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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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January 24, 2014

The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Obama:

Next week you will make your State of the Union address, in which the American people will be made aware of the White House's priorities and views on matters affecting this great nation. In preparation for the address, serious concerns over the expansion of the federal bureaucracy during your Administration should be taken into consideration. As the Ranking Member on the Senate Committee on Environment and Public Works (EPW), I am particularly concerned by Washington bureaucracies, such as the Department of Interior (DOI) and the Environmental Protection Agency (EPA), that have strangled economic freedom and private property rights through regulatory fiat. Expansive regulatory action by unelected bureaucrats has proven to be a clear and compounding factor in the deteriorating plight of our economic recovery, and requires your reconsideration in the White House's priorities moving forward.

Critically, these regulatory actions have been facilitated through means that contradict the administrative process and your commitment to govern the "most transparent administration in history."¹ Over the last year I have exposed your Administration's closed-door practice of excluding key stakeholders in the regulatory process through the practice of "sue and settle" and collusion between EPA and far-left environmental allies. I have also focused on revealing key vulnerabilities in the EPA's economic justification for burdensome rules, including the failure to quantify alternative actions or to look at the impact of rules across the economy. As we anticipate your address next week, I am increasingly concerned that you will continue these practices and unilaterally pursue a regulatory agenda with no consideration of costs imposed upon the economy, and regardless of any input from the American people and their elected officials.

My unease is not isolated as one of your supporters, Professor Jonathan Turley, Shapiro Professor of Public Interest Law at George Washington University, recently expressed similar concerns. Specifically, a December 3, 2013, House Committee on the Judiciary hearing titled,

¹ Jonathan Easley, *Obama says his is 'most transparent administration' ever*, THE HILL (Feb. 14, 2013), <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

"The President's Constitutional Duty to Faithfully Execute the Laws," reviewed numerous concerns facing our republic in the era of your presidency, in which Turley testified:

Despite the fact that I once voted for President Obama, personal admiration is no substitute for the constitutional principles at stake in this controversy. When a president claims the inherent power of both legislation and enforcement, he becomes a virtual government unto himself. He is not simply posing a danger to the constitutional system; he becomes the very danger that the Constitution was designed to avoid.²

Turley went on to discuss issues of selective enforcement of the law that otherwise raise concerns of abuse of agency discretion through what is often referred to as the "fourth branch" of government:

The Framers created a Chief Executive with a relatively short term of four years and clearly defined powers to fit within this system of shared government. Despite the recent emergence of an uber-presidency of increasingly unchecked powers, the Framers were clear that they saw such concentration of power to be a danger to liberty. Indeed, the separation of powers is first and foremost a protection of liberty from the dangers inherent in the aggregation or aggrandizement of power.³

It appears this "concentration of power" has become the vehicle by which unelected officials are given carte blanche to undermine property rights, personal freedoms, and other economic liberties that facilitated America's greatness. In a Washington Post op-ed Turley further highlighted his distress in the growth of centralized power, stating:

This exponential growth has led to increasing power and independence for agencies. The shift of authority has been staggering. The fourth branch now has a larger practical impact on the lives of citizens than all the other branches combined. The rise of the fourth branch has been at the expense of Congress's lawmaking authority. In fact, the vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats. One study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.⁴

Professor Turley was correct in his analysis of the "fourth branch." Economic historian Niall Ferguson noted in a recent article that:

² *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary* (Dec. 3, 2013) (statement of Jonathon Turley).

³ *Id.*

⁴ Jonathon Turley, *The Rise of the Fourth Branch of Government*, THE WASHINGTON POST (May 24, 2013), http://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html.

Since 1993, 81,883 new rules have been issued. In the past 10 years, the "final rules" issued by our 63 federal departments, agencies and commissions have outnumbered laws passed by Congress 223 to 1." Right now there are 4,062 new regulations at various stages of implementation, of which 224 are deemed "economically significant," i.e., their economic impact will exceed \$100 million.⁵

Such expansion of the "fourth branch" is further illustrated by the fact that the number of new rules finalized in 2013 rose to 3,659, which equates to just over 10 new regulations a day – including weekends and holidays. Moreover, the Federal Register is now an overwhelming 174,545 pages and 238 volumes. The American Action Forum (AAF) has also reviewed the breadth of federal regulatory action and found: "From 2009 to 2013, regulators have published \$494 billion in final rules. This figure dwarfs the Gross Domestic Product (GDP) from countries like Sweden, Peru, and Ireland. With more than \$87 billion in proposed rules in 2013, likely to be finalized in 2014, burdens will continue to escalate."⁶ The Center for Regulatory Solutions recently highlighted that World Bank and International Finance Corporation analysis shows that the United States is one of the few countries in the world over the last ten years to make it more difficult to start a business, and that "the United States has had the 6th largest increase in regulatory burden facing new businesses, ranking alongside Yemen, Zimbabwe, and Burundi."⁷

The growth in the "fourth branch" of government under your administration has helped to facilitate the decline in our economic competitiveness, and is a far cry from the promise issued by your White House to "continue to eliminate unjustified regulatory costs"⁸ and your personal commitment to seek "more affordable, less intrusive means to achieve the same ends – giving careful consideration to benefits and costs. This means writing rules with more input from experts, businesses and ordinary citizens."⁹

Unfortunately, the compounding regulatory onslaught, combined with the closed-door dealings between unelected bureaucrats and radical environmental allies through practices such as "sue and settle," are burdening our economy to the point where the United States currently has the lowest workforce participation rate since the Carter Administration. Along with estimates that the real unemployment rate exceeds 14%, at 20%, one in five, a record number of American households now receives food stamps. For young Americans the prospects for their future appear even grimmer. According to recent analysis by the Economic Policy Institute:

⁵ Niall Ferguson, *The Regulated States of America*, THE WALL STREET JOURNAL (June 18, 2013), <http://online.wsj.com/news/articles/SB10001424127887324021104578551291160259734>

⁶ Sam Batkins, *A Regulatory Flurry: The Year in Regulation, 2013*, AMERICAN ACTION FORUM (Jan. 8, 2014), <http://americanactionforum.org/research/a-regulatory-flurry-the-year-in-regulation-2013>.

⁷ Briefing by Center for Regulatory Solutions, to Republican Staff, S. Comm. on Env't & Public Works (Jan. 17, 2014).

⁸ Cass Sunstein, *Final Regulatory Reform Plans Will Save Money, Reduce Waste*, THE WHITE HOUSE BLOG (Aug. 23, 2011), <http://www.whitehouse.gov/blog/2011/08/23/final-regulatory-reform-plans-will-save-money-reduce-waste>.

⁹ Barack Obama, *Toward a 21st-Century Regulatory System*, THE WALL STREET JOURNAL (Jan. 18, 2011), <http://online.wsj.com/news/articles/SB10001424052748703396604576088272112103698>.

For young high school graduates, the unemployment rate is 29.9 percent (compared with 17.5 percent in 2007) and the underemployment rate is 51.5 percent (compared with 29.4 percent in 2007). For young college graduates, the unemployment rate is 8.8 percent (compared with 5.7 percent in 2007) and the underemployment rate is 18.3 percent (compared with 9.9 percent in 2007).¹⁰

A significant problem frustrating our economy originates from an abuse of the legal and regulatory processes facilitated by the Executive Branch of government. There exists zero evidence that our government was established to freely trample on the rights of private citizens and economic activity by way of unelected agency staff and their regulatory actions. When reviewing the claims by those such as Turley, investigating the actions of bureaucratic staff, grappling with our economic realities, and thinking on why your administration would intentionally collude behind closed-doors, a clearer picture of what is at stake becomes evident.

Future generations will look back on whether your administration was committed to the founding principles of a limited government “of the people, by the people and for the people.” In recent years, under your control, the actions of our federal agencies have compounded the deviation from the will of the people. When our bureaucracy becomes so big that individuals within an agency can selectively enforce the law to the point of abuse, the time to lead becomes present. I look forward to your State of the Union address in hopes that you take these concerns into consideration as the future of our commerce, free markets, individual rights and economic liberty are at stake.

Sincerely,



David Vitter
Ranking Member
Senate Committee on Environment and Public Works

¹⁰ Heidi Shierholz, Natalie Sabadish, and Nicholas Finio, *The Class of 2013, Young graduates still face dim job prospects*, ECONOMIC POLICY INSTITUTE (Apr. 10, 2013).