees and, frankly, other Federal employees who violate the constitutional rights of taxpayers and citizens.

The Supreme Court in the *Bivens v. six unnamed Federal narcotics agents*, the Supreme Court recognized this cause of action, but the IRS and the government employees, the IRS employees, in the cases that have been filed regarding the tax—the IRS targeting scandal, has all said that such a right of action does not exist. We urge Congress to clarify and make clear that it does exist.

And then I want to close with something that I think is important for Congress to recognize. This is not a partisan issue. This is a—the Article I role of Congress is at—is at—very much at risk with executive branch overreach not just in this Administration, but going back for decades. And I have five recommendations that I would like Congress to consider doing. First—to reclaim its constitutional authority.

First, I think Congress should abolish the House and Senate Appropriations Committees and reassign the funding responsibility to the Committees of jurisdiction so that funding, oversight, and authorization are handled on an ongoing year-in, year-out basis by the Committees of jurisdiction, rather than separating them such that oversight and authorizing is separated from funding.

Secondly, I think that Congress should consider repealing all general legislative authority delegated to Federal agencies. Because what has happened over the last 40 years is that Congress has delegated its constitutional obligation for enacting legislation and sent that off to Federal agencies and then wonders why it is that the Federal agencies are acting like the Congress. So I would urge the Congress to repeal the general legislative authority that's been delegated and to provide that no regulations can be promulgated without prior congressional approval.

I think you should abolish the Joint Committee on Taxation. We're never going to get tax reform or any changes that I have proposed until and unless you get rid of the Joint Committee on Taxation. I've included recommendations that also were in testimony a year ago, again before the House Committee on Oversight and Government Reform, on how FOIA needs to be redefined, the deliberative process, privilege needs to be eliminated.

And, frankly, I would recommend that Congress create within the GAO a FOIA watchdog division, and that all the funds that are now spent by agencies spending the taxpayers, the millions and millions of dollars, telling us things that may not even be true, and those funds be reallocated so that when citizens try to enforce their FOIA rights, that they actually get a proper response and get the documents that the law says they're entitled to have.

And, finally, I would urge Congress to repeal the Chevron deference doctrine that provides that when litigants appear before the courts of this land to try to hold a Federal agency accountable, the

court gives—puts the thumb on the scale and gives preference and deference to the agencies. Until Congress does something about these principles that have evolved over the last 40 years, we are not going to see an end to executive overreach.

Thank you.

[The prepared statement of Ms. Mitchell follows:]**

****Note:** Supplemental material submitted with this statement is not printed in this hearing record but is on file with the Task Force, and can also be accessed in this witness's statement at:

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104807>

TESTIMONY OF CLETA MITCHELL, ESQ.

**COMMITTEE ON THE JUDICIARY
EXECUTIVE OVERREACH TASK FORCE**

Executive Overreach in Domestic Affairs, Part II:
IRS Abuse, Welfare Reform, and Other Issues

April 19, 2016

Mr. Chairman, Members of the Task Force:

Thank you, first of all, for allowing me to testify here today. And thank you for establishing this Task Force. It is absolutely crucial that Congress take stock of the lawlessness of this Administration, which is evidenced in virtually every action of every agency of the federal government and every area of federal jurisdiction.

Congress is the Article I branch of the federal government. It was intended by our Founders to play the leading role in the national government. Yet, what has happened over the past 90 years, and in particularly over the past seven years under the Obama administration is being reduced to mere bystanders in a government that barely resembles what the Founders had in mind. This Administration has transformed our Constitution and its delicately and carefully developed framework into a ruthless, unilateral monarchical form of government that our Founders rejected and which was and is the antithesis of what our Founders intended, and the opposite of the principles on which our country declared its independence from Great Britain in the first place.

I am here today to discuss what happened in the IRS targeting scandal – the scheme whereby the IRS rounded up and branded hundreds of citizens groups, involving tens of thousands of patriotic Americans nationwide, and quarantined them in a dumping ground within the IRS, stopped processing their applications for

exempt status based on (and I am quoting from the May 2013 report of the Treasury Inspector General for Tax Administration – TIGTA):

“...if the name included the terms Tea Party, or Patriots, or 9/12 Project...
or if the issues that the applicant wanted to work on included such things as
“government spending, government debt or taxes”

or if the group indicated that it planned to educate the public through
advocacy / lobbying to “make America a better place to live”

or IF there were statements in the case file CRITICIZING how the country is
being run...”.

If any of those factors were present, the applicant was shoved into a special category where the application was subjected to heightened and unnecessary scrutiny, where their applications were simply not processed over a period of YEARS rather than weeks, and during which time the groups received multiple sets of questionnaires demanding information that the IRS and TIGTA and even Lois Lerner publicly stated were improper, unfortunate and unnecessary to the processing of their applications. Then, when the scandal became public in May 2013, what have the IRS and this Administration done to ensure this never happens again?

- A new IRS Commissioner was nominated and confirmed ... an individual who had given over \$80,000 to the Democratic party and Democratic candidates in the 10 years preceding his ascension to the top job in the IRS.
- The promised ‘investigation’ by the Department of Justice was a sham...during which the DOJ contacted few – if ANY – of the victims of the targeting, but spent 12 hours interviewing Lois Lerner...the same head of the unit who refused to testify before

Congress...and where the head of the DOJ “investigation” was a maxed out Obama donor.

- The IRS offered a ‘deal’ to the organizations whose applications had been subjected to the viewpoint discrimination that created the targeting scandal...and this ‘deal’ was that IF the organizations would forego *forever* certain constitutional rights the IRS would agree to give them their tax exempt status.
- The IRS issued proposed new regulations that they had developed in secret... “off plan” and never publicly acknowledged until the day the proposed regulations were issued on the day after Thanksgiving – Black Friday in 2013...which would have CODIFIED the unconstitutional mistreatment of citizens and permanently denied to exempt organizations their First Amendment freedoms of speech and association.
- No IRS employee or agent has been demoted, fired, reassigned, or held accountable for the IRS targeting scandal; Lois Lerner is drawing her taxpayer paid retirement and we the taxpayers are paying the legal bills for the private attorneys who are defending the IRS employees and agents who carried out the illegal targeting scheme.

What has Congress done? Congress has held hearings. And issued a number of very detailed reports that document this scandalous behavior by the IRS...And, there have been some changes to the Internal Revenue Code that should help to keep this from happening again.

But there is so much more that Congress must do and that is the purpose of my testimony here today.

With regard to protecting the American people against executive branch overreach, Congress must do two things:

1. Enact additional safeguards and protections in the tax code and other statutes to protect the American people from the IRS and, indeed, every federal agency, to ensure that there is accountability and that there are legal remedies available to taxpayers whose constitutional rights are abused by the IRS and other federal agencies, agents and employees;

AND

2. Congress must restructure ITSELF and reclaim powers it has previously delegated to the executive agencies, in order to restore the constitutional balance between the executive and legislative branches of government, as envisioned by our Founders.

I. Changes to the Internal Revenue Code.

There are a number of changes to the IRC that Congress should enact this year, which will protect the American people from this too-powerful agency, the IRS.

1. **Repeal Schedule B.** The IRC today requires 501(c)(3) organizations to disclose to the IRS their donors of \$5,000 or more. That requirement has been extended by the IRS via regulation to every 501(c) organization. This is not a public schedule – by law, it is confidential. Yet, the IRS has on multiple occasions “accidentally” released the confidential donor information. Congress should repeal the requirement that exempt organizations tell the government who their donors are.

2. Prohibit the use by the IRS of any campaign finance donor disclosures as basis for IRS taxpayer audits. It is clear to me from my experiences over the past several years that the IRS is using required disclosure of donors to campaigns and political organizations as a basis for tracking, scrutinizing, monitoring and auditing taxpayers. It is an area that has NOT been sufficiently examined by Congress...and it should be. What Congress should do without delay is to statutorily prohibit the IRS from collecting and reviewing campaign finance reports or news articles about donors to candidates and political organizations – and to ensure that such information is NEVER included in the monitoring of donors or used in any manner in the selection of donors for audits by the IRS.

3. Add to the Taxpayer Bill of Rights an individual cause of action in federal court against IRS employees who violate the law and who infringe upon the constitutional rights of a taxpayer. The Supreme Court in 1971 conferred a cause of action against individual federal employees who violate the constitutional rights of a citizen. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court said "...power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.... "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra, at 390—395, we hold that petitioner is

entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.”

On several occasions since the *Bivens* decision, Congress has considered creating a specific statutory cause of action within the Internal Revenue Code, such that citizens could recover monetary damages from IRS agents who violate the taxpayer's constitutional rights. In each instance, the IRS Commissioner has advised the congressional committees that such a statute is “unnecessary” because the Supreme Court has already articulated the existence of the remedy in the *Bivens* decision. Yet, in the cases filed against the IRS and individual IRS employees stemming from the targeting of the tea party groups, the IRS and the IRS employees named as defendants in the cases, have all argued to the federal court that a *Bivens* cause of action does not exist because Congress hasn't included it in the statutes.

I serve as counsel to a number of groups targeted by the IRS who are now plaintiffs in these lawsuits. My co-counsel and I disagree with the government's position and we believe that the Supreme Court meant what it said in *Bivens*. But Congress should, once and for all, eliminate any question on this subject and should pass legislation that clearly grants to the citizens the ability to sue federal agencies and individual federal employees who violate their constitutional rights.

I have attached to this testimony other suggested changes to the Internal Revenue Code that I have recommended in prior testimony to Congress about needed changes in the law to ensure that the IRS targeting of the tea party groups *never* is allowed to occur again. See Testimony of Cleta Mitchell to House Oversight & Government Reform Committee, Wednesday, July 30, 2014, “IRS Abuses: Ensuring that Targeting Never Happens Again”, Attachment #1.

II. Change Congress and Reclaim Congressional Authority Over the Executive Branch.

It is not sufficient for Congress to change the Internal Revenue Code. What Congress must also do is make substantive changes in the authorizing laws of the federal agencies and to change its own systems and structures to reassert its Article I authority. The modern Congress has evolved over a period of decades...and every system and structure within the Congress is designed to grow federal power. Every authorizing bill enacted by Congress in the past forty years has conferred unfettered authority upon federal agencies to take over the legislative power of Congress. The ability of citizens to hold federal agencies accountable through FOIA or through legal challenges to federal agency abuses are subject to doctrines that have evolved over the past forty years which treat the citizens as servants of the government, instead of the other way around.

Until and unless Congress changes the way IT is structured and the way IT operates, and until Congress reclaims its legislative authority and responsibility from the executive branch and until Congress gets rid of the doctrines developed – not by the Congress, but by federal courts -- that protect federal agencies from accountability, there is no reason to believe that Congress will be able to get control over the out-of-control federal bureaucracy.

Here are five suggestions for how Congress can reassert the power of the Article I branch of government and reduce the excess of the leviathan federal bureaucracy:

- 1. Abolish the congressional appropriations committees in the House and Senate and vest the spending authority with the committees of jurisdiction.** Congress is structured today in a manner that separates the

spending and budgeting authority from the authorizing and oversight role of Congress. That is absurd. The only thing the agencies really understand is money. Congress should ensure that the funding and oversight roles are carried out in tandem, together. And that the committees charged with oversight also handle the appropriations. That would distribute the responsibility and the power to oversee the executive branch throughout the Congress, ensuring that oversight and authorizing roles are combined with the funding mechanisms. And to ensure that the committee staff do not develop “Stockholm Syndrome” – whereby they start to identify with the agencies rather than the congressional role – staff members should be reassigned every five years from their committees to new committees.

2. Stop the unconstitutional delegation of legislative power and end the unaccountable regulatory state. Congress must reassert its role over the regulatory state. Congress must stop delegating its legislative powers to nameless, faceless bureaucrats. Agencies must be stopped in their tracks from issuing new regulations without prior congressional approval. All of this requires work and focus. Congress must accept that responsibility immediately and halt the expansive growth of the regulatory state by repealing the vast, unlimited legislative authority that is now vested in federal agencies to essentially legislate – with little or no congressional accountability. Repeal that legislative authority that agencies now have, authorize only very limited authority to issue regulations and require all regulations to be approved in advance by Congress. Take away the power that Congress unwisely conferred on the executive branch. Start it today. It is no wonder that the executive branch has swarmed the American system...Congress gave its power away. It is time to reclaim that

congressional duty and power to legislate and to take it away from the executive branch, once and for all.

3. Abolish the Joint Committee on Taxation. There will never be tax reform as long as the JCT exists to block it. Even the changes in the IRC that I have recommended today will be “scored” by the JCT and found to cost billions of dollars, despite the fact that they have NO budgetary impact. Why? Because the JCT exists to protect the IRS from Congress. Until Congress gets rid of that entity altogether, Congress will never regain control over the Internal Revenue Code or the IRS.

4. Overhaul and strengthen the Freedom of Information Act statute and implementation. The Freedom of Information Act (“FOIA”) was established by Congress to ensure transparency and accountability within federal agencies, by requiring federal agencies to produce to taxpayers the documents and materials paid for by taxpayers -- but that process is broken beyond repair. It must be completely overhauled. The IRS, for instance, does not provide ANY documents or materials to taxpayers under FOIA unless the taxpayer SUES the IRS. And then, the documents are either withheld in their entirety or wholly or partially redacted to the point that the production is meaningless -- relying on the “deliberative process privilege” that federal courts have expanded so greatly that the FOIA law is now virtually meaningless. Contrast that with the situations outlined in Sheryl Atkinson’s book Stonewalled, in which she recounts example after example of how our tax dollars are used by federal agencies to spin us...to lie to us...to tell the public things that are simply not true. Those same millions of dollars now being spent by federal agencies to lie to the American people should be reallocated to a FOIA office within GAO, and Congress should rewrite FOIA to substantially narrow the

privileges that federal agencies now claim to keep from complying with FOIA and to withhold information from the citizens. Attached to my testimony is my testimony before the House Oversight & Government Reform Committee last year, and my responses to the Committee's follow-up letter that outlines my suggestions on how to revise and breathe new life in the FOIA process, to reclaim FOIA as a tool to ensure accountability and transparency in the federal government. See Attachments #2, Testimony to the House Oversight and Government Reform Committee, June 2, 2015, on the Freedom of Information Act, and Attachment #3, Responses to Committee questions related to the June 2, 2015 hearing on the Freedom of Information Act.

5. Repeal the Chevron Doctrine. Our government is built on the premise that ours is a nation of laws, not of men. One of the ways that federal agencies have grown ever more powerful over the past forty years is that both Congress and the federal courts have vested the agencies with too much unchecked power and ability to run roughshod over the citizenry. The doctrine articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is a landmark case in which the United States Supreme Court set forth a doctrine which essentially states that in litigation against a federal agency, the federal agency gets the wink and the nod by the court...against the citizens. This doctrine is alien to everything we believe as Americans, and it must be overturned by Congress. It should not be the law in this country that a person who sues the federal government starts with the deck stacked against him. That is what Chevron deference does – it utterly eliminates the notion that is central to our American theory of justice, which is that all parties come before the courts in this country with the equal opportunity to be heard. Chevron deference

turns that principle on its head. And because of Chevron deference, the federal courts are essentially lost to the American people as a source for helping to curb the power of runaway federal agencies. Congress can and must abolish the Chevron deference doctrine if there is to be any hope of restoring the proper balance and separation of powers our Founders gave to us in our Constitution.

These are five things that Congress should do IF you are serious about restoring the rightful role of Congress and IF you are serious about clipping the wings of an out-of-control executive branch of government.

Our nation is at a crossroads and our constitutional framework is completely imbalanced. It bears no resemblance to the balance envisioned and enacted by our Founding Fathers. These steps I've outlined are not easy to accomplish because the entrenched bureaucracy and interest groups both within and outside the Congress will squeal bloody murder at some of these suggestions.

But unless Congress acts boldly to reclaim its role in the constitutional constellation, Congress should just become content with being a bystander – watching with the rest of us as the executive branch runs amok, tramples the rights of the citizens and our country evolves into yet another tyrannical system.

It is up to you, Members of the Task Force. There are many millions of Americans who will support your efforts IF you determine to be bold and do what is necessary to restore the power of the people's branch of government.

Of whom much is given, much is required.

You are the Article I branch -- the FIRST branch – under our Constitution.

We are counting on you to act like it.
Thank you.

Mr. KING. Thank you, Ms. Mitchell.
I now recognize Mr. Bernstein for his testimony.

TESTIMONY OF DAVID E. BERNSTEIN, GEORGE MASON UNIVERSITY FOUNDATION PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. BERNSTEIN. Thank you, Mr. Chairman, Members of the Task Force. Thank you for having me here for this hearing. As the Chairman mentioned, I have a book about the Obama administration and what I perceive to be its lawlessness I document there. But I want to emphasize that, as Ms. Mitchell said, the encroachment by the executive branch on the powers of the legislature and of the judiciary is something that's been going on for a long time. I'm afraid we're reaching a tipping point. And for those who think this is solely a partisan issue, I would suggest that you consider, when I discuss these issues today, how you would feel if a President Trump or a President Cruz exercised similar authority when they—if and when they became President.

So I'm going to focus on several examples today of how the Obama administration has not only violated the law, which is not that uncommon for an executive branch these days, but has done so in ways that really pose a threat to checks and balances that are meant to evade checks and balances. The Administration has not only acted unilaterally without congressional assent, which is what has gotten most publicity, but in some cases, the one I'm going to discuss today, has acted in ways that make it almost impossible for the judiciary to get involved and be the final check on the executive branch.

So my first example involves new government regulations that are disguised as mere guidance. Right? So these executive branch agencies have all this power and they're supposed to, Congress decided in 1940, that in order to enact regulations based on relatively broad or vague congressional legislation, they need to go through this notice and comment period, go through the Administrative Procedure Act, and publish formal regulations that are then subject to judicial review.

But one way of evading that is to just say, well, we're not making regulations; we're just issuing guidance. So the example I have is in 2011, the Department of Education, Office of Civil Rights, sent a Dear Colleague letter to universities around the country requiring universities to change the procedures that they have for dealing with sexual assault on campus when people complain of sexual assault. They were required by this letter to lower the standard of proof to find an accused guilty and also denying a few students of their due process rights, for example, by denying them the right to cross-examine their accusers.

The letter purported to be an interpretation of the Title IX amendment to the Educational Act of 1972, but there's really no case citations in the letter; there's no formal legal analysis. It's just dicta.

Now, when questioned about this, sometimes OCR said, well, these are—this is just guidance. These aren't real regulations. However, assistant secretary of the OCR, Catherine Lhamon, testified under oath before the Senate a couple of years ago, and she

said that we expect the recipients of the letter—in other words, all universities, that in any way take Federal funds—to “fully comply with OCR guidance.”

When the government expects full compliance with its pronouncements, it needs to go through a notice and comment process and create regulations subject to judicial review and not just announce these rules in a letter that can't be reviewed by anybody.

My second example of Administration overreach is the use of TARP funds to—first, to bail out Chrysler and GM and then to use the leverage this gave the government to essentially run the day-to-day operations of General Motors for a time. And the Supreme Court established a long time ago in *Youngstown Sheet and Tube Company v. Sawyer* in 1951, that economic emergency, even when there's a war going on, like the Korean War, does not give the President authority to act unilaterally in the absence of statutory authority. And the most famous opinion from that case by Justice Jackson has come to stand for the proposition that the President's power is lowest when Congress has specifically denied the President the authority to do something.

So here is a bipartisan issue for you: It was the Bush administration in late 2008 that started this. In 2008, Congress, of course, passed TARP and said, we want to give money to financial institutions. Oh, well, I'll give money to car companies we decided too. The House voted yes. The Senate said no. The President went ahead and gave the money to the car companies anyway.

The Obama administration came in, instead of withdrawing from doing this illegal action, instead gave even more money to the car companies and said, by the way, we have a deal for you you can't refuse. We're going to tell you who your chairman is going to be, who your board of directors are going to be, which car models are going to continue, which dealerships are going to continue, and there was really no statutory authority whatsoever to do this.

The third example of Obama administration overreach may actually be called underreach, the Administration's refusal to enforce certain deadlines that are in the Affordable Care Act. And they've done so for, basically, political reasons. There were some rules that would have required people to get new insurance plans that didn't meet Obama—because they didn't meet ObamaCare requirements. The Administration just said, oh, we're going to postpone that for a few years and asked the State insurance commissioners to do so as well.

They also changed the employer mandate to 50 to 100 people—50 to 100 employers—employees. They said, you don't have to abide by that. And it was because elections were coming up, this was unpopular, and they didn't even try to give legal analysis. There was no memo. There was no legal analysis. There were just blog posts on the HHS Web site. “Government by blog posts,” one of my former students and now professional colleagues calls it.

This happened even when the Republicans offered to pass legislation to achieve the same goal. President Obama said, well, I don't want you to pass legislation; I want to do it myself. If you pass legislation, I'm going to veto it.

So my testimony has gone through these three categories: Informally regulating through guidance instead of formal regulations,

exercising massive regulatory authority without legislation over GM in the name of combating economic emergency, and delaying implementation of duly enacted legislation for political reasons. And I fear that if this isn't checked, the whole system of checks and balances we have is at risk.

[The prepared statement of Mr. Bernstein follows:]

David E. Bernstein¹

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 Barholet 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/HFDDiZN7nU2UjwuUuWMnqbM/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=dIiXuv-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/>.

Mr. KING. Thank you, Mr. Bernstein.
The Chair now recognizes Ms. Hammond for her testimony.

TESTIMONY OF EMILY HAMMOND, ASSOCIATE DEAN FOR PUBLIC ENGAGEMENT & PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Ms. HAMMOND. Thank you, Chairman King, Ranking Member Cohen, and distinguished Members of the Task Force for the opportunity to testify today.

I'd like to make a call for nonpartisan administrative law. And what I mean by that is this: We should want a system that permits agencies the flexibility that they need to exercise their expertise, while providing numerous mechanisms to ensure that they operate within the bounds of their statutory mandates. There is room for political decisionmaking within those statutory bounds, and we should be very reluctant to tinker with administrative law for political purposes, because doing so risks a system that operates poorly, regardless of which party has the executive branch.

Our Constitution envisions this kind of system. Congress, of course, may provide as much specificity as it wants in directing agencies how to carry out their work, but this institution simply can't draft statutory language for every new challenge that will arise in the future. So the Constitution permits the President some degree of discretion in executing and enforcing the laws passed by Congress.

With respect to Federal agencies, the President indeed exerts a great deal of control over their policymaking, but the agencies' behavior is constrained in important ways. Consider The Administrative Procedure Act, the APA. At every major part of the APA is a purpose to balance the need for agency discretion with the imperative that they stay within their mandates.

The APA's judicial review provisions are important for enforcing these expectations. Indeed, as I testified in this room last month, judicial review enables courts to police those jurisdictional boundaries set by Congress. They can guard against serious agent errors and incentivize agencies to engage in legitimizing behaviors before the fact, promoting fidelity to statute. Let me give two examples of how this system operates.

The Supreme Court's decision in *Massachusetts v. EPA*, illustrates the limits of Presidential control and the strength of statutory boundaries. As you are no doubt aware, that case involved an agency action rejecting a rulemaking petition to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act. The EPA denied the petition, and it relied for its explanation on various presidential policy preferences.

The Court held that EPA's reasoning was arbitrary and capricious because it did not relate to the statutory test. Notably, this judicial role in cabinining executive discretion operates regardless of the particular political view at issue.

This is illustrated by the recent decision, *Utility Air Regulatory Group v. EPA*, in which the Supreme Court again had occasion to consider EPA's approach to regulating greenhouse gas emissions under the Clean Air Act, this time, under a different Presidential administration with different policy preferences. Once again, the

Court held in part that the EPA had exceeded its statutory authority.

As these examples show, agencies admittedly pushed the boundaries of their statutory authority, whether or not at the express direction of the executive. But courts police that. And even when judicial review is not available, our system provides a variety of mechanisms to monitor agency behavior.

It's striking that the other agencies being discussed today and their actions are the subject of incredible amounts of external review. The FBI, the Department of Justice, the Government Accountability Office, the press, the public, and of course, this institution, have all participated in oversight and robust debate concerning these issues.

It's easy to pick a few examples of big agency decisions to criticize. But I want to emphasize that agencies take thousands of actions every day that conform to good governance. The expectations of judicial review have been internalized into agency culture to such a large degree that they are often present even for unreviewable agency actions.

Our system of administrative law has a vast array of built-in mechanisms to ensure that agencies conform to their statutory mandates. The best policy approach is to let those mechanisms operate as intended, enabling transparency, robust debate, and improving regulatory governance going forward.

Thank you for the opportunity to testify, and I look forward to your questions.

[The prepared statement of Ms. Hammond follows:]

TESTIMONY OF EMILY HAMMOND
ASSOCIATE DEAN FOR PUBLIC ENGAGEMENT & PROFESSOR OF LAW
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

BEFORE THE HOUSE COMMITTEE ON JUDICIARY
EXECUTIVE OVERREACH TASK FORCE
*Executive Overreach in Domestic Affairs Part II—
IRS Abuse, Welfare Reform, and Other Issues*

APRIL 19, 2016

Thank you, Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, for the opportunity to testify today. It is a pleasure to see many of you again.

I am Associate Dean for Public Engagement and Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform, and the Chair of the Administrative Law Section of the Association of American Law Schools. I am testifying today, however, on the basis of my expertise and not as a partisan or representative of any organization. As a professor and scholar of administrative law, I specialize in the actions of federal agencies and the resulting relationships between Congress, the courts, and the executive branch. My work is published in the country's top scholarly journals as well as in many books and shorter works, and I regularly speak on the subject of administrative law.

In my testimony today, I will first provide a general overview of the structure of administrative law and the Administrative Procedure Act (APA). Next, I will describe the opportunities for oversight built into our system of administrative law. Finally, I will describe how federal agencies have in many ways internalized important administrative law norms.

I. The General Structure of the Administrative Law

Our system of administrative law should permit agencies the flexibility they need to exercise their expertise, while providing numerous mechanisms to ensure that they operate within the bounds of their statutory mandates. To be sure, there is room for political decisionmaking within those statutory bounds, but we should be very reluctant to tinker with administrative law for political purposes because doing so risks a system that operates poorly regardless of which party heads the executive branch.

Our Constitution envisions this kind of system. Congress, of course, may provide as much specificity as it desires in directing agencies how to carry out their work. At the same time, the Vesting and Take Care clauses of Article II permit the President some degree of discretion in executing and enforcing the laws passed by Congress. With respect to federal agencies, the President indeed exerts a great deal of control over their policymaking, but the agencies' behavior is constrained in important ways. One such mechanism for controlling agencies is the APA.

The APA itself was a compromise, between liberal interests that wanted New Deal agencies to have freedom to regulate as they saw fit, and conservative interests that wanted to ensure that freedom was appropriately cabined. The result is a carefully balanced system that permits agency discretion, but only within the limits of the statutory mandate. As originally enacted, the APA includes three structural components: section 553's informal rulemaking provisions; sections 556 and 557's formal rulemaking and adjudicatory provisions; and section 706's standards for judicial review. Later, Congress added the critically important Freedom of Information Act, codified in section 552 of the APA.

Implicit in each of these major structural components is the expectation that agencies will exercise broad discretion within their statutory authority. The judicial review provisions are typically considered among the most important for enforcing those expectations. Indeed, as I testified last month, the judicial review provisions of the APA contemplate that courts will police the jurisdictional boundaries set by Congress, they guard against serious errors, and the fact of review incentivizes agencies to engage in legitimizing behaviors before the fact, such as promoting participation, deliberation, and transparency. In turn, these behaviors and judicial review facilitate external monitoring of agency behavior, whether by interested parties, the press, the executive, or Congress.

The Supreme Court decision *Massachusetts v. EPA*, 549 U.S. 497 (2007), illustrates the limits of presidential control. As you are no doubt aware, the underlying agency action was a rejection of a rulemaking petition to regulate greenhouse gas emissions of new motor vehicles under the Clean Air Act (CAA). EPA denied the petition, relying for its explanation on various presidential policy preferences. The Court held that EPA's reasoning was arbitrary and capricious because it did not relate to the statutory text. Notably, this judicial role in cabining executive discretion operates regardless of the particular political view at issue. Recently, in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), the Supreme Court again had occasion to consider EPA's approach to regulating greenhouse gas emissions under the CAA under a different presidential administration with different policy preferences. Once again, the Court held in part that EPA had exceeded its statutory authority, this time for departing from the text and purposes of the statutory provision at issue.

As these examples show, agencies admittedly may push the boundaries of their statutory authority—whether or not at the express direction of the executive. But judicial review is frequently available to rein in agency behavior and bring it back within the confines of its statute. Even when judicial review is not available, moreover, our system includes numerous avenues for external monitoring of agency behavior.

II. External Monitoring of Agency Behavior

Today's hearing relates to agency actions taken with respect to tax enforcement, welfare requirements, and climate change. What is notable about each of these topics is that they all show the power of external monitoring. One type of external monitoring is judicial review, as illustrated by the climate change example above. Other external monitors include the press, the public, Congress, and even oversight authorities within the executive branch like the Office of Information and Regulatory Affairs (OIRA).

Consider, for example, the tax enforcement issue. The reason we know about it is external monitoring. As early as 2012, this institution held oversight hearings in response to constituent complaints. The press closely followed the issue, ultimately publishing significant journalism on the IRS's behavior. Agency officials themselves spoke on the issue, and the Attorney General ordered Justice Department and FBI investigations. After significant attention from Congress, the public, the Administration, and the press, the IRS began work on a rule with the purpose of resolving some of the flaws in existing regulations. But commenters identified numerous deficiencies in the proposed rule, so the agency withdrew it with a plan to redraft. This is precisely what administrative law contemplates—the agency was working to correct itself and learned from the comments offered in response to a proposed rule. Yet Congress has now forbidden the agency from further work on improving its existing flawed regulation, leaving in place the very system that gave rise to the tax enforcement issue in the first place. It is one thing to exercise oversight and bring significant agency wrongdoing to light. It hamstring the process, however, to prevent an agency from working to improve its own flawed regulations without providing any sensible alternative.

With respect to welfare and work-participation requirements, it is also notable that the need for reforms was identified by the nonpartisan Government Accountability Office—another source of external monitoring. Moreover, the administration's policy was formulated in response to comments from state officials and is fashioned to provide flexibility to states. Even if it is not immediately reviewable in court, the guidance document is available and transparent, and has certainly attracted significant attention since its issuance in 2012. Furthermore, experience with how HHS implements its approach will provide even more opportunities for oversight. And finally, the public will have the opportunity to weigh in on this and numerous other policy matters during the November elections.

III. Agency Behavior and Administrative Law Norms

It is easy to pick a few examples of big agency decisions to criticize, but I want to emphasize that agencies take thousands of actions every day that conform to the administrative law norms of good governance. The expectations of judicial review—in particular, the transparency and reason-giving norms originating from judicial doctrines—have been internalized into agency culture to such a large degree such that they are often present *even for unreviewable agency actions*. As my co-author and I concluded in a 2013 study of agency behavior in the absence of judicial review, agencies often engage in dialogue with regulated entities and interest groups alike; they frequently respond to concerns raised even without attention from Congress or the courts; they typically provide reasons for their responses and treat those who appear before them with respect.¹ And by the way, our study was enabled by one further means of external oversight—the Freedom of Information Act.

¹ See generally Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Envtl. L. Rev. 313 (2013).

IV. Conclusion

Our system of administrative law has a vast array of built-in mechanisms to ensure that agencies conform to their statutory mandates. The best policy approach is to let those mechanisms operate as intended, enabling transparency, robust debate, and improved regulatory governance going forward.

Thank you again for the opportunity to testify today. I look forward to your questions.

Mr. KING. Thank you for your testimony, Ms. Hammond.
The Chair would now recognize Mr. Grossman for his testimony.

**TESTIMONY OF ANDREW M. GROSSMAN, ADJUNCT SCHOLAR,
CATO INSTITUTE, AND PARTNER, BAKER & HOSTETLER LLP**

Mr. GROSSMAN. Thank you, Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee.

I'd like to address three questions today, if I could. The first, what is executive overreach? The second, why does it matter? And the third, what can we do about it? To begin with, what are we talking about here?

Now, in a very general sense, when the executive asserts authority to make decisions of major economic and political significance that have not been authorized by Congress, in a certain constitutional sense, that may comprise executive overreach. Likewise, overreach may involve enacting new policies that Congress has not enacted, or received and rejected, or it may involve refusing to faithfully execute the law that has, in fact, been legislated.

Now, that's one set of overreach, and that's a sort of qualitative view of it. But overreaching is typically facilitated and accompanied by other abuses, including arbitrary enforcement policies to achieve political or policy ends, the use of guidance to set forth new legal requirements, and structuring actions in such a way as to evade or delay judicial review.

Now, let me give two examples that take these general principles and, perhaps, make them a bit more concrete. The first is the Department of H—Health and Human Services' 2012 guidance that requested States apply to the Department to waive the work requirements that were the centerpiece of the 1996 Welfare Reform Act. That Act, in particular, requires two things.

First, it requires that States require a certain number of the able-bodied persons on their roles to engage in work activities and, second, it requires that those work activities be particular activities, not made-up work, not busy work, but specific things that actually look and feel and seem like work.

The President asserted authority under section 1—1115 of the Social Security Act, but that section actually specifically does not reply to the provision of the Welfare Reform Act that concerns the welfare work requirements.

Indeed, that statute expressly conditions funding to the States for the welfare programs on adherence to the work requirements. The section 115—I'm sorry—1115 waiver authority applies only to other items concerning State plans: Areas of State plans where States have discretion, where they can experiment, where they can do different things, where they get to make choices. The work requirements were not among those things.

There are three or four different features of the statutory scheme that confirm that particular interpretation. The 2012 guidance addressed none of this. In fact, it barely provided any legal rationale whatsoever. Why? Well, the reason was, was that the Administration recognized that there was basically no possibility that anybody could challenge this measure in court. The Administration knew that this was a blatant attempt to circumvent Congress' commands.

It engaged in what appears, to me, to be unusually aggressive statutory interpretation. It blew up a very limited waiver authority to something that the waiver authority plainly does not contemplate or countenance. And then it did all of this with the expectation that it would be able to evade any kind of judicial review.

And, indeed, the thing that surprised me during this particular episode, is that the Administration's defenders in this particular action chiefly argued simply that nobody would ever be able to take the Administration to court to prove their point. In other words, there was very little defense of this particular action on the merits.

Likewise, the clean power plan to regulate carbon dioxide emissions from existing power plants relies in an obscure all but forgotten provision of the Clean Air Act to seize authority over electricity production across the Nation. According to the Administration, the provision allowing EPA to determine the "best system of emission reduction" applicable to a particular kind of source—in this case, power plants—authorized its required generation shifting; in other words, running some kinds of plants less or closing them in favor of other types of sources that are preferred by the EPA.

Now, that abandons 30 years of consistent EPA interpretation of that statute, 30 years of judicial interpretation of that statute. And it clashes with plain statutory requirements, for example, that a particular standard be achievable by sources to which its applicable. In short, it could provide a basis to shut down any plant, any source of emissions in the entire country in favor of some other thing that EPA might prefer. And that's exactly the kind of discretion that Congress sought to deny EPA, due to the economic consequences that would be involved. Congress wanted to retain that authority for itself.

Again, this is all of the hallmarks of overreach. It's a blatant attempt to circumvent Congress, which rejected the Administration's plans to regulate greenhouse gas emissions. It's enormously aggressive statutory interpretation. And, moreover, the Administration attempted to rush the rule into force so as to evade judicial review. Well, it didn't work. The Supreme Court stayed the rule, recognizing that it was likely illegal.

Why does any of this matter? Well, I don't think this is about partisan politics at all. It implicates the rights and the liberties of all Americans. The Constitution provides for separation of powers to protect individual liberty and it provides for checks and balances to confine each branch of government to its proper place, and, therefore—thereby enforce the separation of powers.

The precedents that are set by this Administration would provide a basis for future executives to carry out policies that could never pass Congress. In this way, departing from the constitutional design because it might be convenient today jeopardizes Americans political freedoms and individual liberties over the long term.

So, finally, let me address what Congress can do about executive overreach. In my written testimony, I offer a number of different proposals that Congress should, to my mind, consider. Let me briefly address three of them here.

The first, as Ms. Mitchell described, is to rethink judicial deference, the agency interpretations of statutes and regulations. Doctrines like Chevron and Auer have facilitated overreaching across

the board. In too many instances, the search for meaning in written law has been replaced with the hunt for ambiguities that might allow the agency to escape the legal confines of the law. Congress can and should rethink these doctrines.

Second, Congress should act to ensure that judicial review is always available and as much as possible is effective. That may include automatically pausing certain agency actions so that agencies can't force compliance with legally questionable rules before courts have a chance to review their merits.

And, third, the court should—sorry—Congress should reconsider broad delegations of authority. At one time, Congress could reasonably expect that the executive branch would not seek to take advantage of unclear or ambiguous statutory language as a basis for launching broad policy initiatives. Those kinds of issues, it was well understood, would be left to Congress. But that time has long passed and the open-ended language remains in the books. Congress should take care to ensure that new laws reserve its policy-making authority and, as possible, should act to clarify older statutes.

In conclusion, executive overreach is a serious problem, and the Task Force should be commended for its efforts to identify the scope of the problem as well as potential solutions.

I thank the Subcommittee for the opportunity to testify on these important issues.

[The prepared statement of Mr. Grossman follows:]

**Executive Overreach in Domestic
Affairs Part II — IRS Abuse,
Welfare Reform, and Other Issues**

Testimony before the Executive Overreach Task
Force, Committee on the Judiciary, United States
House of Representatives

April 19, 2016

Andrew M. Grossman
Adjunct Scholar, Cato Institute
Partner, Baker & Hostetler LLP

My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a partner in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

This Task Force's work is both important and urgent. It is important because the actions of the Obama Administration, especially in President Barack Obama's second term, threaten to permanently upend our constitutional separation of powers by arrogating to the Executive Branch powers that had previously been reserved to the Legislative Branch and subject to check by the Judicial Branch. Although apologists for this Administration can rightly claim that its aggressive use of executive power has continued trends in executive unilateralism that began in previous administrations, unwilling to engage a Congress wary of its policy priorities, it has pushed more forcefully to expand the limits of executive action beyond those recognized by its predecessors. And that, in turn, is why the issue of executive overreaching is so urgent. We simply do not know whether this President's actions have established a new *status quo*, one that will be impossible for future presidents—no matter their political affiliation—to abandon in favor of the old understandings and arrangements. Indeed, we do not know whether future presidents will consider the Obama Administration's executive actions to be a baseline for further, even more aggressive actions that depart still further from our constitutional separation of powers.

Interest in the issue of executive overreaching is not confined to the legal profession and the policy community. The use, abuse, and limits of executive power have been overriding issues of public concern in the current and previous administration. Many members of the public, as well as members of this body, question the legitimacy of numerous actions taken by the current administration, from circumventing Congress to "enact" immigration reform, to circumventing Congress to regulate greenhouse gas emissions and ban new coal-fired power plants, to circumventing Congress to repeal the work requirements that were the centerpiece of 1996's welfare reform, to circumventing Congress to "rewrite" problematic provisions of the Patient Protection and Affordable Care Act.

Inevitably, reaction to individual examples of overreaching is colored by politics, with the President's supporters often willing to suspend their wariness of executive unilateralism when it is deployed to achieve policy goals that they favor and his detractors sometimes quick to pounce on perceived abuses that do not always pan out. But that understandable division should not obscure the fact that the Obama Administration has launched us into a new era of executive administration by seizing the prerogative to make the kind of decisions of enormous economic, social, and practical significance that had

heretofore been made by Congress—particularly in the area of domestic policy. The current President’s supporters should understand, no less than those who disagree with his policy agenda, that placing so much power in the executive carries great risks, risks that ultimately outweigh the policy results that they now celebrate. How many of those who approve the unilateral actions of the Obama Administration would be content to see those same powers, or even greater ones premised on Obama-era precedents, exercised by an administration helmed by a President Donald Trump, Ted Cruz, Hillary Clinton, or Bernard Sanders?

What’s really at stake here are not fleeting political victories, but the rights and liberties of all Americans. The Constitution provides for separation of powers to protect individual liberty¹ and for checks and balances to confine each branch of government to its proper place and thereby enforce the separation of powers. Departing from the Constitution’s structure because doing so may be convenient in some mundane political dispute jeopardizes Americans’ political freedoms and individual liberties over the long term.

Congress is not powerless to reverse this trend, and it can and should work to assert and reclaim its place in the constitutional order. That will not be easy. It will require the fortitude to wield the power of the purse against executive prerogative and to conduct intensive and forceful oversight. It will also require thoughtful legislation to address the pathologies of our current arrangements that the current Administration has exploited so skillfully. And it will require rethinking the ways that Congress has—sometimes intentionally, sometimes inadvertently—facilitated executive overreaching through delegations of broad discretion.

Although there is little prospect that any substantial regulatory reforms will become law in this Congress—why would the President sign a bill abolishing techniques that have proven so useful to his Administration?—now is the time to lay the intellectual and political groundwork for an aggressive first-one-hundred-days regulatory reform agenda for the next administration. It is in that spirit that this testimony analyzes several instances of executive overreaching by the current Administration, identifies the means by which that overreaching was achieved, and then presents several modest proposals for reform to prevent future abuses and shore up the separation of powers.

I. Waiving Welfare Reform’s Work Requirements

The centerpiece of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 was Section 407, which is entitled “Mandatory Work Requirements” and sets out an absolute requirement that state welfare programs achieve specific work-participation rates or forfeit federal funding.

¹ See *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011).

In a 2012 “Information Memorandum” to states, the Obama Administration Department of Health and Human Services encouraged states to submit proposals for state welfare programs that do not comply with Section 407’s work requirements, asserting that HHS has the authority to waive compliance with that provision. This episode reflects several themes in executive overreaching: circumvention of Congress to achieve policy goals, aggressive statutory interpretation to increase executive discretion, abuse of waiver authority, and reliance on lack of standing to avoid potential legal challenges.

A. The 1996 Act Established “Mandatory Work Requirements”

The 1996 Act replaced the failed Aid for Families with Dependent Children program, which perversely encouraged dependency on government by offering states additional federal funding as their welfare rolls grew. The new program, Targeted Aid for Needy Families (TANF), offered block grants to states with programs that met certain conditions. Foremost among these conditions were that states require able-bodied welfare recipients to engage in “work activities” and that each state achieve specified work-participation rates for welfare recipients.

Section 407 lays out these requirements in clear, imperative language. The statute contains two tables specifying minimum work-participation rates, one for all families receiving assistance and one for two-parent families receiving assistance.² A state receiving TANF funding “shall achieve the minimum participation rate” specified in each table for each applicable year.³ For 2002 and thereafter, the applicable participation rates are 50 percent for all families and 90 percent for two-parent families.⁴ To prevent gaming, the statute even contains a provision specifying the precise method of calculating participation rates.⁵

The work requirements for welfare recipients are equally clear and equally mandatory. The statute provides that, “if an individual in a family receiving assistance...refuses to engage in work..., the State shall” either “reduce the amount of assistance” to that family on at least a pro rata basis or simply “terminate such assistance.”⁶ States can decline to impose a penalty for violations only in three circumstances: for “good cause,” for exceptions established by the state and approved by HHS, and for a single parent where childcare is

² 42 U.S.C. § 607(a).

³ 42 U.S.C. §§ 607(a)(1), (a)(2).

⁴ *Id.*

⁵ 42 U.S.C. § 607(b).

⁶ 42 U.S.C. § 607(e)(1).

otherwise completely unavailable.⁷ Such exceptions are not counted, however, in calculating states' work-participation rates.⁸

It is apparent on the face of Section 407 that Congress was concerned that the Department of Health and Human Services (HHS), which administers TANF, or states would attempt to evade the law's strict work requirements. To prevent backsliding, it legislated in great detail, defining terms with specificity and setting hard caps on exemptions. For example, rather than leave the matter to administrative discretion, Section 407 enumerates 12 "work activities"—including subsidized and unsubsidized employment, on-the-job training, and vocational training—that satisfy the state and individual work requirements.⁹ It specified the number of hours per week that family members would be required to work to be considered "participating in work activities."¹⁰ It put a hard cap of 30 percent on the proportion of a state's welfare recipients who could participate in educational activities and still be counted as engaged in work.¹¹ Finally, the law requires HHS to oversee and verify states' compliance with all work requirements.¹²

In addition to the penalties for individuals refusing to work, the 1996 Act established penalties for states that did not comply with Section 407. States that failed to cut off or reduce assistance to such individuals would lose between 1 and 5 percent of their TANF funding in the subsequent year, amounting to millions of dollars.¹³ And states that failed to meet the minimum work-participation rates specified in Section 407 would lose 5 percent of their federal funding in the subsequent year, increased by 2 percentage points for each year of non-compliance, up to 21 percent.¹⁴ In this way, Congress gave the work requirements real teeth.

B. The Obama Administration Asserts Authority To Waive Work Requirements

On July 12, 2012, HHS issued an "Information Memorandum" to state welfare plan administrators regarding "waiver and expenditure authority un-

⁷ 42 U.S.C. §§ 607(e)(1), (e)(2).

⁸ 42 U.S.C. § 607(b)(1)(B).

⁹ 42 U.S.C. § 607(d).

¹⁰ 42 U.S.C. §§ 607(c)(1)(A), (1)(B).

¹¹ 42 U.S.C. § 607(c)(1)(D).

¹² 42 U.S.C. § 607(i). *See also* 42 U.S.C. § 609(a)(15) (imposing penalties for states' failure to comply with work participation verification procedures).

¹³ 42 U.S.C. § 609(a)(14).

¹⁴ 42 U.S.C. § 609(a)(3).

der Section 1115.”¹⁵ Despite the prosaic title, the memorandum signaled a major shift in policy for HHS regarding the mandatory nature of the work requirements contained in Section 407.

HHS, the memorandum explained, “is encouraging states to consider new, more effective ways to meet the goals of TANF, particularly helping parents successfully to prepare for, find, and retain employment.”¹⁶ To achieve these goals, the memorandum announced that HHS would accept applications for waivers from TANF requirements “to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families.” Specifically, “to improve employment outcomes,” HHS would exercise its Section 1115 waiver authority to “waive compliance” with Section 407 and authorize states to adopt different “definitions of work activities and engagement, specified limitations, verification procedures, and the calculation of participation rates.”¹⁷

The memorandum contained a single paragraph of legal analysis supporting HHS’s novel contention that it could waive any aspect of Section 407:

Section 1115 authorizes waivers concerning section 402.... While the TANF work participation requirements are contained in section 407, section 402(a)(1)(A)(iii) requires that the state plan “[e]nsure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 407.” Thus, HHS has authority to waive compliance with this 402 requirement and authorize a state to test approaches and methods other than those set forth in section 407, including definitions of work activities and engagement, specified limitations, verification procedures, and the calculation of participation rates.¹⁸

That same day, Representative Dave Camp and Senator Orrin Hatch sent a letter to HHS Secretary Kathleen Sebelius requesting that she provide “a detailed explanation of your Department’s legal reasoning” underlying its assertion of authority to waive Section 407’s requirements.¹⁹

¹⁵ Memorandum from Earl Johnson, Director, Office of Family Assistance, to States administering the TANF Program and other interested parties (July 12, 2012), at 1, *available at* <http://www.acf.hhs.gov/programs/ofa/policy/im-ofa/2012/im201203/im201203.html>.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ Letter from Dave Camp, Chairman, House Ways and Means Committee, and Orrin Hatch, Ranking Member, Senate Finance Committee, to Kathleen Sebelius, Secretary of Health and Human Services (July 12, 2012), *available at*

The Secretary responded a week later with a three-page letter explaining that “Republican and Democratic Governors have requested more flexibility in welfare reform” and, in particular, that governors of both parties had supported legislation in 2005 to broaden waiver authority.²⁰

Accompanying Secretary Sebelius’s letter was a one-page attachment setting forth the Administration’s “Legal Basis for Utilizing Waiver Authority in TANF.” This document recapitulates the legal basis offered in HHS’s earlier Information Memorandum—i.e., that because Section 1115 authorizes waiver of requirements in Section 402, and because Section 402 mentions Section 407, Section 1115 authorizes HHS to waive Section 407.²¹

HHS, the Secretary’s letter further explains, “has long interpreted its authority to wave state plan requirements under Section 1115 to extend to requirements set forth in other statutory provisions that are referenced in the provisions governing state plans.” As an example, it mentions Wisconsin’s “Work Not Welfare” program, which included a waiver of rules related to the distribution of child support contained in Section 454, despite that Section 1115 only references the child support state plan provisions of Section 457 (which, in turn, references Section 454). Even if there were doubt as to this authority, the document continues, Congress has ratified HHS’s more expansive interpretation by declining to amend the statute.²²

Finally, the document dismisses the argument that a separate provision, Section 415, precludes HHS from waiving Section 407’s work requirements, on the basis that this limitation applied only to the “former AFDC program” and “does nothing to restrict the Secretary’s waiver authority with respect to the current TANF program.”²³

C. Legal Analysis: An Overreach

By its own terms, Section 407 establishes a set of obligations on states accepting TANF funding from the federal government. It expressly conditions their entitlement to funds on satisfying specified “work requirements.” It contains no exception to its reach and no provision giving the Secretary of HHS authority to relax or waive its requirements. There can be no question but

http://waysandmeans.house.gov/UploadedFiles/7.12.12_TANF_work_requirements_letter.pdf.

²⁰ Letter from Kathleen Sebelius, Secretary of Health and Human Services, to Orrin Hatch, Ranking Member, Senate Finance Committee (July 18, 2012), *available at* <http://www.washingtonpost.com/blogs/ezra-klein/files/2012/07/Sen-Hatch-TANF-7-18-.pdf>.

²¹ *Id.* at 4

²² *Id.*

²³ *Id.*

that, by default, it applies to all states accepting TANF funding. HHS does not dispute this point, nor could it.

The questions that HHS's actions raise, however, are (1) whether the Secretary possesses authority, from some other statutory source, to excuse states accepting TANF funding from full compliance with Section 407's requirements and (2) if so, whether that authority is limited by any other provision. As to the first question, HHS points to Section 1115's waiver authority, but as is discussed below, that provision cannot be read to reach Section 407. As to the second, even if Section 1115 could be interpreted, standing alone, to authorize the waiver of Section 407's requirements, that interpretation would ultimately have to be rejected in light of the more specific language of Section 415, which precludes the waiver of work requirements and confirms Congress's intention that Section 407's work requirements not be subject to waiver.

1. Section 1115 Waiver Authority

HHS argues that Section 1115 authorizes it to waive Section 407's work requirements. It does not.

Section 1115 provides, in relevant part:

In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [various human welfare programs], in a State or States—(1) the Secretary may waive compliance with any of the requirements of section 302, 602, 654, 1202, 1352, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project[.]²⁴

(Because it refers to U.S. Code provisions, rather than the organic statute, its reference to Section 602 corresponds to Section 402 of the Social Security Act.)

Section 402, in turn, defines what it means to be an “eligible state,” i.e., one that is eligible to receive a TANF block grant.²⁵ In particular, it requires a state to “submit[] to the Secretary a plan,” in the form of a “written document that outlines how the State intends to” carry out various requirements for federal funding.²⁶ Among other things, a state must outline how it intends to

²⁴ 42 U.S.C. § 1315(a)(1).

²⁵ 42 U.S.C. §§ 602(a), 603(a)(1)(A).

²⁶ 42 U.S.C. § 602(a)(1)(A).

“[e]nsure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section [407].”²⁷

This provision, HHS argues, allows it to waive Section 407’s work requirements. But that contention must be rejected on three grounds.

The first, and simplest, is the negative-implication canon, or *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). Section 1115 lists seven provisions the requirements of which the Secretary may waive. Section 407 is not among them. Ergo, the Secretary has no authority to waive its requirements. The enumeration of statutory provisions subject to waiver manifests congressional intent to limit the Secretary’s discretion, not to allow her free reign over the entirety of Title 42.²⁸

Second is the precise language and structure of Sections 402 and 407. Section 407 establishes freestanding requirements for state programs receiving TANF funding and does not depend on Section 402 for its effectiveness. Its text contains commands for states participating in TANF: they “shall achieve the minimum participation rate” and “shall reduce the amount of assistance otherwise payable” to a family whose members refuse to work.²⁹ These provisions establish independent obligations on states participating in TANF and are effective irrespective of any requirement of Section 402. In other words, even had Section 402 omitted any reference to Section 407, they would still continue in force; a state would merely be relieved from “outlin[ing]” in a “written document . . . how the State intends to satisfy” any portion of Section 402.

This interpretation is confirmed by Section 402’s limited reference to Section 407’s requirements. As described above, Section 407 imposes two separate types of requirements for states: (1) that they attain certain “minimum participation rate[s]” and (2) that they impose penalties on any recipient of assistance (with certain exceptions) who “refuses to engage in work.”³⁰ But Section 402 only refers to the latter requirement; it does not so much as mention the minimum participation requirements. Accordingly, those requirements cannot possibly be among the “requirement[s] of section [402]” that Section 1115 authorizes the Secretary to waive. And there is no basis in the text of Section 407 to distinguish between the two types of work requirements;

²⁷ 42 U.S.C. § 602(a)(1)(A)(iii).

²⁸ See, e.g., *United States v. Giordano*, 416 U.S. 505, 514 (1974).

²⁹ 42 U.S.C. §§ 607(a)(1), (a)(2), (e)(1).

³⁰ *Id.*

both are specified in the same imperative language, as freestanding commands on participating states.³¹

Third is the distinction between Section 402, which is concerned with states' discretion in carrying out their TANF programs, and other provisions (including Section 407) intended to deprive them of any discretion. Section 402 lays out the minimum contents for a state plan that is "eligible" for funding, requires that the plan be submitted in a "written document," and requires the state to certify that it will carry out the provisions of the written plan.³² This mechanism allows the states discretion as to how they structure and operate their TANF programs, within the parameters allowed by the statute. That discretion may be broadened by Section 1115 waivers that relax Section 402 requirements.

But the statutory structure reflects that Congress did not intend to give the states such broad discretion with respect to all aspects of their programs and, in particular, with respect to work requirements. This is why minimum work-participation requirements are nowhere mentioned in Section 402; Section 407 affords states zero discretion as to whether they will meet these requirements, such that there is no reason for the states to "outline" their preferred policy choices. They have no choice, other than declining to seek TANF funds.³³ Conversely, because states have some discretion as to how they intend to implement the individual work requirements for welfare recipients, they are required to outline how they intend to exercise that discretion.³⁴ There is no basis in Section 402 to conclude, however, that their failure to do so—for example, if the outlining requirement is waived—somehow absolves them from carrying out the individual work requirements altogether.

To the contrary, Congress carefully and deliberately distinguished between areas where the states would have some discretion (and where waivers might be appropriate) and those where they would not (and waivers would be unavailable). This is apparent in comparing the broad and discretion-conferring language of Section 402 with the absolute commands of Section 408, which specifies non-waivable "prohibitions" and "requirements," and of Section 409, which specifies in comprehensive fashion penalties for states' violation of TANF requirements. Section 408 contains a number of bedrock requirements for all state TANF programs, such as prohibiting assistance to

³¹ Compare 42 U.S.C. §§ 607(a)(1), (a)(2) with 42 U.S.C. § 607(e)(1).

³² 42 U.S.C. § 602(a)(4).

³³ See 42 U.S.C. § 607(a)(1) (work requirements apply only to "a State to which a grant is made).

³⁴ In particular, 42 U.S.C. 607(e)(1) grants states some discretion to establish "exceptions" to the recipient work requirement, although they remain subject to the minimum work-participation rate requirements.

families without minor children.³⁵ Although containing three separate penalties for violations of Section 407's work requirements, Section 409 does not impose penalties for any "requirement" of Section 402.³⁶ Instead, it establishes a number of additional requirements for state TANF programs. As a result, states are not penalized for legitimate exercise of their discretion under Section 402, but they are for violations of the requirements of Sections 407, 408, and 409.

The history of Section 402 also shows that Congress intended this distinction. Prior to the 1996 Act, Section 402 contained all requirements for state welfare programs, while providing the states substantially less flexibility in the structure and operation of their programs. It opened with the command that "[a] State plan for aid and services to needy families with children must . . ." and proceeded through the subsequent nine pages of the official U.S. Code to enumerate in excruciating detail every requirement for state programs, all of them mandatory.³⁷ Accordingly, Section 1115 (which did then, as now, apply to Section 402) permitted the Secretary to waive any requirement whatsoever respecting states' welfare programs.

TANF, however, scrapped the prior approach, replacing the specific strictures of Section 402 with general requirements that afforded states substantial flexibility in the design of their programs, over which the Secretary retained waiver authority to provide still-further flexibility.³⁸ But where Congress sought to preclude state flexibility, as with work requirements, it used mandatory language and placed those requirements in separate provisions not subject to Section 1115.

This also cuts against the Administration's argument that Congress ratified HHS's broad assertions of waiver authority; to the contrary, Congress acted to pick and choose to which requirements it would apply. The Administration's interpretation, however, would render the distinctions drawn by Congress in the text and structure of the 1996 Act entirely ineffective, as if it had merely amended Section 402 and left it at that. Of course, Congress did no such thing, and a court would not so casually deprive amendments made by Congress of any meaning.³⁹ Indeed, when a previous Secretary raised a similar argument concerning his Section 1115 authority, the court rejected it

³⁵ 42 U.S.C. § 608(a)(1).

³⁶ 42 U.S.C. §§ 609(a)(3)(A), (a)(14)(A), (a)(15)(A).

³⁷ 42 U.S.C. § 602(a) (1994).

³⁸ 42 U.S.C. § 601(a).

³⁹ *United States v. Wells*, 519 U.S. 482, 495-96 (1997) (rejecting ratification argument where Congress reenacted statute).

in favor of “[t]he plain language of the statute.”⁴⁰ There is little doubt that a court would view things the same way in this instance, perhaps even without wading into the intricacies of the TANF program.

2. Section 415’s Limitation on the Secretary’s Waiver Authority

That the Secretary lacks authority to waive Section 407’s work requirements is confirmed by another provision of the 1996 Act, Section 415, which provides additional limitations on the Secretary’s waiver power with respect to work requirements.

Section 415(a) sets out rules governing the treatment of waivers in place at the time the 1996 Act came into effect and those “granted subsequently.” For waivers already in effect, states may continue to receive funding without complying with the Act’s new requirements, although only until the expiration of the waiver, without regard to any extensions.⁴¹ Similarly, for waivers submitted and approved between the date of the Act’s passage (August 22, 1996) and its effectiveness (July 1, 1997), states may continue to receive funding without complying with the Act’s new requirements, so long as the waiver does not increase federal costs.⁴² But a third provision states that, notwithstanding the exception for plans submitted and approved during the interim period, “a waiver granted under section [1115] or otherwise which relates to the provision of assistance under a State program funded under this part (as in effect on September 30, 1996) shall not affect the applicability of section [407] to the State.”⁴³

The Administration argues that this third provision “has no application” to present-day waivers “because it is a transitional provision applicable only to waivers under the former AFDC program....”⁴⁴ But there is some ambiguity in the language of the statute. It can be read broadly to preclude any “waiver granted under section [1115]” from waiving Section 407’s work requirements. Or it can be read more narrowly, to apply only to “a waiver granted under section [1115]...which relates to the provision of assistance under a State program funded under this part (as in effect on September 30, 1996).” While the Administration may have the better argument on this point—in light of the placement of this provision in a subsection regarding “continuation of waivers” and its parallel placement with the interim-waiver

⁴⁰ *Portland Adventist Medical Center v. Thompson*, 399 F.3d 1091, 1099 & n.9 (9th Cir. 2005).

⁴¹ 42 U.S.C. § 615(a)(1)(A).

⁴² 42 U.S.C. § 615(a)(2)(A).

⁴³ 42 U.S.C. § 615(a)(2)(B).

⁴⁴ Sebelius letter, at 4.

provision—its interpretation is not inevitable. (Also, for what little it may be worth, the legislative history says nothing on this point, one way or the other.)

But the Administration’s interpretation, even if correct, is fatal to its position regarding Section 1115 authority. It concedes, as it must, that Congress allowed states obtaining interim-period waivers to ignore every single new requirement of the 1996 Act *except for the work requirements contained in Section 407*, which they were required to implement immediately upon their becoming effective. This confirms the absurdity of the Administration’s central claim that those same states could, under subsequent waivers granted after the 1996 Act went into effect, abandon those same work requirements that Congress specifically required they implement even under interim-period waiver plans. It makes no sense to suggest that Congress was so concerned about ensuring that the work requirements were not waived that it inserted a stop-gap provision to prevent waiver during the interim period following the passage but then authorized HHS to waive those requirements at will at any time thereafter.

The absurdity of this argument demonstrates its fallacy: if the Administration’s interpretation of Section 415 is correct, then its interpretation of Section 1115 to allow it to waive work requirements is surely wrong.

D. The Aftermath

HHS’s 2012 guidance attracted considerable attention and criticism, particularly from Members of Congress. It may be that the resulting controversy doomed this particular attempt to circumvent the law: given the popularity with the public of the 1996 Act’s work requirements, perhaps state officials were unwilling to bear the political cost—including intensive oversight by their own legislatures and by Congress—of seeking to waive them. So far as I am aware, no states ultimately took advantage of HHS’s invitation to dispense entirely, or even substantially, with Section 407 compliance. But the episode is, nonetheless, instructive for several reasons.

First, the guidance was a blatant attempt to circumvent Congress to achieve the policy goals of the Administration and its allies, who have long opposed the 1996 Act’s work requirements. Shortly before the guidance was announced, the President stated, “We’re going to look every single day to figure out what we can do without Congress.”⁴⁵ In this instance, the Administration never even attempted to work with Congress to change the law, perhaps recognizing that any such effort would most likely be futile or even backfire

⁴⁵ Remarks by the President on College Affordability, Oct. 26, 2011, <http://www.whitehouse.gov/the-press-office/2011/10/26/remarks-president-collegeaffordability>.

by drawing greater attention to an attempt to strike or water down a popular measure. So the Administration determined to go it alone.

Second, to do that, it relied on one of the Administration's most useful tools, aggressive interpretation of statutory authority, typically to increase executive discretion. As described above, the Administration appears not to have devoted all that much attention to the legal basis of its 2012 guidance, instead contriving a superficially plausible rationale and going no further. While in other instances the Administration has employed interpretative gymnastics to reach preferred policy results, here it settled for much less.

Third, and related, the 2012 guidance took advantage of a limited waiver provision. The Administration has used waiver provisions—often intended for special circumstances, emergencies, or (in the case of “cooperative federalism” programs) facilitating state experimentation in particular areas—to expand its policy discretion across the board. Waiver authority in programmatic areas can rarely be challenged in court and often—even if intended for narrow circumstances—can be employed to override the most detailed statutory provisions that Congress put care and thought into crafting. The implicit understanding that waiver authority might be intended only for unusual or emergency circumstances, with general provisions to otherwise govern, is not one that is necessarily enforceable and not one that this Administration has felt compelled to observe. It has also recognized that waiver authority can be used to effectively “enact” new programs, by waiving onerous statutory requirements for parties who agree to carry out policies not mentioned in the statute but favored by officials. In this way, even the most narrowly conceived waiver provisions can become open-ends grants of executive authority unless they are subject to clear statutory limitations.

Fourth, the Administration felt no need to drill down on its statutory interpretation, or to take seriously limitations on its waiver authority, because it did not expect to have to justify its legal position in court. The Supreme Court has interpreted Article III's “case” or “controversy” requirement to require a plaintiff to demonstrate “standing”—in short, that it (1) has suffered, or will imminently suffer, a concrete injury (2) caused by the conduct challenged (3) that can be redressed by a favorable decision.⁴⁶ The 2012 guidance was probably viewed by the Administration as immune from judicial review, because it was just guidance (which is not reviewable under the Administrative Procedure Act⁴⁷) and because any action under it would not result in conferring standing on any plaintiff. Under the guidance, a state would approach HHS with a proposed program, and HHS in turn would waive statutory re-

⁴⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴⁷ See 5 U.S.C. § 704.

quirements in approving that program. No particular party⁴⁸ would be injured, and so no one could bring suit. Unsurprisingly, a number of the Obama Administration’s most controversial assertions of executive authority have been in circumstances where the Administration anticipated that judicial review would be unavailable due to standing limitations.

In sum, the Administration’s 2012 attempt to waive the 1996 Act’s work requirements may be most notable as an exemplar of how executive overreach works: stretching statutory authority, and evading judicial review, so as to avoid having to win congressional approval. That it was ultimately unsuccessful reflects the fact that the President, acting unilaterally, is still constrained by reality—much as even the Administration’s most heroic overreaching has been insufficient to drive up enrollment in PPACA insurance plans.

II. EPA’s “Tailoring Rule”

In 2014, the Supreme Court struck down, in part, an Obama Administration EPA regulation purporting to “tailor” numerical thresholds in the Clean Air Act by reading them to be entirely different numbers, so that the agency could impose regulation on a larger set of facilities than it otherwise would be able to.⁴⁹ The episode is a clear example of attempting to rewrite a statute to achieve particular policy goals, in reliance on both judicial deference canons and standing-based defenses to evade judicial review—a strategy that, in the end, failed for the Administration.

In 2009 and 2010, the Obama Administration EPA released the federal government’s first round of regulations addressing greenhouse gas emissions under the Clean Air Act. The “Endangerment Finding” announced EPA’s determination that greenhouse-gas emissions by motor vehicles endanger public health and welfare by fostering climate change.⁵⁰ The “Triggering Rule” announced that the effectiveness of standards for motor-vehicle greenhouse-gas emissions would trigger permitting requirements for stationary sources (e.g., factories, power plants, etc.), as well, under certain Clean Air Act programs.⁵¹ One of those programs, Prevention of Significant Deterioration (“PSD”), makes it unlawful to construct a “major emitting facility” without first obtaining a permit, which in turn requires that the facility employ the “best available control technology” for emissions of regulated pollutants.⁵² A

⁴⁸ Other than taxpayers, but taxpayer status is generally insufficient to confer standing. See *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁴⁹ *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

⁵⁰ 74 Fed. Reg. 66496 (2009).

⁵¹ 75 Fed. Reg. 17004 (2010).

⁵² 42 U.S.C. § 7475.

“major emitting facility” is defined by the statute to be any stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources).⁵³

EPA’s “Tailoring Rule” addressed those statutory thresholds. EPA explained that the PSD program was meant to regulate only “a relatively small number of large industrial sources,” but that applying the statutory thresholds would require thousands of sources to obtain permits, due to the large amounts (much larger than other regulated emissions) in which greenhouse gases are typically emitted. That, the agency said, would make PSD both unadministrable and “unrecognizable to the Congress that designed” it. Rather than read the statute not to regulate greenhouse-gas emissions as regulated “pollutants”—a capacious term arguably subject to some agency interpretative discretion—the agency acted to “tailor” the PSD threshold, requiring sources emitting 100,000 tons per year of carbon-dioxide (or its equivalent) to obtain a permit, while leaving open the possibility that it might reduce the threshold in the future.⁵⁴

In other words, EPA rewrote the statutory language “two hundred and fifty tons per year or more of any air pollutant” as “10,000 tons per year of carbon-dioxide.” It then argued that, because this rewrite alleviated burdens on sources that would otherwise be regulated, no one was injured by it such that a party would have standing to challenge it.⁵⁵ The D.C. Circuit bought that argument.⁵⁶

Not a single justice on the Supreme Court did. Instead, the Court addressed the merits and held that the statute could not be read to trigger PSD requirements based greenhouse-gas emissions. The majority, in an opinion by Justice Antonin Scalia, rejected EPA’s call for deference to its statutory interpretation under the standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁵⁷ The Court agreed with EPA that “that requiring permits for sources based solely on their emission of greenhouse gases at the 100– and 250–tons–per–year levels set forth in the statute would be ‘incompatible’ with ‘the substance of Congress’ regulatory scheme.’”⁵⁸ But, unlike

⁵³ 42 U.S.C. § 7479(1).

⁵⁴ This account is somewhat simplified for concision. The rule actually involves several thresholds and phases, as well as the “Title V” program, none of which alters this legal analysis.

⁵⁵ See *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012).

⁵⁶ *Id.*

⁵⁷ 467 U.S. 837, 842–843 (1984).

⁵⁸ 134 S. Ct. at 2443 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)).

EPA, it concluded that “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”⁵⁹ While an agency may have interpretative discretion in areas of statutory ambiguity, “[i]t is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD...permitting.”⁶⁰ Agencies, it concluded, “are not free to adopt...unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.”⁶¹ Allowing them to do so “would deal a severe blow to the Constitution's separation of powers.”⁶²

EPA's power-grab, the Court recognized, was basically unprecedented:

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.⁶³

But, as will be seen below, neither the agency nor the Administration were chastened.

This episode again reflects an attempt to circumvent Congress in achieving policy priorities—here, imposing limitations on new sources of greenhouse gases that could remain in operation for years. EPA adopted an interpretation of broad language in the Clean Air Act that was at odds with more specific provisions of the statutory text, and deployed a number of open-ended legal theories—including the need to ensure its own “administrative convenience”—as grounds to expand its discretion. It also relied heavily on judicial deference canons, as well as standing doctrine to evade review entirely of its most suspect statutory interpretations. These are all recurring motifs in the annals of executive overreach.

⁵⁹ *Id.* at 2445.

⁶⁰ *Id.*

⁶¹ *Id.* at 2446 (quotation marks omitted).

⁶² *Id.*

⁶³ *Id.* at 2446.

III. EPA's "Utility MACT" Rule

EPA's "Utility MACT" Rule, also known as the "Mercury and Air Toxic Standards" ("MATS") Rule, was an instance where the Administration was able to shield a legally vulnerable regulation from effective challenge, allowing it to impose tens of billions of dollars in costs and force the premature retirement of a number of power plants despite that its rule was ultimately held unlawful.

At issue was the application of the Clean Air Act's hazardous air pollutants program, contained in Section 112 of the Act, to power plants. The Section 112 program targets stationary-source emissions of a number of listed hazardous air pollutants.⁶⁴ The program's focus is on categories of sources (e.g., petroleum refineries, industrial process cooling towers, etc.) that emit those pollutants. EPA is required to "list" all categories of sources that emit hazardous air pollutants and then issue emissions standards for each listed category.⁶⁵ Unlike other pollution-control programs, Section 112 provides little discretion in setting minimum standards for "major sources"—those emitting or with the potential to emit more than 10 tons of a single pollutant or more than 25 tons of a combination of pollutants per year.⁶⁶ In general, under the "maximum achievable control technology" standard, major sources are subject to a "floor" based on "the average emission limitation achieved by the best performing 12 percent of the existing sources."⁶⁷ EPA then may in some circumstances go "beyond the floor"—that is, make them even more stringent—based on cost considerations and other factors.⁶⁸ But the general idea of Section 112 and MACT is that every major source—no matter its age or unique characteristics—is required to minimize emissions of hazardous air pollutants to the same extent as the very best performing sources in the same category.⁶⁹

When Congress created the current Section 112 program in the 1990 Clean Air Act Amendments, it required EPA to identify, list, and regulate nearly all categories of sources emitting hazardous air pollutants but made an exception for fossil fuel-fired power plants. Recognizing that other provisions of the Amendments would directly lead to significant reductions in power plants' emissions of hazardous air pollutants through market-based measures

⁶⁴ 42 U.S.C. § 7412.

⁶⁵ *Id.* § 7412(c)(1)-(2).

⁶⁶ *Id.* § 7412(a)(1).

⁶⁷ *Id.* § 7412(d)(3)(A).

⁶⁸ *Michigan*, 135 S. Ct. at 2705.

⁶⁹ See generally, *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000); S. Rep. No. 101-228, at 131-33 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3516-18.

and could therefore render Section 112 regulation unnecessary, it directed EPA to study power-plant emissions and review “alternative control strategies.”⁷⁰ It then directed EPA to regulate power plants under Section 112 only if it “finds such regulation is *appropriate and necessary* after considering the results of the study.”⁷¹

Pursuant to a consent decree, EPA proposed MACT standards for power plants in May 2011 and published a final rule in February 2012.⁷² The final rule’s preamble features a dense 54-page discussion of the basis for regulation, ultimately “affirm[ing]” that application of Section 112 to power plants remained “appropriate and necessary.”⁷³ Although greatly expanded, the 2012 analysis relies on the same interpretation of the statutory trigger as an earlier 2000 finding.⁷⁴ Under that earlier finding (as well as the 2012 one), regulation is *appropriate*, in the agency’s view, if power plants emit a listed hazardous air pollutant that poses risks to public health or the environment and if controls are available to reduce those emissions. Regulation is *necessary* if other Clean Air Act programs do not eliminate those risks. Despite the statute’s special treatment for power plants, EPA viewed the costs of regulation—in this instance, the application of the Clean Air Act’s most stringent program to the nation’s largest category of industrial sources—as irrelevant.

The agency did respond to comments that it was required to consider costs in assessing the “appropriate[ness]” of regulation. According to EPA, it was reasonable to make the decision listing power plants without consideration of the costs of regulation because it is forbidden from considering costs when making listing decisions under Section 112 for other source categories.⁷⁵ It also claimed discretion to adopt an interpretation of “appropriate” turning only on the ability of Section 112 regulation to address power plants’ emissions of hazardous air pollutants. “Cost,” it concluded, “does not *have to be read* into the definition of ‘appropriate.’”⁷⁶ In this, the agency appeared to argue that it had discretion to consider costs, but was not obligated to do so.

⁷⁰ 42 U.S.C. § 7412(n)(1)(A). See also 136 Cong. Rec. 3493 (Mar. 6, 1990) (statement of Sen. Symms); 136 Cong. Rec. H12911, 12934 (daily ed. Oct. 26, 1990) (statement of Rep. Oxley).

⁷¹ 42 U.S.C. § 7412(n)(1)(A) (emphasis added).

⁷² *Id.* For an account of the events leading up to entry of the consent decree, see Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon 5–7 (2014), available at <http://www.heritage.org/research/reports/2014/02/regulation-through-sham-litigation-the-sue-and-settle-phenomenon>.

⁷³ 77 Fed. Reg. 9,304, 9,310–64 (Feb. 16, 2012).

⁷⁴ See *id.* at 9,311.

⁷⁵ *Id.* at 9,327.

⁷⁶ *Id.* (emphasis added).

And so it decided not to, on the view that Section 112 was geared to reducing hazards to human health and the environment.⁷⁷

Although EPA did not take into account costs when determining whether to regulate, it did produce a “Regulatory Impact Analysis” tabulating the expected costs and benefits of the standards. The regulation would force power plants to bear costs of \$9.6 billion per year⁷⁸—making the rule one of the most expensive in the history of the federal government.⁷⁹ It projected monetized direct benefits—that is, benefits flowing directly from reduced emissions of hazardous air pollutants, particularly mercury, that could be quantified—of \$4 to \$6 million per year, chiefly from “avoided IQ loss” resulting from reduced mercury exposure.⁸⁰ It also projected ancillary benefits attributable to reductions in emissions of particulate matter (and to a much lesser extent, carbon dioxide) amounting to \$37 to \$90 billion per year, while acknowledging that these particulate matter “co-benefits” are subject to “uncertainty” based on limitations in its research linking particulate-matter levels with health outcomes.⁸¹

The rule was challenged on numerous grounds but ultimately upheld by the D.C. Circuit, over the dissent of Judge Kavanaugh, who argued that it was “entirely unreasonable for EPA to exclude consideration of costs in determining whether it is ‘appropriate’ to regulate electric utilities under the MACT program.”⁸² In Judge Kavanaugh’s view, the result was the same “whether one calls it an impermissible interpretation of the term ‘appropriate’ at *Chevron* step one, or an unreasonable interpretation or application of the term ‘appropriate’ at *Chevron* step two, or an unreasonable exercise of agency discretion under *State Farm*.”⁸³ The Supreme Court granted three petitions raising that point and directed the parties to address a single question that it had formulated: “Whether the Environmental Protection Agency unreasona-

⁷⁷ See *id.*

⁷⁸ *Id.* at 9,305–06.

⁷⁹ *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1263 (D.C. Cir. 2014), (Kavanaugh, J., concurring in part and dissenting in part) (citing James E. McCarthy, Congressional Research Service, R42144, EPA’s Utility MACT: Will the Lights Go Out? 1 (2012)).

⁸⁰ See 77 Fed. Reg. at 9,306, Table 2, 9,427–28. For a description of EPA’s convoluted approach to estimating and monetizing these benefits, see Brief for the Cato Institute as Amicus Curiae, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/michigan-v-epa-merits.pdf> (“Cato Michigan Brief”).

⁸¹ 77 Fed. Reg. at 9,306 & Table 2.

⁸² *White Stallion*, 748 F.3d at 1261 (Kavanaugh, J., concurring in part and dissenting in part).

⁸³ *Id.* at 1261 (Kavanaugh, J., concurring in part and dissenting in part).

bly refused to consider cost in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities.”⁸⁴

The Court’s opinion in *Michigan v. EPA*, authored by Justice Scalia, forcefully declares, “Not only must an agency’s decreed result be within the scope of its lawful authority”—that is, within its statutory authority—“but the process by which it reaches that result must be logical and rational.”⁸⁵ And that process, it continues, must rest “on a consideration of the relevant factors.”⁸⁶

The opinion reasons that there is a presumption that agencies will consider the costs of their actions. “Agencies,” it says, “have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”⁸⁷ And it is not “even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”⁸⁸ Accordingly, to overcome the presumption that costs will be taken into account, EPA’s burden was to identify “an invitation to ignore cost.”⁸⁹

The “appropriate and necessary” language, the Court concluded, is not anything of the sort. While recognizing that the word “appropriate” is “capacious[],” which would ordinarily provide an agency a wide scope of interpretative discretion, the majority explains that a reasonable statutory interpretation may not, like any agency action, “entirely fai[l] to consider an important aspect of the problem”—which “naturally” includes costs.⁹⁰ After all, “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”⁹¹ For example, an agency could not reasonably deem something like emissions limitations “appropriate” if “the technologies needed to eliminate these emissions do even more damage to human health.”⁹²

⁸⁴ 135 S. Ct. 702 (2014).

⁸⁵ 135 S. Ct. at 2706 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

⁸⁶ *Id.* (quoting *State Farm*, 463 U.S. at 43).

⁸⁷ *Id.* at 2707.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2708.

⁹⁰ *Id.* at 2707 (quoting *State Farm*, 463 U.S. at 43) (alteration in original).

⁹¹ *Id.*

⁹² *Id.*

Michigan thus held that EPA acted unlawfully when it issued the Utility MACT Rule, but the Court’s decision has not had any impact on the Rule itself. One day after the decision dropped, EPA Air Administrator Janet McCabe took to the agency’s weblog to boast that the Court’s decision wouldn’t make any difference to the agency’s plans. Because the Rule hadn’t been stayed, “the majority of power plants are already in compliance or well on their way to compliance.”⁹³ In other words, plants had spent (by EPA’s own estimation) tens of billions of dollars to comply with a Rule that, at the end of the day, was unlawful. On that basis, the D.C. Circuit declined to vacate the Rule, instead remanding it to EPA for further consideration. Challengers are currently seeking to interest the Supreme Court in reviewing that decision.⁹⁴

As discussed below, EPA attempted to take advantage of this precedent in its next major action, the Clean Power Plan.

IV. EPA’s “Clean Power Plan”

EPA’s “Clean Power Plan” represents the agency’s attempt to arrogate to itself authority over the nation’s generation fleet and electric grid that has always been exercised by the states and, in certain aspects, by the Federal Energy Regulatory Commission. The Plan relies on aggressive statutory interpretation, as bolstered by *Chevron* deference, to effect a transformation of the nation’s energy economy. Keenly aware of the Utility MACT precedent, and no doubt concerned over the legal infirmities of the Clean Power Plan, the Supreme Court acted to stay the rule on February 9, 2016.⁹⁵

The Plan relies on Section 111(d) of the Clean Air Act. That provision charges states to establish and apply “standards of performance” for certain existing stationary sources of air pollutants. A “standard of performance” is “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.” Under Section 111(d), EPA “establish[es] a procedure” for states to submit plans establishing such standards and providing for their implementation and enforcement. EPA’s procedure must allow states “to take into consideration, among other factors, the remaining useful life” of a source. Only if a state fails to submit a compliant plan may EPA step in and promulgate a federal plan to regulate sources within a state directly.⁹⁶

⁹³Janet McCabe, In Perspective: the Supreme Court’s Mercury and Air Toxics Rule Decision, June 30, 2015, <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>.

⁹⁴ See Petition for Certiorari, *Michigan v. EPA*, No. 15-1152 (filed Mar. 14, 2016).

⁹⁵ Order, *Chamber of Commerce v. EPA*, No. 15A787, et al. (filed Feb. 9, 2016).

⁹⁶ 42 U.S.C. § 7411.

EPA promulgated the Plan at the same time that states and utilities were making final decisions whether to upgrade or retire coal-fired facilities in response to Utility MACT—which EPA projected would result in the retirement of 4,700 megawatts of coal-fired generating capacity and require tens of billions of dollars in investments for the remaining facilities to achieve compliance by the April 16, 2016 deadline. The Plan aims to reduce carbon-dioxide emissions from the power sector by 32 percent by 2030, relative to 2005 levels. These emissions reductions are premised on states’ actions to overhaul their electric sectors, shifting from coal generation to natural gas and from fossil fuels to renewable sources like wind and solar.

It specifies numerical emissions rate- and mass-based CO₂ goals for each state, based on its existing coal-fired and gas-fired generation fleet. These goals are based on projected emissions reductions that EPA believes can be achieved through the combination of three “building blocks” that it says represent a baseline “best system of emission reduction”: (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation with increased use of natural gas, and (3) replace fossil-fuel-fired generation with generation from new, zero-carbon-emitting renewable energy sources, such as wind and solar. 80 Fed. Reg. at 64,667/1. In other words, the EPA Power Plan requires states to transition away from coal-fired generation and take all steps that are necessary to integrate other generating sources and to maintain electric service. EPA, however, itself lacks the authority to carry out all but the first of these building blocks, as well as supporting actions necessary to reorganize the production, regulation, and distribution of electricity.

Yet EPA recognizes that such “generation-shifting” will be required for states to comply with the Plan. EPA acknowledges that source-specific efficiency improvements are insufficient to achieve anywhere near that required magnitude of reductions. Accordingly, whether a state adopts a state plan to meet these targets or EPA promulgates a federal plan, the Plan forces the state to undertake and facilitate generation-shifting, as well as substantial legislative, regulatory, planning, and other activities to accommodate the changes required by the Plan and to maintain electric service throughout the state.

Serious federalism issues aside, the Plan contravenes two separate statutory limitations on EPA authority. First is the bar on regulation of source categories already subject to Section 112—as power plants are following EPA’s Utility MACT rule. Section 111(d) states that EPA may not require states to issue “standards of performance for any existing source for any air pollutant...emitted from a source category which is regulated under section [112].”⁹⁷ The Supreme Court recognized the plain meaning of the Section 112

⁹⁷ 42 U.S.C. § 7411(d)(1)(A)(i).

exclusion in *AEP v. Connecticut*, finding that “EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the ‘hazardous air pollutants’ program, § 7412. See § 7411(d)(1).”⁹⁸ EPA promulgated Section 112 regulations for electric utility generating units—that is, power plants—in 2012. EPA therefore lacks authority to require Section 111(d) emissions standards for power plants—full stop.

In fact, EPA likewise has recognized for years that “a literal reading” of the language codified at 42 U.S.C. § 7411(d)(1) mandates “that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112.”⁹⁹

Of course, where the “literal reading” of the text is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰⁰ And that should be the end of the matter here: the Clean Air Act unambiguously withholds authority from EPA to require states to establish Section 111(d) performance standards for a source category, like power plants, that is regulated under Section 112.

EPA’s primary defense to the plain language of the Act is to assert that there is an ambiguity in the Statutes at Large concerning Section 111(d), based on two portions of the 1990 Clean Air Act Amendments that EPA claims conflict.¹⁰¹ The first is a substantive amendment to Section 111(d) (the “House Amendment”). Before 1990, the Section 112 exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant “included on a list published under...112(b)(1)(A).”¹⁰² This meant that if EPA

⁹⁸ 131 S. Ct. 2527, 2537 n.7 (2011).

⁹⁹ 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). *Accord* EPA, Air Emissions From Municipal Solid Waste Landfills – Background Information For Final Standards And Guidelines 1-6 (1995) (explaining that the Section 112 exclusion applies “if the designated air pollutant is...emitted from a source category regulated under section 112”); Final Brief of Respondent at 105, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) (“[A] literal reading of this provision could bar section 111 standards for any pollutant, hazardous or not, emitted from a source category that is regulated under section 112.”); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) (“A literal reading...is that a standard of performance under CAA section 111(d) cannot be established for any air pollutant that is emitted from a source category regulated under section 112.”); EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26 (2014) (“EPA Legal Memorandum”) (“[A] literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112.”).

¹⁰⁰ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

¹⁰¹ *E.g.*, EPA Legal Memorandum 22–23.

¹⁰² 42 U.S.C. § 7411(d) (1989).

had listed a pollutant under Section 112, the agency could not regulate that pollutant under Section 111(d). In order “to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112,”¹⁰³ the House Amendment provides:

strik[e] “or 112(b)(1)(A)” and insert[] “or emitted from a source category which is regulated under section 112.”¹⁰⁴

The second amendment (the “Senate Amendment”) appears in a list of “Conforming Amendments” that make clerical changes to the Act. Conforming amendments are “amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill.”¹⁰⁵ Consistent with this description, the Senate Amendment merely updated the cross-reference in the Section 112 exclusion. It states:

strik[e] “112(b)(1)(A)” and insert[] in lieu thereof “112(b)”.¹⁰⁶

This clerical update was necessitated by the fact that substantive amendments expanding the Section 112 regime—broadening the definition of “hazardous air pollutant” and changing the program’s focus to source categories—had renumbered and restructured Section 112(b).

As an initial matter, there is no true conflict between the amendments. Amendments are executed in the order of their appearance,¹⁰⁷ and the House Amendment appears first in the 1990 Act, striking the reference to “112(b)(1)(A).” Accordingly, the Senate Amendment fails to have any effect, because it is no longer necessary to “strik[e] ‘112(b)(1)(A)’” to conform the Section 112 exclusion to the revised Section 112.¹⁰⁸ The U.S. Code provision, in other words, fully enacts both amendments.

¹⁰³ 70 Fed. Reg. at 16,031.

¹⁰⁴ Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

¹⁰⁵ Legislative Drafting Manual, Office of the Legislative Counsel, United States Senate 28 (1997) (“Senate Manual”).

¹⁰⁶ Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990).

¹⁰⁷ Manual on Drafting Style, House Legislative Counsel 42 (1995); Senate Manual 33. See also Donald Hirsch, *Drafting Federal Law* § 2.2.3, p.13 (U.S. House Office of Legislative Counsel, 2d ed. 1989); Lawrence E. Filson & Sandra L. Strokoff, *The Legislative Drafter’s Desk Reference* § 14.4, p.191 (CQ Press, 2d ed. 2008). The Supreme Court recognizes these treatises as authoritative on legislative drafting. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 & n.4 (2004); *id.* at 71 (Scalia, J., dissenting).

¹⁰⁸ See Revisor’s Note, 42 U.S.C. § 7411 (Senate Amendment “could not be executed, because of the prior [House] amendment”). The failure of a subsequent amendment to have any effect, due to changes made by an earlier amendment in the same legislation, is not at all unusual. Oklahoma is aware of more than 30 other instances—including dozens in Title 42 alone—in which an amendment to the U.S. Code failed to have any effect due to an earlier

In any case, the U.S. Code provision is also consistent with Congress’s intent in enacting both amendments, which address different aspects of the scope of EPA’s authority. The House Amendment added a limitation to the scope of Section 111(d): where a category of sources is regulated under Section 112, Section 111(d) cannot be used to impose additional performance standards on that source category. The purpose was to ensure that existing source categories regulated under Section 112—which the 1990 Act substantially revised to focus on source categories rather than pollutants—would not face additional costly regulation under Section 111.¹⁰⁹

The Senate Amendment had a different focus, seeking to maintain the pre-1990 prohibition on using Section 111(d) to regulate emissions of hazardous air pollutants from existing sources regulated under Section 112. Failure to retain that limitation would have allowed EPA to undo Congress’s considered decision to regulate only certain sources of hazardous air pollutants: the 1990 Act requires EPA to regulate all major sources of hazardous air pollutants, but only those area sources representing 90 percent of area source emissions, thereby sparing many smaller sources from the stringent Section 112 regime.¹¹⁰ 42 U.S.C. § 7412(c)(3). In other words, the Senate Amendment restrains EPA from circumventing this limitation by simultaneously regulating the same emissions under both Section 112 and 111(d) and thereby burdening all sources, even the ones Congress exempted from regulation.

Thus, by blocking both double regulation and circumvention of the Section 112(c)(3) area-source limitation, the U.S. Code provision achieves Congress’s intent underlying both amendments and constitutes a statutory limitation on EPA’s authority. But even if there were a conflict, an agency or court “must read [allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose.”¹¹¹ Thus, even assuming *arguendo* that there is a potential conflict, EPA’s interpretation must be rejected because it deprives the House Amendment of any effect. EPA cannot attempt to manufacture ambiguity to expand its interpretative license and ability to pursue its policy goals.

The second statutory defect in EPA’s overall approach is more fundamental: the statute does not permit EPA’s generation-shifting approach, only

amendment. Petitioner’s Opening Brief at 31–32 n.9, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. filed Mar. 9, 2015).

¹⁰⁹ See 70 Fed. Reg. at 16,031 (discussing legislative history and concluding that the House Amendment sought to avoid “duplicative or overlapping regulation”).

¹¹⁰ “Major” sources emit or have the potential to emit above a statutorily prescribed threshold of hazardous air pollutants; “area” sources are those that fall below this threshold. 42 U.S.C. § 7412(a)(1)–(2).

¹¹¹ *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

allowing it to specify standards of performance applicable to, and achievable by, particular sources.¹¹² In EPA's view, "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886/1. That includes requiring a source owner or operator to shift generation to another source. But while the first "building block"—reducing emissions by improving sources' efficiency—may be lawful to the extent that it is "achievable," measures that involve reducing the utilization of coal-fired power plants in favor of other generation sources are not permissible components of the "best system of emission reduction" that underlies a Section 111 standard.

This is plain on the face of the statute. Section 111(d) requires states to "establish[] standards of performance *for any existing source*" that is already subject to a new source performance standard.¹¹³ Likewise, Section 111(d) requires EPA to establish "standards of performance for new sources" within listed categories.¹¹⁴ These provisions simply do not authorize obligations regarding other sources—for example, that application of a performance standard to a coal-fired plant would require increased utilization of some other facility that is not subject to the standard. Confirming as much, Section 111(e) enforces new source performance standards by providing that it is "unlawful for any owner or operator" of a regulated source to violate any such applicable standard.¹¹⁵

Indeed, a "best system of emission reduction," which is used to determine an emission standard, must be both "achievable" and "adequately demonstrated," but those requirements would be nullified if generation-shifting (which is always an achievable and adequately demonstrated means of reducing emissions) in favor of other sources or reduced output were a permissible basis for a performance standard.¹¹⁶ Achievability, the D.C. Circuit has long held, must therefore be demonstrated with respect to the regulated source category itself.¹¹⁷

Moreover, Section 111 expressly regulates sources' emissions "performance," which concerns the rate of emissions at a particular level of production, and not the level of production. In other words, mandating that a high-emissions facility shifting production to another facility may reduce emissions, but it has nothing to do with that facility's emissions performance. In-

¹¹² 42 U.S.C. § 7411(a)(1).

¹¹³ 42 U.S.C. § 7411(d)(1)(A) (emphasis added).

¹¹⁴ 42 U.S.C. § 7411(b)(1)(B).

¹¹⁵ 42 U.S.C. § 7411(e).

¹¹⁶ 42 U.S.C. § 7411(a)(1).

¹¹⁷ *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

deed, in its Section 111 regulations, EPA determines “performance” by measuring “pollutant emission rates” with respect to particular levels of production.¹¹⁸ Similarly, its regulations do not regard “[a]n increase in production rate of an existing facility” as a modification triggering application of new source performance standards.¹¹⁹

In light of these and many other statutory features, the courts have had no difficulty in recognizing that “best system of emission reduction” refers to measures applicable to a particular facility. The Supreme Court, viewing this language, recognized that it refers to “technologically feasible emission controls”—that is, emission-reduction technologies implemented at the source.¹²⁰

EPA’s own regulations reflect the same understanding. Its regulations establishing procedures for state plans pursuant to Section 111(d) define compliance in terms of the purchase and construction of “emission control systems” and “emission control equipment,” as well as other “on-site” activities.¹²¹ They require EPA to publish guidelines “containing information pertinent to control of the designated pollutant form [sic] designated facilities,” which in turn refers to “any existing facility which emits a designated pollutant.”¹²² Likewise, EPA’s guidelines must reflect “the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated *for designated facilities*.”¹²³ These citations are just the tip of the iceberg. A complete recitation of all the EPA regulatory actions that treat “best system of emission reduction” as referring to on-site measures would go on for pages. A recent example is the agency’s proposed performance standards for new power plants—released less than two weeks after the Plan—which reaffirms that Section 111 standards of performance “apply to sources” and must be “based on the BSER achievable at that source.”¹²⁴

The Plan was, as noted above, stayed by the Supreme Court, and its lawfulness is currently being litigated before the D.C. Circuit, with a decision ex-

¹¹⁸ 40 C.F.R. § 60.8(e).

¹¹⁹ 40 C.F.R. § 60.14(e).

¹²⁰ *Hancock v. Train*, 426 U.S. 167, 193 (1976). See also *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 869 (3d Cir. 1981) (“system” is something that a source can “install”); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981) (holding that, prior to an amendment authorizing operational standards, EPA could not “require a use of a certain type of fuel” that would reduce emissions).

¹²¹ 40 C.F.R. § 60.21(h).

¹²² §§ 60.22(a), 60.21(b) (cross-reference omitted).

¹²³ § 60.22(b)(5) (emphasis added).

¹²⁴ 79 Fed. Reg. 36,880, 36,885 (June 30, 2014).

pected before the end of the year. It is not premature, however, to identify the Plan as an example of executive overreaching: it seeks to effect a transformation of the U.S. energy economy by contorting an obscure statutory provision into license for EPA to regulate the central aspects of electricity generation and distribution across the nation. Whether or not ultimately upheld by the Judicial Branch, this kind of action involves the sort of major questions that are properly decided by Congress in exercise of its legislative power.

And it certainly bears all the hallmarks of overreaching: circumvention of Congress to achieve a major policy priority; a rush to change the facts on the ground prior to the completion of judicial review; aggressive statutory interpretation; the “discovery” of broad authority in long-dormant statutory provisions; and extensive reliance on interpretative deference canons. It also adds one not previously discussed in this testimony: trenching on the vertical separation of powers, which (as my colleague David Rivkin has observed) often results when the Executive Branch acts to breach the horizontal separation of powers.

V. Opportunities for Reform

The Legislative Branch can and should act to restrain executive overreaching and thereby assert and defend its own interests, those of the citizens its members represent, and the liberties of the American people. The section proposes several different areas of action.

- **Rethink Judicial Deference to Agency Interpretations of Statutes and Regulations.** Judicial review is one of the most important checks on executive action. But it is also crucial for safeguarding the interests of the Legislative Branch, because it is the judiciary that measures the execution of the law against what Congress has actually legislated. It is therefore appropriate that this body should consider the effectiveness of judicial review and opportunities for improvement and reform. In particular, it should consider whether and how to address the deference that courts afford to agencies’ interpretations of their own regulations (often referred to as “*Auer* deference” or “*Seminole Rock* deference”) and of statutes they administer (“*Chevron* deference”).

Giving agencies the authority to interpret their rules is not a constitutional command, but a matter of congressional delegation or authorization. The Court “presume[s] that the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”¹²⁵

Thus, when considering which of several competing actors should be entitled to such deference, the Court has asked “to which...did Congress dele-

¹²⁵ *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991). See also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

gate this ‘interpretive’ lawmaking power.”¹²⁶ There is no reason to believe that the presumption of delegated or conferred authority is inviolable; any power that Congress may confer on an agency, it can also rescind. Nor is there any reason to believe that the power to interpret regulations—to say what the law is, without deferring—is one that the Constitution forbids assigning to the courts, consistent with the requirements of Article III.¹²⁷ Indeed, the courts routinely exercise that power today, in cases where agencies have not addressed a particular interpretative question or have been denied deference.¹²⁸ Accordingly, through legislation, Congress could abrogate *Auer* deference, leaving courts to interpret agency rules *de novo* or according to their “power to persuade.”

There are good reasons to do so. As Professor John Manning has written, according “the agency lawmaker...effective control of the exposition of the legal text that it has created,” *Auer* deference, unlike *Chevron*, “leaves in place no independent interpretive check on lawmaking by an administrative agency.”¹²⁹ This is problematic for the reason identified by Montesquieu and embraced by the Framers: “[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”¹³⁰

As Manning explains, allocating legislative and executive power to the same entity has serious consequences for individual liberty. First, it encourages an agency to issue imprecise or vague regulations, “secure in the knowledge that it can insist upon an unobvious interpretation, so long as its choice is not ‘plainly erroneous.’”¹³¹ Second, it undermines accountability, by removing an independent check on the application of law that is ill-considered or unwise. Third, it “reduces the efficacy of notice-and-comment rulemaking” by permitting the agency “to promulgate imprecise or vague rules and to settle upon or reveal their actual meaning only when the agency implements its rule through adjudication.”¹³² Fourth, “[*Auer*]

¹²⁶ *Martin*, 499 U.S. at 151.

¹²⁷ Congress has, in fact, codified *Skidmore*-style deference in certain cases. See 12 U.S.C. § 25b(b)(5)(A).

¹²⁸ *E.g.*, *Christopher* 132 S. Ct. 2156, 2168–69 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹²⁹ John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *Colum. L. Rev.* 612, 639 (1996).

¹³⁰ *Id.* at 645 (quoting Montesquieu, *The Spirit of the Laws* bk. XI, ch. 6, at 157 (Anne Cohler et al. eds. & trans., 1989) (1768)).

¹³¹ *Id.* at 657.

¹³² *Id.* at 662.

deference disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it.”¹³³ Finally, *Auer* may distort the political constraints on agency action by making it “more vulnerable to the influence of narrow interest groups” who are able “to use “ambiguous or vague language to conceal regulatory outcomes that benefit [themselves] at the expense of the public at large.”¹³⁴ In recent opinions, members of the Supreme Court have expressed similar views.¹³⁵

Overruling *Auer*—whether by judgment or by legislation—would hardly be an avulsive change in the law. And it would have the benefits of fortifying the constitutional separation of powers, improving notice of the law, and ultimately advancing individual liberty. It is a reform worthy of serious consideration.

Congress may also wish to consider courts’ continued application of Chevron deference. One aspect of Justice Scalia’s *Perez* concurrence that has attracted considerable attention is his suggestion that fixing the pathologies of administrative law may require reconsideration of *Chevron* deference.¹³⁶ His remark speaks to a broader dissatisfaction—on the Court, among regulated parties and the public, and in the academy—with the current state of administrative authority. Where agencies once were viewed as delegates of Congress, simply “fill[ing] up the details” of congressional enactments,¹³⁷ the Executive Branch has become a primary, if not *the* primary, mover in making federal law, supplanting Congress.¹³⁸ Scalia’s criticism is notable because he is often seen as the leading expo-

¹³³ *Id.* at 669.

¹³⁴ *Id.* at 676.

¹³⁵ See, e.g., *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 3366 (2011) (Scalia, J., concurring); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 & n.17 (2012); *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring); *id.* at 1339 (Scalia, J., concurring); *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring in the judgment); *id.* at 1220 (Thomas, J., concurring in the judgment).

¹³⁶ *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment). But should it really have been such a surprise? See *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part) (“...*Chevron* (take it or leave it)...”); *Mead*, 533 U.S. at 241–42 (“There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.”).

¹³⁷ See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

¹³⁸ See, e.g., Tim Devaney, Obama’s ‘pen and phone’ barrage, *The Hill*, Dec. 28, 2014, <http://thehill.com/regulation/pending-regs/228093-obamas-pen-and-phone-barrage>.

ment of judicial deference to agencies, in general, and of *Chevron*, in particular.

Chevron's impact cannot be overstated—at least, its impact on the Executive Branch. It has fundamentally changed the way that agencies go about their business of interpreting governing statutes. The search for meaning in Congress's commands has been replaced with a hunt for ambiguities that might allow the agency to escape its statutory confines.¹³⁹ In other words, whatever its effect in court cases—which is hotly disputed—*Chevron* has transformed the way that the Executive Branch pursues its policy objectives. No matter *Chevron's* specifics in judicial proceedings, executive agencies have come to see it as a license for improvisation and lawmaking, so long as an escape-hatch of ambiguity can be found—and it always can.¹⁴⁰ Whether or not *Chevron* has reduced judicial discretion, it has unleashed the Executive Branch and upset the balance of power between it and Congress. This is the “mood” of *Chevron* deference.¹⁴¹

And yet *Chevron* has arguably failed at its primary purposes of cabining judicial discretion and increasing deference to agencies' policy determinations. Empirical studies “show that immediately after the *Chevron* decision, the rate of affirmance of agency interpretations rose substantially, especially at the court of appeals level, but then in subsequent years it has settled back to a rate that is very close to where it was before *Chevron*.”¹⁴² One “study found that approval of an agency interpretation is *less* likely in cases in which *Chevron* is cited.”¹⁴³ And another found that *Chevron* has been unsuccessful in “eliminat[ing] the role of policy judgments in judicial review of agency interpretations of law.”¹⁴⁴ Despite *Chevron's* conceptual merits, its actual application in the courts leaves much to be desired.

¹³⁹ See, e.g., Jonathan Adler and Michael Cannon, Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA, 23 *Health Matrix* 119, 195 (2013) (describing the “frantic, last-ditch search for ambiguity by supporters who belatedly recognize the PPACA threatens health insurance markets with collapse, which in turn threatens the PPACA”).

¹⁴⁰ Cf. Timothy Noah, Bill Clinton and the Meaning of “Is,” *Slate*, Sep. 13, 1998, http://www.slate.com/articles/news_and_politics/chatterbox/1998/09/bill_clinton_and_the_meaning_of_is.html.

¹⁴¹ See Kent Barnett, Codifying *Chevron*, 90 *N.Y.U. L. Rev.* 1, 54 n.275 (2015).

¹⁴² Jack M. Beerman, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should be Overruled, 42 *Conn. L. Rev.* 779, 829 (2010) (citing studies).

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ Thomas J. Miles and Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 *U. Chi. L. Rev.* 823, 825–27 (2006).

As with *Auer*, Congress may supplant *Chevron*. Congress could, for example, specify that agency interpretations would be subject only to *Skidmore* deference—that is, according to their power to persuade—just as it has done with review of certain agency action under the Dodd–Frank Wall Street Reform and Consumer Protection Act.¹⁴⁵ Or it could specify, as the Supreme Court actually once held post-*Chevron*, that “a pure question of statutory construction [is] for the courts to decide.”¹⁴⁶ In fact, Congress *already has* specified that, in the Administrative Procedure Act.¹⁴⁷ So it will apparently have to be more emphatic if it intends to overrule or limit *Chevron*.

- **Reconsider Congress’s Role in Rulemaking.** The Congressional Review Act provides a (cumbersome and generally ineffective) procedure for Congress to disapprove certain agency action, subject to the President’s veto power. But it bears considering whether the CRA inverts the proper order of lawmaking under the Constitution, which makes Congress—not any agency—the primary actor in setting generally applicable laws. Proposals like the REINS Act would reassert Congress’s constitutional authority by requiring that at least major rules be subject to congressional approval before they take effect. Professor Jonathan Adler persuasively argues that the REINS Act would “enhance regulatory accountability and popular input on major regulatory proposals,” without compromising the government’s ability to undertake needed regulatory initiatives.¹⁴⁸ It would also go a long way to deterring, or as necessary blocking, regulations that contravene congressional understanding of the Executive’s statutory authority and discretion.
- **Ensure the Availability and Effectiveness of Judicial Review.** Recent actions by EPA suggest that the Executive Branch may be seeking to take improper advantage of its agility, relative to the other branches, by forcing compliance with legally questionable rules like Utility MACT and the

¹⁴⁵ See 12 U.S.C. § 25b(b)(5)(A).

¹⁴⁶ *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

¹⁴⁷ 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); § 706 (“The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”). One strike against *Chevron* (and *Seminole Rock* and *Auer*) is that it’s flatly inconsistent with the APA. Historical evidence suggests that Congress meant what it said in 1946, but that courts ultimately adopted the more deferential views expressed in the Attorney General’s Manual on the Administrative Procedure Act. See Beerman, *supra*, at 789–90.

¹⁴⁸ See Jonathan H. Adler, *Would the REINS Act Rein In Federal Regulation?*, Regulation, Summer 2011, at 22, available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2011/7/regv34n2-2.pdf>.

Clean Power Plan. A party seeking to enjoin a lawfully promulgated rule bears an unusually heavy burden, such that many rules that ultimately fail judicial review are nonetheless allowed to go into force, and remain in effect, during the pendency of litigation challenging their lawfulness. As a result, rules that are ultimately held unlawful may nonetheless compel parties to invest heavily in compliance, achieving their supporters' policy prerogatives through sheer force of edict. In this way, the executive can act to deny regulated parties their rights under law.

Congress can act to curb this kind of abuse. The most straightforward approach, in general, would be to provide for an automatic stay of rules that impose costs above a certain threshold and are subject to judicial challenge, while also providing that, when a stay is imposed, judicial proceedings be expedited. In this way, serious questions regarding agency authority could be decided in relatively short order, before parties are required to undertake burdensome compliance measures that may ultimately prove unwarranted. Such relief could be limited, as appropriate, to rules promulgated under particular statutes (e.g., the Clean Air Act and Communications Act) or by certain agencies, with narrow exceptions for rules that the President certifies are vital to national security. The point here is not so much to identify every possible exception that may be worthy of consideration, but only to note that a law providing for automatic stays need not be absolute and can be flexibly crafted so as to address possible concerns. In other words, Congress can strike a better balance between the benefits of timely federal action and adherence to the rule of law.

- **Reconsider Broad Delegations and Discretionary Authority in Domestic Affairs.** In many instances of executive overreaching, at least some blame should be placed at Congress's feet. In the episodes described in this paper, as well as many others, the Administration has sought to take advantage of broad, vague, or otherwise uncertain statutory delegations of authority. At one time, Congress could reasonably expect that the Executive Branch would not seek to take advantage of unclear or ambiguous statutory language as a basis for launching broad policy initiatives—those kinds of issues, it was understood, would be left to Congress. But that time has past, and many statutes on the books are invitations to mischief by agencies that wish to achieve their policy priorities without going through the legislative process. At the least, Congress should take care in the laws that it enacts so as to avoid providing greater discretion than it intends. Congress should also revisit existing laws that have proven problematic or that appear open to abuse. In particular, many statutes contain waiver provisions that, while intended to authorize exceptions from rules that are otherwise generally applicable, are sufficiently broad as to provide at least

an arguable basis for general application themselves. These are ripe for reform.

- **Limit Collusive Litigation (AKA “Sue and Settle”).** “Sue and settle” raises serious concerns about the conduct and resolution of litigation that seeks to set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,¹⁴⁹ there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to constructively address it. Recent examples show that the problem is real, it is serious, and it is, if anything, getting worse.

Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and consent decrees that compel future government action. Legal experts have given considerable thought on how to alter the incentives and the legal environment that facilitate collusive settlements. Over the past three years, Members of the House and Senate have developed several bills that seek to carry out the principles identified in my 2012 testimony on abuses of settlements and consent decrees. The most comprehensive of those bills, the Sunshine for Regulatory Decrees and Settlements Act, passed the House in the previous Congress, and (as reintroduced this Congress) has drawn strong support in the Senate.

That bill’s approach represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a “failure to act” lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while en-

¹⁴⁹ See generally *The Use and Abuse of Consent Decrees in Federal Rulemaking: Hearing before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives, 112th Congress (Feb. 3, 2012), available at http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) [hereinafter “2012 Testimony”].*

sure that the public interest in transparency and sound rulemaking is not compromised.

Other proposed legislation focuses on settlements under specific statutory regimes. For example, the Endangered Species Act (ESA) Settlement Reform Act¹⁵⁰ would amend the ESA to provide, in cases seeking to compel the Fish and Wildlife Service to make listing determinations regarding particular species, many of the procedural reforms contained in the Sunshine for Regulatory Decrees and Settlements Act, such as broadening intervention rights to include affected parties and allowing them to participate in settlement discussions. In addition, as particularly relevant in this kind of litigation, the bill would require that notice of any settlement be given to each state and county in which a species subject to the settlement is believed to exist and gives those jurisdictions a say in the approval of the settlement. In effect, this proposal would return discretion for the sequencing and pace of listing determinations under the ESA to the Fish and Wildlife Service, which would once again be accountable to Congress for its performance under the ESA.

Similarly, the Reducing Excessive Deadline Obligations Act of 2013,¹⁵¹ which was introduced in the last Congress and passed the House, would have amended the Resource Conservation and Recovery Act to remove a nondiscretionary duty that EPA review and, if necessary, revise all current regulations every three years and the Comprehensive Environmental Response Compensation and Liability Act to remove a 1983 listing deadline that has never been fully satisfied.¹⁵² The effect of these amendments would have been to reduce the opportunity for citizen suits seeking to set agency priorities under these obsolete provisions.

- **Be Realistic in Setting Mandatory Duties.** The “sue and settle” phenomenon suggests that there may be a broader issue at play than just collusion in litigation. Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy has observed, “Difficult and fundamental questions are raised” by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) “committed to the

¹⁵⁰ H.R. 585; S. 293.

¹⁵¹ H.R. 2279 (113th Cong.).

¹⁵² See generally Reducing Excessive Deadline Obligations Act of 2013, House Report 113-179 (113th Cong.).

Executive by Article II of the Constitution of the United States.”¹⁵³ Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, suborning the public interest to special interests and sacrificing accountability.

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to William Yeatman of the Competitive Enterprise Institute, “98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”¹⁵⁴ Furthermore, “65 percent of the EPA’s statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days.”¹⁵⁵ With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable nondiscretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the po-

¹⁵³ *Friends of the Earth, Inc. v. Laidlaw Envi'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

¹⁵⁴ William Yeatman, EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, “Sue and Settle,” July 10, 2013, <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>.

¹⁵⁵ *Id.*

litical consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.¹⁵⁶

Second, Congress should consider narrowing citizen-suit provisions to exclude “failure to act” claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, and subject to congressional oversight, not by litigants and not through abusive litigation.

V. Conclusion

Executive overreach is a serious problem and the Task Force should be commended for its efforts to identify the scope of the problem and potential solutions. I thank the subcommittee for the opportunity to testify on these important issues and look forward to your questions.

¹⁵⁶ One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 *Admin. L. Rev.* 171, 200–02 (1987).

Mr. KING. Thank you, Mr. Grossman.

I thank all the witnesses for your testimony.

And we'll now proceed under the 5-minute rule with questions. And I'll begin by recognizing myself for 5 minutes.

First, Mr. Grossman, the recommendations that you've discussed here, consider the judicial review in, I wanted to pose this: That as I've watched our executive branch's overexuberance on regulations that are emerging, if we go to the courts and appeal to the courts when they've overreached, it looks to me like an Administration can come and go before we can get resolution on the courts, listening to Ms. Mitchell's testimony this morning. How do we deal with that?

Mr. GROSSMAN. Right. Well, I mean, there are certain ways to structure judicial review so as to avoid the kind of gamesmanship that has plagued agency actions in recent years. One example that Ms. Hammond noted was the Utility Air Regulatory Group decision. But I will note that the major rule that came after that, that really drew a lot of controversy, was the so-called Utility MACT rule, which was the major regulation of power plants that the Administration rushed into force, despite lots of opposition, not merely by power plant operators, but by grid regulators and the like, arguing that there should be a more gradual implementation period so as to reduce costs, so as to allow for judicial review, and so as to protect the integrity of our electrical grid.

The Administration turned a blind eye to all of that in its response, and as a result, by the time the Supreme Court ruled that that rule was illegal, it had already been in force and basically everybody had complied. I think—

Mr. KING. I recognize that point. I'm just watching my clock tick down here. So do you have knowledge of the drafting of the work requirement in the TANF regulations? I mean, it's my recollection that it was written as tight as possible with the idea that it would prevent a President from circumventing or waiving the work requirement. Would that be true? And is it possible to write something tight enough that perhaps the President would recognize that it's too tight for him to jump out of the boundary?

Mr. GROSSMAN. Well, I think in this Administration, it seems like almost anything's fair game. But if you take an honest and fair view of the statute, there simply is no waiving those particular work requirements. The waiver provision does not extend to them. The language simply isn't there.

Mr. KING. We have to have an honest and fair view or we're caught up in forever litigation.

I turn to Mr. Bernstein. And just thinking about your comments that had to do with the auto companies. And I recall a witness we had here from the State of Indiana testified, seated where Ms. Hammond is right now, and he testified that as the bankruptcy of Chrysler, as I recall, went before the court, that there was only one appraisal, the White House's appraisal and, let's see, there was only one proposal that went before the Chapter 11 court, and that there was only one bidder on the tail end of that. And in all cases, the appraisal, the Chapter 11 proposal, and the—and the bidder on it were all the White House, that there was only one proposal in each one of those three cases. And I recall asking him, were there

any Is crossed—and Is dotted differently or any Ts crossed differently as a result of the testimony before the court? And his answer was, no.

Is that a fair picture of the package that was offered by the White House that you described?

Mr. BERNSTEIN. That's fair. It is also the case that it was designed to benefit the oil workers union that supported the Democrats in the 2008 election and beyond and to harm other stakeholders, such as the Indiana pension fund that was probably represented by the person that you had here.

The Bankruptcy Court just deferred to everything the Administration did; said, well, almost everyone who was a bondholder agreed to it. The problem was the bondholders were all big financial institutions that were being threatened with criminal and civil prosecution for their role in the 2008 financial crisis, and they were given one of these a-deal-you-can't-refuse choices.

So the Supreme Court, though, upheld everything but said, well, we vacated the lower courts actual legal finding, this is not going to be precedent. It was too late. The companies already merged. So it was already moot by the time it got to the Supreme Court, so we don't know what the Court would have said.

Mr. KING. It would be nice to be in a business deal and have that kind of leverage. Thank you.

And I turn to Ms. Mitchell. And I appreciate your recommendations. They were clear, concise, and compact.

I wanted to propose, in return to one of your proposals here, a bill called, it's H.R. 2778, the Sunset Act. It's a bill that I offered several cycles ago and probably need to push harder in the next Administration. What it does is it sunsets all regulations phase in 10 percent a year for 10 years. So the agencies are required to offer up all of their regulations to Congress, requiring an affirmative vote for them to have the force and effect of law. And it says that any new regulation, regardless of its value, has to have the affirmative vote of Congress, and then it also sunsets at the end of 10 years.

Would something that I've described here, would that conform to one of your proposals?

Ms. MITCHELL. It's certainly a step in the right direction. I think that the only way that Congress is going to restore its role as the Article I branch of government is for Congress to take some serious and seemingly radical positions. I mean, I'm pleased to hear Ms. Hammond describe the Administrative Procedures Act and this nirvana that could exist. It's just that that isn't reality.

I'll give you an example with the IRS, one of the things I've learned, having dealt with them now for 7 years on the scandal and its ongoing tentacles. When the IRS unveiled its proposed regulations to basically enshrine the discriminatory activities that they had undertaken with the application process and proposed new regulations that they had developed in secret, off plan, no notice, they were sprung on the citizenry on Black Friday, the day after Thanksgiving of 2013.

One of the things that I've learned since then is the IRS takes the position, has taken the position in judicial proceedings that the Administrative Procedures Act is not applicable to IRS regulations,

the IRS regulations are not subject to the Regulatory Flexibility Act; they're not subject to the Paperwork Reduction Act, and that it can basically do whatever it wants.

Now, if Congress is going to sit by and let the IRS continue to take that position, that's a pretty frightening prospect. And I think that something—Congress has to take dramatic steps to curb specific excesses in agencies and to do the kind of general repeal of the unfettered regulatory power that has been, in my view, unconstitutionally delegated to the executives.

Mr. KING. Thank you, Ms. Mitchell. Of course, I would just abolish them and simplify this considerably.

The Chair would recognize the Ranking Member from the State of Tennessee.

Mr. COHEN. Thank you, Mr. Chair.

You know, I agree that there's executive overreach that's been by all executives. I think, you know, power is taken, not given as in the Machiavelli rule that continues and will live forever, I guess. We had it when Bush was President, the IRS. Nixon's the champion. He's number one with the enemy's list. It was awful.

And, Ms. Mitchell, you had some good comments, but—and I could understand them, but you talked about all these groups that had “patriot” in their names. There were other groups that were looked at too. And I've got some information, because I asked as we started, there were some of these groups that were more Democratic type groups. “Progress” was in their names, and so they got picked. Progress Missouri and, I think, Progress Texas. And they were a California group too. It was set up primarily for the benefit of a political party, and they were looked into, Emerge America. And so, you know, are you familiar with those cases?

Ms. MITCHELL. Yes, sir, I am.

Mr. COHEN. Don't you think it would have been a little better for you to mention those cases in your testimony as well to show that—that the IRS—it was an IRS problem? It was not a political assault on Tea Party folk, but it was an effort by some people that was bad policy to go after a bunch of different people, some of who were considered liberal. And if we—I think if we approach it that way, I think it'd be better to deal with the issue than just pick out the one groups.

Ms. MITCHELL. Well, Congressman, that would be fine, except that that is not a correct characterization of what happened. And I can give you a specific example with Progress Texas.

If you look at the data, which the Committee on Oversight and Government Reform has compiled and which the testimony of the Treasury Inspector General for Tax Administration specifically provided to the House Ways and Means Committee, you will find that those assertions in that New York Times article about how the IRS was an equal opportunity discriminator, turns out that that is not exactly correct.

And I'll give you just the example of Progress Texas. Progress Texas showed up on a list. There were, I think, 85 groups in September of 2011. Progress Texas showed up on that list along with—as one of three or four liberal sounding groups. The commentary about Progress Texas said that it appeared that they had anti-Rick Perry propaganda on their Web site. Now, contrast that with King

Street Patriots, one of my clients, or Tea Party Patriots, one of my clients, where they—the commentary would say by their names “appeared to have anti-Obama propaganda.” That was September or November, sometime in that timeframe, the fall of 2011.

In June of 2012, Progress Texas got its 501(c)(4) letter of exempt status. Tea Party Patriots did not get its (c)(4) status until February 29th of 2014, the day that its president testified before the House Committee on Oversight and Government Reform. And King Street Patriots didn’t get its exempt status until the fall of 2014.

So the disparate treatment is documented, and anyone who thinks that’s not true just hasn’t studied the record. I’m sorry.

Mr. COHEN. Well, but the fact is what is true, and we have studied the record, is groups with the name “progress” were looked at as well. And they did not just automatically get their exemption. And groups that were liberal got it, same kind of examination. And I don’t know about—

Ms. MITCHELL. No, they didn’t.

Mr. COHEN. I don’t know about your situation. Maybe they hired you early and maybe the other groups didn’t. And because you were hired and were so thorough, that they had a little bit more difficulty and took a little more time, or maybe they had more people or didn’t respond as quickly. I don’t know. But the fact is the IRS was bipartisan in the way they did it. They weren’t right with either side and the IRS corrected it. And there were no criminal investigations and no reason for criminal investigation because there was no probable cause.

Ms. MITCHELL. Well, I—

Mr. COHEN. Ms. Hammond, I would like to ask you about your proposal to deal with the Administrative Procedures Act. How do you think we could do that?

Ms. HAMMOND. I’m sorry, sir.

Mr. COHEN. You had a suggestion we should change the law to make it—

Ms. HAMMOND. In fact, I do not suggest that we should change the law. I don’t agree that the APA is nirvana. It is not perfect. It is functional. And what it attempts to do is strike this balance that I was discussing by trying to ensure that agencies do have the flexibility to exercise their expertise but that we ensure that they remain faithful to their statutory mandates. And so I don’t propose that we change the APA in any way, not because I think it’s perfect, but because I think it’s pretty good.

Mr. COHEN. And are you familiar with Progress Texas, Emerge America, and some of the groups that were considered more liberal that were also given extra scrutiny by the IRS?

Ms. HAMMOND. Yes, it is my understanding that some of those groups were targeted as well.

Mr. COHEN. Thank you very much.

I yield back the balance of my time.

Mr. KING. The gentleman yields back.

The Chair will now recognize the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank the witnesses that are here.

So much to correct with so little time. My colleague on the other side of the aisle said this was political theater, said an effort to brand the President illegitimate. That struck a memory nerve. And I recall when Bill Posey filed a bill, and I thought it was a good bill. It was a good bill, just over two pages. And it was going to require that in future years, future election, had nothing to do with 2008, that since there was no enabling statute for the constitutional requirements of age and being a natural-born citizen, it would provide enabling statute to do that and require the parties to resolve, in advance, whether somebody meets those two constitutional requirements.

Now, those are great ideas, especially since the Washington Post and New York Times had questioned John McCain's viability to meet those. I have never, ever said the President was not a natural-born citizen. I've been branded a birther because I signed on to Bill Posey's bill.

But through that, reporter after reporter after reporter asked, "So why are you now trying to delegitimize the President in getting thrown out of office?" And one, one of the best reporters here in town, I said, "Have you read the bill?" She said, "No, but I got my information from the highest level of the White House. I got a memo. It says you are the newest guy trying to delegitimize the President getting thrown out of office." I said, "Read the bill, and if you have questions, then ask me."

She read the bill. Next time I saw her she said, "That was nothing like the White House said it was." I said, "Yeah, it's a good bill." It was a good bill then. It's a good bill now. Even with Obama going out of office, it would be a good bill. But that word, illegitimate, delegitimize, it is an effort to brand legitimate efforts to fix things that are wrong.

Now, the Obama administration—despite the comments that everything's fine, this is no different, all the Administrations are the same—23 times have been told that you've gone too far. And it's unprecedented. Nobody's ever come close to having 11 unanimous Supreme Court decisions, including the extreme liberals, saying, Obama administration, you have gone too far."

So as far as being illegitimate, this is legitimate stuff. And as far as the Justice Department finding that the IRS did nothing wrong, they said, well, now, we found mismanagement, uncovered substantial evidence of mismanagement, poor judgment, and institutional inertia.

On over they say, now, although Ms. Lerner exercised poor judgment in using her IRS email account to exchange personal messages that reflected her political views, yeah, that was inconvenient because it showed that she was acting in accordance with her political positions. There was plenty of evidence.

Just like this Administration, after both a United States District Court and the Fifth Circuit Court of Appeals said, "There is substantial evidence to find that these other Muslim organizations are acting in conspiracy with the Holy Land Foundation that was found guilty of supporting terrorism," this Administration came back and says, "We find no evidence, after courts had already said, 'There's plenty of evidence here. We're not striking their names.'"

So it is really unfair to say that this Administration finds no evidence and try to relate to that, to there being no evidence.

Now, I appreciated very much the recommendations, Ms. Mitchell. Those were terrific. And I'm sorry, I always did well on national testing because I ask questions when I don't know. And I'm curious, what is the associate dean for public engagement? Is there a dean of public engagement that's over you? What does public engagement do?

Ms. HAMMOND. There is a dean of the law school. That's Dean Blake Morant.

Mr. GOHMERT. But there's no dean of public engagement?

Ms. HAMMOND. That's correct.

Mr. GOHMERT. So the associate dean is the top dean of public engagement?

Ms. HAMMOND. That's correct, but underneath the full dean of the law school.

Mr. GOHMERT. Gotcha. Okay. Thank you.

With regard to the TARP overreach, I've got to say, that was such a horrible bill. It gave them all kinds of ability. That's why I was so opposed to it. But I would just like to encourage each of you, because our time is so limited here.

Ms. Mitchell, you've given great recommendations.

I would encourage each of you—I know Professor Hammond doesn't see any needs—but we've got to fix this system. You've made some great recommendations. Any others that you could recommend, things to do, please recommend them. We've got to do these things.

Thank you.

Mr. KING. The gentleman from Texas yields back.

The Chair would now recognize the gentleman from Florida, Mr. Deutch.

Mr. DEUTCH. Thank you very much, Mr. Chairman.

First, thanks to the witnesses for being here.

Ms. Mitchell, just one question: Since we're using this admittedly flawed criteria that the IRS used, how many organizations were ultimately denied their tax-exempt status as social welfare organizations for compliance with 501(c)(4)?

Ms. MITCHELL. Congressman, now, that is part of what the Sixth Circuit excoriated the IRS about in that opinion—

Mr. DEUTCH. Well, I don't think any.

Ms. MITCHELL. I don't think we know yet.

Mr. DEUTCH. Right. So—

Ms. MITCHELL. I don't think we know yet.

Mr. DEUTCH. I appreciate that. So given that, I just would like to make a few observations. We find ourselves here during what has been much publicized as the GOP tax week, and I suppose during tax week we're here to commemorate the 150 million tax filings that flood into the IRS, 5 million coming in just yesterday after the deadline passed.

The majority, no doubt, thinks the best way to curry favor with the American public is to blame the IRS. I don't buy it, frankly. I would point out that Congress gets the money to fund this hearing from IRS tax revenue, that we earn our salaries as Members of Congress thanks to the IRS collecting tax revenue.

And so while the IRS absolutely and legitimately needs reform, the majority refuses to acknowledge what the agency does right, how to fix what actually needs to be fixing, and instead looks to generate headlines this week by blaming the IRS for seemingly everything wrong with the government.

So here's the question: Were social welfare groups handled inappropriately at the IRS? Yes.

But is that the real scandal, Mr. Chairman? The real scandal, I would suggest, is the fact that political spending by so-called social welfare groups is exempted from taxation and is subsidized by the American people. These groups are some of the biggest players in politics. And the—my friends on the other side of the aisle should not be complicit in their attempt to hide their donors or agendas behind some hollow outrage at the IRS.

The poor handling of tax-exempt applications at the IRS was a direct result of the Supreme Court's obliterating our campaign finance system in *Citizens United*. After that decision, thousands of new applications flooded the IRS. These groups were specifically created to skirt disclosure requirements and contribution limits. That's the scandal that we ought to be focused on.

Consider that just after *Citizens United* came down, thousands of new applications came in for social welfare tax-exempt status, a 92 percent increase from 2009 before *Citizens United* to 2012. Many of these groups were created at the direction of sophisticated, well-connected, and well-funded Beltway campaign funders, who went to work to create all kinds of complicated webs of tax-exempt groups to funnel money, unlimited contributions from one organization to another.

Why? Why was that done? What is the scandal here? It's to hide the identity of donors, to make it seem as though campaign season ads are speaking for the people when they're really speaking for the wealthy individuals and corporations that fund these super-PACs that so often we don't even know about because of these 501(c)(4)s, to obscure connections to corporations that don't have the best interest of the people at heart.

Corporations who want to stop clean energy requirements; corporations who want to prevent gun efforts to stem the tide of gun violence; corporations who want to protect subsidies, tax breaks, and loopholes. And many of these social welfare organizations are nothing more than a post office box in Alexandria, Mr. Chairman.

Why do we have to continue to waste the resources of this Congress to conduct this hearing after internal and external IRS reviews, FBI and Department of Justice investigations, a partisan contempt proceeding, and multiple investigations by House Committees, including hundreds of interviews and hundreds of thousands of pages of documents collected? We find ourselves just where we started.

The real scandal is the scandal this Congress is doing nothing about, and it's the overwhelming influence of money in politics. The true scandal is that Congress refuses to accept responsibility for putting the IRS in the position of evaluating tax-free political activity. The actual scandal is that Congress refuses that the American people shouldn't be forced to subsidize the political activities of sham groups.

The scandal that I'm most ashamed of, though, Mr. Chairman, is that this House of Representatives will do nothing except hold these show trials. Today's hearing won't do a thing to stop a system that protects big money in politics, but it will help to continue the dominance of the wealthy few over the will of the people in our American democracy. That, Mr. Chairman, is the scandal that we ought to be focused on, and I hope one day we will.

And with that, I yield back.

Mr. KING. The Chair thanks the gentleman from Florida and now recognizes the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

The gentleman from Florida mentioned the real scandal. Here's the real scandal: The IRS systemically targeted conservatives for exercising their First Amendment political speech rights. They did it in a systematic way, and they did it for a sustained period of time.

They get caught. Lois Lerner gets caught, and she does what all kinds of people do when they get caught with their hand in the cookie jar: She lies about it.

Isn't it true, Ms. Mitchell, she went to a bar association speech, May 10, 2013, planned a question from one of her friends, and said, wasn't me, it wasn't us, it was folks in Cincinnati. Isn't that true?

Ms. MITCHELL. That's true, but it wasn't true.

Mr. JORDAN. Right. Exactly.

Ms. MITCHELL. I'm sure she said it, but it wasn't true.

Mr. JORDAN. She said it, but it wasn't true. The facts show it was all in Washington. So she lies. And then when she gets caught lying, she does what happens sometimes. She's brought in this Committee room, at that same table you're all sitting there, and she takes the Fifth.

So now here's what happened: The central figure lies when the story first breaks, then she takes the Fifth. Now, this sort of—any criminal investigation, any congressional investigation, there's a premium on getting the documents, information, emails, communications, all the stuff that went on. But when you have the central figure taking the Fifth, it really emphasizes the need for the documents.

So Mr. Koskinen is brought in. The President says he's the fixer. He's the professional guy brought in to fix this system and clean up the IRS. And under his watch, I think he breached every duty he had.

Would you say, Ms. Mitchell, that he had a duty to preserve the documents that were there relevant to the congressional and criminal investigations that were going on?

Ms. MITCHELL. He absolutely did. They were under subpoena from the House Committee on Oversight and Government Reform in August of 2013, and they weren't produced. A subpoena was re-issued in February of 2014, and he—

Mr. JORDAN. Two subpoenas.

Ms. MITCHELL. Two subpoenas. And not only that, but there was ongoing litigation with respect to—as early as May of 2013.

Mr. JORDAN. From your clients.

Ms. MITCHELL. My clients, and the Z Street case, which had been filed in 2010, and involved the very same factors and subpoenas and documents.

Mr. JORDAN. Two subpoenas, three preservation orders. The IRS themselves, they sent a preservation order to themselves. They said preserve all documents.

So Mr. Koskinen, his IRS had a duty to preserve all the documents. They had a duty to produce them to the Committee because we subpoenaed them. And they had a duty to inform us if they couldn't preserve them or didn't preserve them and couldn't produce them. And so all three of those duties were breached when they allowed 400 backup tapes to be destroyed. Would you agree, Ms. Mitchell?

Ms. MITCHELL. I agree. And I think that for that reason alone, but certainly for many others, I think that Commissioner Koskinen has lied to the Congress repeatedly and he should be impeached and removed from office.

Mr. JORDAN. I hadn't even got to that, but you're exactly right. You're exactly right. Duty to preserve; they failed that. Duty to produce documents; they failed that. Duty to inform us in a time—he knew that problems with Ms. Lerner's email, or with her server and her emails, he knew about that and waited 4 months to tell us. He waited 4 months to tell us that some of the backup tapes had been destroyed.

Four hundred backup tapes destroyed, potentially 24,000 emails, and he comes and testifies and says nothing. And then he said, oh, when it came to the backup tapes in the later testimony, that they were all destroyed. Some of them weren't. Some of them were. So they had a duty to testify accurately, a duty to correct the record.

And it seems to me when we're talking about executive overreach, one of the things the legislative branch can do is impeach this guy. I mean, that's the record.

Now, we can add to it. Let me do one other—if I could, Mr. Chairman, one other area.

Are you familiar with StingRay technology, Ms. Mitchell?

Ms. MITCHELL. A little bit. I'm conversant.

Mr. JORDAN. So StingRay technology, my understanding, is this is the capability that certain law enforcement and, in this case, the Internal Revenue Service has to bring this technology into an area and find—geolocation technology. What happens is this device mimics the cell phone tower, and all the cell phone numbers in that area come to this. They can find out where you're at, your number and collect. It's a net. It's not a fishing line; it's a fishing net.

Last week, testimony in this Committee, we learned that the IRS has employed this technology 37 times, and each time did it without a probable cause warrant. Do you think that's appropriate for the agency with the track record we now know that they have relative to conservative groups is employing this kind of technology without a probable cause warrant?

Ms. MITCHELL. Absolutely not, and that's why I think that the—that Congress needs to establish an individual cause of action to be—for individuals whose—in the cases that I've been talking about where First Amendment rights were violated. If your Fourth Amendment rights are being violated by the IRS and by individual

IRS agents and employees, you ought to be able to have the ability to file a lawsuit and get damages.

We have to find ways to hold the individual people accountable for violating the constitutional rights of the American people. And if Congress doesn't do that, we are never going to get control of them.

Mr. JORDAN. I appreciate it, Mr. Chairman. I thought I was—I see my time has expired. Thank you.

Mr. KING. The gentleman returns the time.

And the Chair would now recognize the gentleman from South Carolina, Mr. Gowdy.

Mr. GOWDY. Thank you, Mr. Chairman.

I am going to barely resist the temptation of asking questions of law professors, other than to just note, Professor Hammond, at some point I would like to discuss with you *In Re: Aiken County*, which is a case on prosecutorial discretion, as you probably know better than I do, because I am somewhat vexed as to whether or not there are any limits on prosecutorial discretion. Some of my colleagues on the other side don't seem to think there are.

And you also mentioned oversight. And at some point I'd like to discuss with you, when Congress sends a subpoena and that subpoena is not honored, or when Congress seeks to do oversight and the executive branch does not cooperate, what tools we have and the order in which you would use those tools.

But I am going to save all of that for a later date because my attorney from Ohio, Jimmy Jordan, is here, and I would like to give the remainder of my time to my attorney, Mr. Jordan.

Mr. JORDAN. Well, I appreciate the gentleman yielding.

And let me go to this. And let me go to Mr. Grossman here. Are you familiar with the tax gap that exists at the Internal Revenue Service, in other words, the difference between what they're supposed to be collecting for the Federal Treasury and what they actually do collect?

Mr. GROSSMAN. I'm afraid I am not.

Mr. JORDAN. Anyone familiar with how much that is? \$385 billion, according to the GAO study that was released in the last 2 weeks. \$385 billion that the—this is the fundamental mission of the Internal Revenue Service, is actually to collect the tax revenue due to the Federal Treasury. That's what their job is, and they're failing to the tune of \$385 billion a year. You think about our deficit this year, I think it's \$500 billion. I mean, this is a huge amount of money. So a \$385 billion tax gap.

The GAO also recommended that the Internal Revenue Service employ 112 recommendations, 112 specific things the IRS can do to help them comply in accomplishing their fundamental mission, collecting revenue for the Treasury to fund the things—the services and things that we have in our government. And to date, the IRS has only implemented 62.

So less than half of the recommendations to help accomplish their fundamental mission they've actually put into practice. And it sort of begs the obvious question: You've got time to harass conservative groups, ask them all kinds of intrusive questions, privacy-violating questions, infringe on—this is something I think gets lost in this debate too.

Remember what the underlying offense was here. They were going after people's most cherished right, your right under the First Amendment to speak out against the policies of your government, fundamental and central to who we are as a country. So the very agency that has a \$385 billion tax gap can't even do half of the recommendations GAO says you should do to accomplish your fundamental mission, has time to target people for exercising their First Amendment liberties.

Mr. Bernstein, do you want to comment on any of that? I got a little speech there. It was not really a question, but I'll let you comment. And I have got one other question I want to ask too. Go ahead.

Mr. BERNSTEIN. I could comment briefly, because I do discuss this in my book. They were under a lot of pressure also. I don't know that much about Ms. Lerner's own political views, except what I've seen in the media, but they had letters from various senators, from congressmen. There was political pressure coming from the White House that after Citizens United, we think this stuff is going to benefit Republicans, and we need to have you guys crack down on it somehow.

Mr. JORDAN. Right. Ms. Lerner did. And she gives this now somewhat famous speech at Duke University where she says everyone is after us to fix it now. She gave the speech in the fall of 2010. Fix it now meant before the election. The pressure she was getting and letters she was receiving from all kinds of Democrats in the Congress, so she felt some obligation to try to address the situation.

Now, you know, do you think—back to the StingRay technology, Ms. Hammond, do you think any of the 112 recommendations made by GAO to help the IRS accomplish their mission, do you happen to know if any of those 112 included the IRS buying and employing StingRay technology? Do you know?

Ms. HAMMOND. I don't know.

Mr. JORDAN. Does anyone know?

Mr. Grossman, do you know?

Mr. Bernstein, do you know? One of the recommendations was to buy this StingRay technology and use it on citizens to accomplish the fundamental mission.

Ms. MITCHELL?

Ms. MITCHELL. I'm assuming the GAO did not instruct the IRS to go buy StingRay technology.

Mr. JORDAN. You would be absolutely right. You can move to the front of the line.

I mean, think about that. One hundred and twelve recommendations. The IRS has one StingRay. They're in the process of buying another. One hundred and twelve recommendations to help you actually do what you're supposed to do, collect revenue for the Treasury. They can't implement even half, but they're buying a second StingRay. They're going to potentially use that and infringe on American citizens' Fourth Amendment liberties.

This is the IRS that John Koskinen is commissioner of. This is the IRS that allowed documents to be destroyed, violating people's First Amendment liberties when the targeting took place. And now, using our tax revenue, the limited amount that they're collecting—

or actually not limited, a lot of money they're collecting but not the full amount—to buy technology to infringe on our Fourth Amendment liberties. Again, underscoring why Mr. Koskinen should have articles of impeachment move forward against him.

With that, I yield back, Mr. Chairman.

Mr. KING. The gentleman from Ohio yields back to the gentleman from South Carolina, who yields the balance of his time.

And the Chair now recognizes Mr. Issa of California.

Mr. ISSA. Thank you, Mr. Chairman. And I apologize, the Wounded Warriors got between us and part of this.

Ms. Mitchell, it's good to see you as always. You did a good job of listing more things than I could write down, and they were all good. But I want to ask you sort of a—I don't want to be rhetorical. I want to be as straightforward in the question. If it's been asked already, I want to apologize.

But as you know, the Ways and Means Committee referred a criminal referral to the Department of Justice that—against Lois Lerner, which said—and I'll paraphrase as close as I can 18 U.S.C.—the U.S. attorney for the District of Columbia shall present to the grand jury these, you know, these accusations. They didn't do that. If that is the case—which it is—what would you suggest in the way of reforms?

If we have the IRS with an individual adjudicated by the Committee of jurisdiction—which was not my Committee. It was Ways and Means that did it, based on all of our investigations—that, in fact, she criminally conspired to withhold people's rights and did so in a number of areas and then lied about it, which the lie was actually part of it.

What do we do if, in fact, a congressional referral that has the weight of law that ordered the U.S. attorney to do something and the U.S. attorney didn't do it? Are we to impeach the U.S. attorney? Should we get the U.S. attorney disbarred? It's still out there. The fact is Loretta Lynch could do it today, but if I see her in the hallway, I'm not going to ask her when.

So perhaps you could opine on that. Because, to me, all your suggestions may be for not if government refuses to do that which is already on the books.

Ms. MITCHELL. Well, Congressman, as you know, this Department of Justice has been documented as being the most politicized Department of Justice in American history. And not only did the Department of Justice fail to proceed with the criminal referral from House Ways and Means with regard to Ms. Lerner, the U.S. attorney for the District of Columbia failed to and refused to proceed to enforce the contempt citation that the House enacted for contempt of the House.

And the thing that I always come back to is, well, the President of the United States went on national television in prime time, on May 14 of 2013, right after the IRS scandal broke and the TIGTA report was issued, and he said, I'm mad too, and I'm directing Eric Holder and the Justice Department to conduct a complete, full investigation.

And the Justice Department interviewed Lois Lerner for 12 hours. She talked to them. They have the ability to put her in jail. They talked to IRS employees and agents. But to my knowledge,

they didn't talk to any of the victims of the targeting. And then they concluded that there was nothing to pursue. I mean, it was a sham investigation. And so the Department of Justice is—that's a huge problem.

Mr. ISSA. Well, this Committee, broadly, has the authority to change the Department of Justice in pretty profound ways, if we choose.

Let me ask a question. I'll open it up to all of you. In light of the fact that before this Committee, in a question that I asked former Attorney General Eric Holder, his answer—and I have to be honest. I don't fully remember the question, but I can tell you the answer. He told me he wore two hats: One is the highest law enforcement officer in the land; the other, quite evidently, is a political appointee to the President. And that includes consulting to the President, even though the President has its own lawyers, and it includes, in fact, strategizing with the President over politics.

And we've now learned that the attorney general in his emails, in pretty good detail, led an attempt to withhold from the Oversight Committee in the Fast and Furious case specific discovery. They planned what not to give and when not to give.

So I'm going to ask you all a question I'd like you to opine on now and in writing, if you would. Isn't it time for this Committee to consider depoliticizing the attorney general's position? The FBI director has a single 10-year term where he's put up, he's confirmed, and, in fact, he does not serve in the ordinary pleasure of the President.

Should this Committee consider depoliticizing the attorney general, taking it out of being dual-hatted—the President can have all the advisers and political people he wants—but make once and for all, in a post-Nixon, post-Obama period, make the attorney general's position as nonpartisan as we can by making it a term appointment and not, in fact, a pure pleasure of the President?

And we'll go right down the aisle.

Ms. MITCHELL. Well, Congressman, I've thought about this a lot, actually. But I would tell you that, in my experience, in my lifetime, I don't believe there's any such thing as depoliticizing something. The IRS has 90,000 employees. Only two of them are political appointed by the President, one for a set term and one, the chief counsel serves at the pleasure of the President. All the rest are career employees.

Mr. ISSA. I don't want to disagree with you because you're very good, but when we looked at the imbeds, some of whom were working for Mr. Cummings on the oversight staff and had been at the IRS for the previous years, there are a lot more political appointees than are official.

But if I can go down the aisle for each of you just to get your view on—

Ms. MITCHELL. Could I just say this one thing? Just because they're supposed to be nonpolitical doesn't mean they are. We saw with the IRS and we will see it in the Justice Department.

Mr. ISSA. I have no doubt that even the FBI is not what we would hope it to be. But I'd like to see, is this a direction we should go to eliminate, if you will, the dual hat that the attorney general spoke of here? Please.

Mr. BERNSTEIN. That's a very interesting proposal. I think it might pose some constitutional problems to have an executive officer who's not accountable to the President. We do have such officers. As a matter—

Mr. ISSA. It is statutorily done in other areas.

Mr. BERNSTEIN. It is statutorily done, but from an originalist point of view or from a proper separation-of-powers point of view, I'm not sure that I could defend it. There might be some way of splitting some of the attorney general's duties with the judicial branch, because there are judicial functions that are part of the judicial—that are part of—that could possibly be delegated there. Judiciary is allowed to appoint certain people, like with certain kinds of special prosecutors and whatnot. So there might be some room to try to split some of the responsibilities.

Mr. ISSA. Briefly, Ms. Hammond.

Ms. HAMMOND. I do believe that there would be separation of powers problems with changing the way these people would be removed. And I agree with Ms. Mitchell; I don't think that it's possible to depoliticize in that kind of way.

Mr. ISSA. All right. Look, the FCC and the SEC obviously have their examples, but—and I'll agree that they're not completely depoliticized.

Mr. Grossman.

Mr. GROSSMAN. And I would tend to agree with Professor Bernstein; it would raise serious constitutional questions. With that said, I think the underlying premise of the idea, the frustration at the lack of accountability in oversight that's been possible in this Administration is something that can be addressed and should be addressed in a variety of different ways.

Mr. ISSA. Thank you, Mr. Chairman. Thanks for your indulgence.

Mr. KING. The gentleman from California yields back.

And the Chair would now recognize the Chairman of the full Committee, Mr. Goodlatte of Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

And thank you all for your testimony today.

Mr. Bernstein, can you describe this Administration's abuse of power in ways that hurt religious liberty?

Mr. BERNSTEIN. Sure. Well, I think the most outrageous example of the Administration's abuse of religious liberty, which really didn't get that much attention, is that every court in the United States that has ever reached the issue said that churches and other religious organizations have a right to choose their ministers, have a right to choose the people who serve them in a religious function. And it's a First Amendment right, under both the establishment clause and the free exercise clause. Every single court.

There was a case that came before the Supreme Court in 2011, and the only issue that was in the lower courts was does this particular teacher at a religious school qualify as a minister under the broad definition of minister for the ministerial exemption or not? Shockingly, when the case actually reached oral argument at the Supreme Court—this was not in the briefs even—the counsel for the Justice Department actually argued that there is no ministerial exception; that the government could, in fact, tell religious organizations who their ministers, rabbis, priests, imams, and what have

you could be, with no—with the only possibility of defense that you have the First Amendment expressive association defense under *Boy Scouts of America v. Dale*.

But the people in this particular Administration would have been against the decision in *Dale*. It was 5 to 4. And we know the courts, the balance now. So if *Dale* gets reversed, then you have no possibility of religious freedom.

So that was really a shocking argument. In fact, Justice Kagan said, are you really arguing that? That's shocking even to her. And it's really an extreme view that we associate, even in the legal academy, which is very left wing, we're sort of the extreme left-wing fringe of the legal academy. And if the court had bought that, it would have been a really serious threat to religious liberty. Fortunately, nine to zero the court said absolutely not.

Mr. GOODLATTE. Very fortunately.

Mr. Grossman, can you explain in more detail the problem caused when a regulatory action is challenged in court but is allowed to remain in effect for years until a final judgment on the regulation is reached by the courts?

Mr. GROSSMAN. Sure. Well, you know, in many instances, of course, parties do seek to stay regulations, but the standard to obtain a stay is very, very high. And in many instances, the kind of—the cards that you need, the information you need, the facts that you would need to obtain a stay are frequently things that are in the position of the agency, which, of course, has no interest in seeing its hard-fought rule put to the side while litigation continues.

And so what this means, as a practical matter, is that in almost every instance an agency can come forward with a legally aggressive, perhaps legally indefensible rule that imposes billions or tens of billions of dollars worth of cost, and they can, in fact, through sheer force will it into being, irrespective of whether or not it is ultimately wound up being struck down by the court, as the Utility MACT rule was by the Supreme Court.

Mr. GOODLATTE. And this was taking an old law and rewriting the regulations without ever consulting the Congress or, in fact, failing to get the Congress to take the action that the Administration thought should be taken and then going ahead and doing this. And the end result is that after years of litigation and the Administration losing, they've actually really won because of all the changes that have already been made.

Mr. GROSSMAN. That's exactly right. And in that sense, it short circuits the normal judicial process and short circuits what we all think of as the rule of law. And somebody has to comply with the law and does so at enormous expense in a sort of one-way fashion. Others, they might retire a facility they own, they might bear some unusually large cost, they might suffer in some sense. That can't be undone. It can't really be fixed, and as a practical matter, it isn't.

And it seems to me, though, that's simply contrary to the way that everybody understands that the rule of law ought to work, which is that you shouldn't have to comply with unlawful commands.

Mr. GOODLATTE. And what is the solution to that?

Mr. GROSSMAN. Well, I think there are two things. In a narrow sense, Congress certainly could prescribe, particularly in certain areas, that in certain circumstances a stay is appropriate for rules when they raise certain types of issues or when they're challenged in certain kinds of ways. Look, there are a lot of parameters to do it, but I think a lot of that harm could be ameliorated.

But the second thing is, there needs to be a change in the relationship at this point between the executive branch and the legislative. The executive branch needs to be much more solicitous of what it is that Congress has actually legislated. We don't want people in the executive branch being aggressive and inventing new authorities that this body never intended.

Mr. GOODLATTE. Now, that sounds very attractive to many of us here on the dais. How do we accomplish that?

Mr. GROSSMAN. Well, gosh, that's a serious question. My testimony does, you know—my written testimony, that is, does suggest a few different ways of accomplishing that. And I think one of them would be looking at the deference canons that are applied by the courts in determining whether or not it is that the agencies are following the law or not.

You know, as I testified, and as I've explained in numerous examples, the search for meaning has largely been replaced with the search for escape hatches in the law. In other words, the executive looks where is there an ambiguous word that I can use to do whatever it is that I would like. If courts got less into the business of rubber-stamping that kind of reasoning and more in the business of scrutinizing whether actions comply with the law, I think you would see a different relationship between the branches.

Mr. GOODLATTE. Agreed.

Thank you very much, Mr. Chairman.

Mr. KING. I thank you, Mr. Chairman.

The Chair now recognizes the gentleman from Texas, Judge Poe.

Mr. POE. I thank the gentleman.

Thank you all for being here.

Ms. Mitchell, it's good to see you again.

I want to follow up on Mr. Issa's comments about abuse of power with the Administration bureaucrats. It's been a long time ago, but the House of Representatives held Eric Holder, the Attorney General of the United States, the chief law enforcement officer in the U.S., in contempt of Congress for hiding information. It's been 4 years later, not much has been said about it.

But last week, 2 weeks ago, Federal judge—Ms. Jackson, I believe, Federal Judge Jackson ruled that, hey, the Administration has got to turn over those emails to Congress, and the whole thing now has kind of gone away. Indicative of, you know, when this happened, all from the other side, we heard this hue and cry about, oh, this is so awful about holding the attorney general in contempt. But he got his day in court and he lost. The attorney general was wrong in not turning that information over to Congress, even though it took 4 years to uphold what Congress did. Abuse of power, as I see it.

Let's narrow it down to the IRS. Federal judge, I don't know this guy, David Sentelle, last week said, "It's hard to find the IRS to be an agency we can trust." Well, no kidding. Federal judge has got

it right. We can't trust them. You can talk to taxpayers, non-taxpayers out there in the fruited plain about the IRS. You know, they don't say nice things about the IRS. And the bottom line is, they don't trust the IRS. They feel like the IRS uses its authority to go out and use it for political persecution of individuals, one of which was your client, Catherine Engelbrecht.

Now, I know you have attorney-client privilege, and I don't want to interfere with that, but it's been testified before this Committee that the King Street Patriots, Catherine Engelbrecht's organization, that all—True the Vote—that's all they want to do, is have honest voting. Started in 2010, had six visits by the FBI, one visit by ATF to her organization, one visit by the Texas Environmental Quality Agency, one visit by ATF.

In some of those visits, the FBI was accompanied by people from Homeland Security, Harris County Sheriff's Office Terrorism Task Force. The FBI or the IRS wanted to know who attended these meetings, wanted to know where Catherine was going to make speeches, wanted to know who was in the audience when Catherine Engelbrecht made speeches, and wanted to know what her speech was about and what her future speeches were about. And it is all persecution of this organization by the IRS because they don't like what they are doing.

Now, assume that's all true, Ms. Mitchell. Is that a fair statement, that it was—would you call it persecution, or what would you call all that?

Ms. MITCHELL. Well, I don't think it was a coincidence, if you're asking that. And I might add that the IRS also subjected—and I can say this because Catherine, Ms. Engelbrecht testified before the House, one of the House Committees about this. She and her husband were subjected to individual personal audits by the IRS, as well as their family business being subject to audit by the IRS. And all that came about—

Mr. POE. And never had been audited before ever in their entire lives with the business.

Ms. MITCHELL. It all came about after she submitted applications for the (c)4 status for King Street Patriots and the (c)3 application for True the Vote.

Mr. POE. And they were investigated by OSHA as well, were they not? Never before happened.

Ms. MITCHELL. All surprise visits. Surprise visits.

Mr. POE. And right now, today, is there law to prevent the IRS from doing that again to somebody else out there?

Ms. MITCHELL. Well, that's exactly what I'm saying. The Constitution, the First Amendment—and we have an action pending. And Judge Sentelle from the D.C. Circuit, it was our appeal last week at the oral argument on our appeal in which he made those comments. We were before a three-judge panel. I mean, we've sued the IRS and we've also sued on behalf of True the Vote and we've sued individual employees of the IRS.

Now, one of the things that really, I have to tell you, galls me is not only has no one been held accountable, but we the taxpayers are paying the legal fees of the private attorneys who are defending the individual IRS agents in this litigation. So, you know, until—we have to find ways to hold individual Federal employees account-

able and responsible when they violate the constitutional rights of citizens.

Mr. POE. Reclaiming my time because I'm about out of it. Nobody's been fired, to your knowledge, in the IRS? Some people might have gotten bonuses. Nobody's gone to jail?

Ms. MITCHELL. No.

Mr. POE. And don't you think this is, I mean, appalling that our government would use Soviet-style persecution of people who disagree and want to exercise the First Amendment freedom of speech? Don't you think that's a sad state of affairs with the IRS?

Ms. MITCHELL. It's outrageous.

Mr. POE. I yield back, Mr. Chairman.

Mr. KING. The gentleman from Texas yields back.

The Chair now recognizes the patient gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman.

Mr. Grossman, we've been following the ongoing waters of the U.S. regulations. The internal memos from the Army Corps of Engineers have stated that the EPA's definition is likely indefensible in court. Yet the EPA is continuing to move forward. Does this constitute, in your opinion, an overreach by the Administration?

Mr. GROSSMAN. Yes, it does. You know, the key precedent in this area is the Supreme Court's Rapanos decision. And while fractured, the controlling opinion was arguably Justice Kennedy's. And I think, as most legal analysts who view this rule have recognized, the waters of the United States rule goes well beyond anything that would be authorized by Justice Kennedy's opinion, to the point that isolated puddles and things like that would be subject to Federal jurisdiction.

Mr. LABRADOR. Thank you.

Do you think that Chevron provides the EPA the apparent authority to act in this manner?

Mr. GROSSMAN. You know, look, Chevron puts a thumb on the scale in favoring an agency in basically every case involving statutory interpretation, or at least a lot of them. But in this instance, it simply goes well beyond anything that would be acceptable, even giving the agency Chevron deference.

This case raises at heart serious constitutional issues about limits on Federal power and about limitations under the Clean Water Act. The Supreme Court has recognized that as broad as that act may be, it is not infinitely capacious. And the waters of the United States rule simply goes well above and beyond anything that the courts have recognized as legitimate.

Mr. LABRADOR. Thank you. While the waters of the U.S. regulations are a big issue today, there are smaller areas where the EPA is acting in the same manner. Can you name any of those areas where the EPA is acting in the same manner in impacting Americans without bothering to wait for congressional authority?

Mr. GROSSMAN. Well, gosh, you know, obviously the foremost one is the EPA's, you know, many headed set of actions regarding greenhouse gas emissions. You know, the Congress in 2009 rejected a cap-and-trade scheme that was put forward by the Administration, and the Administration has subsequently discovered that it can impose the same regulations on the U.S. economy simply by

fiat under statutory authority that's been buried in the Clean Air Act since the 1970's.

I think this came as a surprise to many Members of Congress, but it also came as a surprise to people familiar with the Clean Air Act, given that the agency's understanding of its statutory authority under that act never encompassed these kinds of actions at all.

While the Supreme Court in *Massachusetts v. EPA* may have given the agency some license to peek into greenhouse gas regulations under certain Clean Air Act programs, the type of cap-and-trade system that the agency is trying to implement in its clean power plan just is insupportable, and, to my mind, is the kind of thing that, you know, really demonstrates what's wrong with the current aggressive posture of agency statutory interpretation that we now live with.

Mr. LABRADOR. Excellent.

I was also made aware that the EPA admitted wrongdoing in funding a social media campaign to support its waters of the U.S. regulations. This is a clear violation of Federal law, but yet the EPA still went forward with the campaign, as you know. This is another example of an agency exercising far too much authority. How can we reign in these agencies?

Mr. GROSSMAN. Well, first, I would say, you know, the social media campaign operated by EPA, it's not only that it was illegal; it was also wrong. EPA was acting, in effect, to mislead the public about support for its own actions. And, you know, there should never be a circumstance when an agency of the United States Government is acting to mislead the public.

You know, as to what Congress can do about this, you know, my testimony describes a number of different possible alternatives. But, you know, at heart, Congress needs to step forward and it needs to reclaim its legislative authority. You know, the executive branch is always going to be the portion of government that has the greatest agility, but this branch of government is the one that actually wields the power. It has the power of the purse and it has the legislative power, and those are very powerful things indeed.

Too often Congress has delegated to the executive branch, particularly legislative authority, and has been unwilling to exercise its power of the purse in any forceful fashion. Congress can certainly do a lot of things to change the balance of power between the branches, but those are really at the heart of it, you know, where efforts should be directed.

Mr. LABRADOR. Mr. Bernstein, I think the administrative state has swelled to proportions well beyond the original intent of the Administrative Procedures Act. Can this or any other Congress regain its authority without a major overhaul of the APA?

Mr. BERNSTEIN. That's a very profound question. I think the first thing we need to do is to enforce the APA itself, and I think there needs to be a way for—like these universities, for example, the example I gave earlier that are subject to this Dear Colleague letter—to be able to challenge that.

Right now the problem is you get guidance from the agency or you get sort of informal prosecutions from the agency. We'll go after you if you don't do this or that. And you want to go to court, but there's no formal regulation that the courts can review. The

agency claims, we're not acting in an official legal matter so there's nothing for the courts to do.

So I think part of the answer has to be, as other people mentioned, less Chevron deference on that hand, but also more of a willingness of courts to be more—to allow people to proactively say, look, the agency is saying it's not official rule, but they're telling us that we have to comply. Don't look at the formality. Look at what the agency is actually doing. And once we get to that stage, if the courts can do that, I'm not sure how much more changes to the APA itself we necessarily need.

Mr. LABRADOR. Thank you.

I yield back.

Mr. KING. The gentleman from Idaho yields back.

Seeing no further business to come before this—oh, the gentleman from Georgia has arrived. In that case, we'll recognize the gentleman from Georgia, my friend, Mr. Hank Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

The Preamble of the Constitution of the United States of America lists one overarching theme, which is to establish a more—or to ensure a more perfect union. So—and then five things that they wanted to do in order to ensure a most—a more perfect union, which was to establish justice, ensure domestic tranquillity, provide for the common defense, promote the general welfare, and ensure the blessings of liberty to ourselves and our posterity.

And I'm going to express my complete dismay in this Task Force's disregard of those ideals by targeting the legal administrative agency action created to clarify the previously complex and rigid work requirements in the Temporary Assistance for Needy Families program, otherwise known as TANF. The laser focus of this Task Force is to dismantle guidelines that would provide States greater flexibility in determining its work requirements in the program, and this is nothing more than just conservative politics against poor people.

In my home State of Georgia, the TANF program has assisted over 50,000 low-income families in obtaining food and basic necessities. That's what it does right now. Prior to the issuance of the 2012 human—Health and Human Services guidance, TANF was the only employment program in which getting participants into permanent paid employment was not a key measure of success.

States have devoted significant time to tracking hours rather than providing direct service to individuals which could help them improve their prospects for securing employment or helping them become more job ready. Moreover, participation in basic education was not a priority. Finishing college degree requirements did not count as a stand-alone activity that would allow single-parent households to continue receiving benefits.

The previous work rate requirements heavily constrained the States' ability to use training and education, even where the evidence shows stronger employment outcomes for those who complete those programs. The Administration's lawful changes to the TANF program challenge—the lawful changes to the TANF program challenged States to engage in a new round of innovation that sought to find more effective mechanisms for helping families succeed in employment.

I was mistaken. I would hope that this Task Force would immediately cease wasting taxpayer dollars debating legal rhetoric and start assisting everyday Americans.

And with that, I would like to ask of Ms. Emily Hammond, were there any questions that were asked of you that you were not able to answer fully and which you desire to address while you have the time right now?

Ms. HAMMOND. Thank you very much, sir.

I would like to just respond to some of the suggestions that we do away with Chevron deference as a way of constraining agencies. I've previously, again, testified here that doing away with Chevron deference is a piecemeal and likely unrealistic approach to trying to enhance legislative oversight of what the executive branch does.

What I would ask this institution to do is something that I think my co-panelists would agree with, which is to draft statutes clearly in the first place so that agencies can follow that direction. Right now, the agencies are doing the best they can, for example, with the waters of the United States. I disagree with my co-panelists. I do believe that that rule stays within the bounds of Justice Kennedy's opinion and should be upheld on review.

The point is, the courts are doing their job. Chevron enables them to do their job but still polices those statutory boundaries. Thank you.

Mr. JOHNSON. Thank you. And I'll note that you are hailing from Georgia. Welcome to Washington, D.C., once again. Good to see you.

Ms. HAMMOND. Thank you.

Mr. JOHNSON. Thank you.

And I yield back, Mr. Chairman.

Mr. KING. The Chair thanks the gentleman from Georgia.

And this concludes today's hearing.

I thank all the witnesses for your testimony here today.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses again, and I thank the Members and the audience. This hearing is adjourned.

[Whereupon, at 4:22 p.m., the Subcommittee was adjourned.]