

THE
IMPERIAL
PRESIDENCY

— PREPARED BY —
THE OFFICE OF

ERIC CANTOR
HOUSE MAJORITY LEADER

THE
IMPERIAL
PRESIDENCY



IMPLICATIONS FOR
ECONOMIC GROWTH
& JOB CREATION



THE IMPERIAL PRESIDENCY

Over the past several months opinion pieces appearing in such places as [The Washington Post](#), [National Review](#), and [The Wall Street Journal](#) have talked about the emergence of an “Imperial Presidency.” While some may wish to simply chalk this up to partisan criticism of the incumbent President, even [The New York Times](#) in a recent A1 article examined “an increasingly deliberate pattern by the administration to circumvent lawmakers...”

Less noticed, but perhaps even more important – especially to the over 20 million Americans currently out of work or underemployed – is the link between a breakdown in the rule of law and reduced economic growth and individual prosperity.

Property rights and rule of law are essential for the proper and efficient functioning of society and the economy. Unambiguous laws and procedures provide a framework by which free people agree on the scope and reach of their government’s actions, whereas unclear laws or arbitrary enforcement undermine individual liberty and the notion of popular sovereignty. Clear, transparent, predictable rules that are applied without preference or prejudice allow individuals to invest, build businesses, and create jobs. When there is a breakdown in the rule of law, increased uncertainty leads to reduced investment and less growth.

Numerous economic studies have documented the relationship between a strong rule of law and economic growth. In 2008, The Economist published the following chart alongside a story entitled “[Order in the Jungle](#).” The chart aptly illustrates the strong relationship between adherence to the rule of law and economic growth. As economist Hernando de Soto – a leader in the field of the impact of property rights and rule of law on economic growth succinctly [stated](#): “So the origin

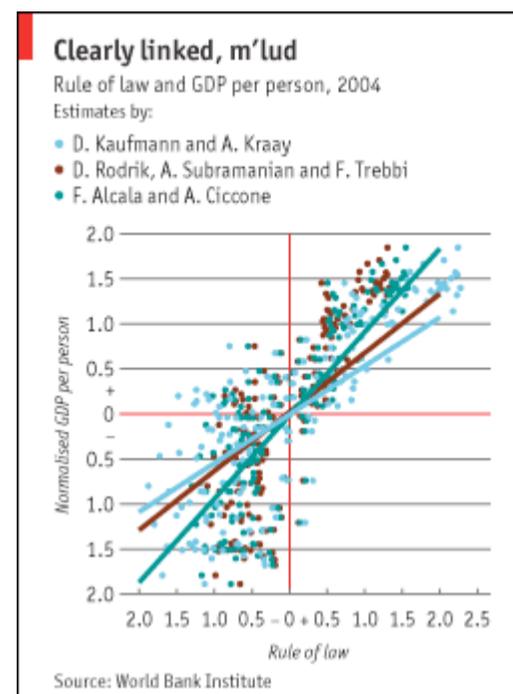
of the rule of law— which will allow a modern nation to grow and so bring peace, stability, and prosperity to the world—is property rights. And the rule of law will actually generate prosperity.”

In the United States, the ultimate law is the Constitution, which specifically provides how laws are to be enacted and requires the President to take care that the laws that are enacted are faithfully executed. The laws of the United States establish the process whereby individuals can enforce their property rights and private contracts and provide the framework by which executive agencies are to conduct rulemakings and the other regulatory activities.

When “laws” are created without going through Congress; when laws are selectively executed; when an administration intervenes into the normal judicial process and diminishes an individual’s property rights; and when the normal regulatory process is circumvented, the rule of law is eroded.

All of this increases uncertainty. Individuals, families, and businesses now not only face uncertainty with respect to the policy decisions made by government, but they face uncertainty as to how those decisions will even be made. Numerous economic studies and surveys indicate that uncertainty itself (which is certainly increased with the breakdown in the rule of law) also hinders economic growth.

While Administrations of both political parties have been known to test the bounds of the limits of their power, the breadth of the breakdown in the rule of law in recent years has reached new levels. In the Heritage Foundation and Wall Street Journal’s annual Index of Economic Freedom, the United States scores lower today on the rule of law than it did in 2008. As the 2012 report notes, “Corruption is a growing concern as the cronyism and economic rent-seeking



associated with the growth of government have undermined institutional integrity.” Individuals and businesses are increasingly forced to rely on the courts to enforce their most basic substantive and procedural rights.

Over the past year-and-half, the Committees of the House of Representatives have investigated and documented numerous break-downs in the rule of law. This report compiles over 40 separate examples that span the breadth of government, including instances where the Administration has attempted to:

- Tell a private business in what state it can locate;
- Tell a religious institution which employees are “religious” under certain federal laws;
- Regulate the internet;
- Rewrite Federal education law;
- Created new “Super” regulatory agencies; and
- Significantly restrict America’s energy resources.

IGNORING ADVISE & CONSENT

One of the checks and balances imposed by the Founding Fathers was the requirement that senior Executive Branch officials be appointed only with the consent of the Senate. In the modern regulatory state the approval of officials by the Senate is one key way to ensure that regulators do not abuse their authority. In order to address situations where the Senate was in recess, thus preventing them from consenting, the Founders provided for a limited interim appointment process absent Senate confirmation.

“Recess” Appointments

When the Senate did not approve four of his nominees to two regulatory agencies – the head of the new Consumer Financial Protection Bureau (CFPB) and three members of the National Labor Relations Board (NLRB) – President Obama took the unprecedented step of declaring that the Senate was in recess – even though it wasn’t – and invoking his interim appointments power.

Seating the head of the CFPB and a quorum for the NLRB allowed both agencies to begin promulgating regulations that would have otherwise have been on hold until the President and the Senate came to agreement on filling the vacancies.

The President’s unconstitutional acts are now the subject of pending litigation by those negatively impacted by the new rules and determinations published by these agencies.

CREATING “LAWS” OUTSIDE OF THE CONGRESSIONAL PROCESS

For decades, Congress under both parties authorized and permitted federal agencies to exercise immense control over the economy through the rulemaking process. For the regulated, there is virtually no difference between a legal requirement imposed by statute and a legal requirement imposed by regulation. But both parties have always agreed that agency action is limited to the authority granted to the agency by an Act of Congress, duly signed by the President. Under this simple limitation, at least some limits are imposed on the unelected officials who run the agencies. Under the Obama Administration, agencies have gone further than ever before in overturning decades of regulatory precedent, acting without statutory authorization, and otherwise abusing the rulemaking process to create de facto laws without going through Congress.

Changing the Unionization Process

- **Majority Threshold:** In 2009, the President’s appointees to the National Mediation Board (NMB) changed union election rules that had been in place for 75 years under the Railway Labor Act so that union certification required only a majority of the employees who vote in the election (as opposed to the majority of all employees). This change made it easier to form a union. But, the NMB conveniently left in place the arduous process under the Railway Labor Act to decertify a union. Congress ultimately responded with provisions included in the FAA Modernization and Reform Act (P.L. 112-95) to address the President’s changes by requiring: (1) Any new NMB rulemakings be subject to public hearings; (2) Elections to either unionize

or vote out a union are conducted on an equal footing; and (3) GAO to conduct regular and substantive oversight of the NMB, which the Board has previously lacked.

- **Ambush Elections:** In June 2011, the National Labor Relations Board (NLRB) proposed sweeping changes to the rules governing union elections. Under the proposal, union elections could take place in as little as 10 days, restricting an employer's right to communicate with his or her employees and undermining workers' ability to make an informed decision. This past May a federal judge overturned the NLRB regulation citing that the agency lacked the legal quorum necessary when it approved the measure.
- **Creating Micro-Unions:** In August of 2011, the NLRB discarded decades of precedent in order to adopt a biased standard for determining which group or "unit" of employees can vote in a union election. Union leaders have long tried to organize smaller units of employees as an incremental step toward organizing an entire business. In an effort to preserve unity in the workplace and keep labor costs low, employers often seek to expand the unit to include a greater number of employees. Under the board's new standard, it will be virtually impossible for employers to challenge the group of employees handpicked by the union. The new standard empowers union leaders to manipulate workplaces for their own gain, with dramatic consequences in the real world. Affected employers will be constantly engaged in costly labor disputes. For example, a grocer could be negotiating one day with his cashiers and the next with those who stock the shelves.

In November of 2011, in response to these harmful Obama Administration regulations and edicts, the House passed the Workforce Democracy and Fairness Act.

Telling Businesses Where They Are Allowed to Locate

Choosing where to set up shop and hire workers is a fundamental business decision. Bureaucrats at the National Labor Relations Board (NLRB) believe they should have a say in that decision. In April of 2011, the NLRB filed a complaint against The Boeing Company for building an assembly line in South Carolina despite the fact the NLRB could not demonstrate that Boeing was breaking any law. The NLRB tried to force Boeing to move the work to Washington State from the non-union facility in South Carolina. Ultimately the NLRB backed down and dropped their case against Boeing, only after their coercive efforts caused Boeing to modify its agreement with a Washington-based union.

In September of 2011, in response to the NLRB, the House passed the Protecting Jobs from Government Interference Act.

Imposing “Propaganda” Mandates on Employers

Despite the fact that Congress has never provided the National Labor Relations Board (NLRB) with the authority to require employers to provide general notice posting in the workplace, last year the NLRB finalized a new rule that requires nearly every private employer to post in the workplace a vague and biased notice of employee “rights.” What the poster really represents is a marketing campaign by Big Labor mandated by its allies at the NLRB. This new unfunded mandate on business is currently the subject of litigation.

Telling Federal Contractors Who They Have to Hire

Shortly after taking office, President Obama issued an Executive Order that would limit employer flexibility and increase costs by forcing federal contractors that perform services previously performed by another contractor to offer jobs to the predecessor’s employees. While Congress had previously legislated issues related to successor contractors, Congress never required or even authorized the imposition of this new mandate on whom private employers are required to hire.

Regulation of Hydraulic Fracturing

The states have always had primacy to regulate oil and gas activity, including hydraulic fracturing, on state and private lands. This relatively new technology represents the largest area of growth towards American energy independence. With respect to hydraulic fracturing specifically, the federal government expressly codified this primacy, leaving the EPA with limited authority to regulate fracturing. The Agency, in a March 2011 letter to Senator Cardin, admits that “EPA’s authority to regulate or respond to natural gas exploration and production activities is limited by exemptions established under several of the principal environmental statutes we administer...”

EPA seems undaunted by this admitted lack of Congressionally-granted authority, and instead is looking for ways to overcome this limitation without Congressional consent. To this end, EPA’s Office of Science Policy within the Office of Research and Development (ORD) recently stated that the Agency is doing “a pretty comprehensive look at all the statutes” to determine where “holes” may allow for additional oversight or regulation.

In response, several House Committees held hearings to examine the negative impact that will result from the Obama Administration’s regulation of hydraulic fracturing on energy development, job creation and economic growth.

Establishing a National Ocean Regulatory Policy

On July 19th, 2010 President Obama signed Executive Order 13547 to adopt the final recommendations of the Interagency Ocean Policy Task Force to implement a new National Ocean Policy, which includes a mandatory Coastal and Marine Spatial Planning initiative to “zone” the oceans. In this unilateral action, he established a top-down, Washington, D.C.–based approval process that will hinder rather than promote ocean and inland activities and cost American jobs.

Without clear statutory authority, the policy sets up a new level of federal bureaucracy with control over the way inland, ocean and coastal activities are managed. This has the potential to inflict damage across a spectrum of sectors in-

cluding agriculture, fishing, construction, manufacturing, mining, oil and natural gas, renewable energy, and marine commerce, among others. The Administration took this action despite the fact that in four separate Congresses, legislation has been introduced to implement similar far-reaching ocean policies, and to-date NO bill has passed the House or even been reported out of a Committee.

The House Natural Resources Committee held several hearings to examine the President's National Ocean Policy.

Creating a New Land Regulation Program

In 2010, Secretary of the Interior Ken Salazar announced a "Wild Lands" Secretarial Order. This new Wild Lands policy would effectively allow the Administration to circumvent the strictly congressional authority of designating wilderness areas. By treating these new Wild lands as de facto wilderness, millions of acres of public land could be placed off-limits from their original multi-use purpose. Congress ultimately stepped in and prohibited the Department of the Interior from using funds to carry-out this policy.

Global Warming Regulations

The Obama Administration's EPA is developing global warming regulations that have the potential to be the most complex, far-reaching, and expensive in the agency's history.

At a November 2010 White House Press Conference, President Obama said of Congress' rejection of a cap-and-trade bill, "cap-and-trade was just one way of skinning the cat, it was not the only way. It was a means, not an end. And I'm going to be looking for other means...."

The Obama Administration is using the regulatory process to "skin the cat," implementing major aspects of the 2009 cap-and-tax legislation despite the fact that it was rejected by Congress.

Network Neutrality Regulations

In recent years technology has been one of our nation's strongest economic growth areas, yet the Federal Communications Commission (FCC) has sought to impose new network neutrality rules on the internet. In 2010, a Federal court struck down the FCC's first attempt to regulate the internet; noting that the FCC lacked authority to issue such regulations. Then-Energy & Commerce Committee Chairman Henry Waxman (D-Calif.) introduced legislation to provide such authority. Despite the fact that the legislation was not enacted, the FCC proceeded anyway with new net neutrality rules. Businesses negatively impacted by these new regulations have been forced to go to court once again to defend against regulations that the agency has no authority to issue.

In April, the House passed a Resolution of Disapproval, H. J. Res. 37, to overturn the FCC's controversial internet rules that stifle small business growth and investment in order to promote freedom and innovation.

Auto Efficiency Mandate

The Obama Administration is imposing costly vehicle efficiency standards more than a decade into the future under the regulatory auspices of an agency not authorized to establish such standards. Congress set up the CAFE program in the 1974 Energy Policy and Conservation Act (EPCA), but the Administration's rule violates most of that statute's key provisions.

- **Regulatory Agency:** It is clear that Congress wanted the National Highway Traffic Safety Administration (NHTSA) to be the sole federal agency setting these standards, and that states were preempted from going their own way. Yet the Obama administration has given EPA the lead role and has allowed California to wield significant influence, in effect allowing California to dic-

tate an auto standard for all other states. Under this administration's rules, NHTSA is a decidedly junior partner despite being the only one with any expertise on fuel economy standards.

- **Stringency and Regulatory Timeline:** The stringency of the rule, 54.5 mpg by 2025, goes far beyond what Congress envisioned when it last spoke on the matter in the 2007 energy bill. The fact that standards are being locked in all the way out to model year 2025 is something Congress never authorized.
- **Cost:** EPA concedes that its mandate will cause sticker prices to rise \$3,000 by 2025, while the National Association of Auto Dealers predicts even higher vehicle cost increases – this arguably violates NHTSA's obligation under EPCA to take economics into account.
- **Vehicle Safety:** There is no indication that the 54.5 mpg by 2025 mandate has taken into consideration vehicle safety concerns, despite the fact that safety is a statutory requirement in establishing such standards.

Several House Committees have held hearings to examine fuel economy standards for light and heavy duty vehicles, and the Obama Administration's recent agreement to raise fuel economy standards for model years 2017-2025.

Claiming the Power to Define What Constitutes Religious Employment

The Administration's Equal Employment Opportunity Commission (EEOC) took the position that the Administration has the power to declare what religious staff positions at a religious institution are "religious enough" to enjoy the protections from government interference guaranteed by the First Amendment. Ultimately, the Supreme Court decided 9-0 against the Obama Administration's position. Even President Obama's two Supreme Court appointees found the Administration's position untenable.

Draconian Regulation of Coal

The Clean Air Act's "Good Neighbor" provision gives the EPA the authority to reduce interstate pollution that interferes with the attainment and maintenance of the national ambient air quality standards protecting public health. A previous regulation coordinated states' implementation plans addressing interstate pollution, but that regulation was remanded by the court for further analysis. Under the guise of responding to that court remand, the Obama EPA misused the Good Neighbor provision to impose more stringent emissions reductions under federal implementation plans in the Cross-State Air Pollution Rule ("CSAPR"). CSAPR was a thinly veiled attempt to impose such draconian reductions on coal-fired power that the only option for some was a shutdown of electric generation plants and a loss of jobs at coal mining operations. In an August 2012 decision vacating EPA's "Cross-State Air Pollution Rule," the D.C. Circuit Court of Appeals stated the following---

- "EPA has transgressed statutory boundaries."
- "EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines its target after the States' chance to comply with the target has passed."
- "EPA's authority to issue these [Federal Implementation Plans] rests on our accepting its rickety statutory logic. We decline the invitation."

IGNORING THE PLAIN LETTER OF THE LAW & FAILING TO FAITHFULLY EXECUTE THE LAW

The President is charged under the Constitution with ensuring that the laws – all laws – are faithfully executed. That means comporting regulatory proposals to the requirements of statute and carrying out the law as it is written, not as the President may wish that it were written. Yet, in multiple instances when the plain letter requirements of the law are in conflict with the President’s policy goals, the law is ignored. Such actions rob citizens of their ability to trust in and rely on the plain letter of the law.

Waiving Work Requirements Under Welfare

In July of 2012, despite the plain reading of the law, the Obama Administration asserted that they had the right to waive the statutory work requirements included in the bipartisan 1996 welfare reform law. The non-partisan Government Accountability Office has determined that prior Administrations and even the Obama Administration had earlier determined that indeed they had no such authority to waive the work requirements. And with good reason, the law explicitly states that the section that contains the work requirements cannot be waived.

In September 2012, the House passed a resolution to prevent President Obama from eliminating successful, bipartisan work requirements in the Temporary Assistance for Needy Families (TANF) program.

The Contraception Mandate and the Rights of Religious Employers

The President's health care law requires employers to provide certain "preventive services" at no-cost to the insured. In carrying out this requirement the Department of Health and Human Services (HHS) has mandated through regulation that employers, including religiously-affiliated institutions, pay for sterilization, abortion-inducing drugs, and birth control services even if paying for them violates the employers' conscience rights.

Such employers have every reason to expect that their rights would be protected given that current law -- the Religious Freedom Restoration Act (RFRA) -- provides that the federal government may "substantially burden" a person's "exercise of religion" only if it demonstrates that application of the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. Yet in issuing their mandate, HHS never even attempted to structure the requirements in such a way as to eliminate the burden on religious employers. As a result of the controversy, religious employers have had to resort to the courts to enforce their legal rights under the law.

Expansion of the Refundable Tax Credit Providing for Premium Assistance

The President's health care law provides for premium-assistance tax credits only to individuals enrolled in an exchange established by a state. Despite statutory language to the contrary, the IRS issued final rule on May 23, 2012, stating that premium tax credits are available to individuals who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange.

Given that many states have refused to run an exchange, this arbitrary abuse of regulatory power will permit the IRS to spend hundreds of billions of dollars without authorization from Congress. In addition, due to the structure of the health care law, this unlawful decision will also subject many employers to the law's penalty for failing to provide federally-approved health insurance.

Medicare Advantage Quality Bonus Demonstration

The President's health care law cuts payments to Medicare Advantage plans (which enroll about 25% of all Medicare beneficiaries) by \$308 billion over the next ten years. As a result of these cuts, the Medicare Trustees predict enrollment in Medicare Advantage will be cut in half by 2017 as compared to prior law.

Recognizing that fully implementing the cuts to Medicare Advantage could be politically unpopular, the Administration initiated a nationwide "demonstration" program to provide bonus payments to most Medicare Advantage plans. These bonus payments offset 70% of the health care law's cuts to Medicare Advantage in 2012, undermining the intent of the law and avoiding the elimination of plan benefits or the possibility of higher premiums for seniors during a presidential election season. The non-partisan GAO reviewed the cost, design, and authority for this demonstration and determined:

- The demonstration dwarfs ALL other Medicare demonstrations – both mandatory and discretionary – conducted since 1995 and is at least seven times larger than the combined budget impact of all other demos.
- The design precludes any credible evaluation of its effectiveness, calling into question its utility as a demonstration.
- It offsets a significant portion of PPACA's payment reductions during its 3-year timeframe.
- It does not have any elements designed to show how to increase the efficiency and economy of Medicare services, as required by law.

All of this calls into question whether the department even had the authority to launch this "demonstration" since it seems intended not to serve the purposes of authorized demonstration projects, but rather to delay the impact of the cuts to Medicare included in the President's health care law until after the election.

Medical Loss Ratio

The President's health care mandates that insurance companies only spend a certain amount of their premiums on non-health service activities—the so called medical loss ratio (MLR) – and offer rebates to consumers if they exceed the statutory MLR. The MLR requires insurance companies to lower administrative and operational spending, while ObamaCare increases administrative and operational costs on insurers.

The Act requires that the Department of Health and Human Services (HHS) deduct federal and state taxes and licensing or regulatory fees from the denominator of the medical loss ratio (MLR) calculation so as to avoid penalizing companies for paying their taxes.

Despite this clear statutory requirement, HHS issued a regulation that violates the law by permitting the deduction of some federal taxes while disallowing the deduction of other federal taxes. This violation of the statute makes the regulation more onerous and could lead to higher premiums.

Termination of Yucca Mountain Nuclear Waste Repository

In order to fulfill a 2008 campaign pledge, President Obama halted the process to make Yucca Mountain the nation's permanent nuclear waste repository. Yucca Mountain has been studied for decades and exhaustively evaluated for its scientific and technical ability to serve as a nuclear waste repository. The site was eventually determined to have the “best overall prospects for being considered a suitable repository site.”

In 1982, Congress passed the Nuclear Waste Policy Act (NWPA) to centralize the long-term management of nuclear waste and mandate construction of a permanent nuclear waste repository. Congress amended the NWPA in 1987 to designate Yucca Mountain as the sole site for a deep geologic repository. This de-

cision was subsequently reaffirmed by Congress in 2002, and again in 2007. In 2008, the Department of Energy (DOE) submitted the License Application to the Nuclear Regulatory Commission (NRC) for the construction of Yucca Mountain.

But despite this extensive legislative record of Congressional intent, decades of scientific and technical evaluation, and approximately \$15 billion spent by DOE, the Obama Administration is disregarding the law and attempting to unilaterally prevent Yucca Mountain from serving as the Nation's nuclear waste repository. DOE, at the Administration's behest and contrary to its responsibilities under the NWPA, withdrew the License Application in 2010 and established the Blue Ribbon Commission for America's Nuclear Energy Future to consider alternative solutions, effectively kicking the can down the road for two years and undoing decades of progress to find a solution for the disposal of spent nuclear fuel.

Several House Committees have held hearings to investigate the decision to block the Yucca Mountain nuclear repository.

Rewriting Bankruptcy Law

The bankruptcy law creates the clear rights and obligations that are necessary to make financial transactions possible. Creditors are willing to lend money on the basis that they understand what the responsibility of the borrower is in the event of bankruptcy. Yet when the Obama Administration intervened in the

bankruptcies of General Motors and Chrysler they did so in a way that abused the bankruptcy code and eroded the rights of creditors in order to advance the interest of the Administration's political allies.

The Obama Administration's bailout of General Motors and Chrysler represented a politicized and ad hoc approach to bankruptcy law that subverted the rule of law and resulted in significant losses for taxpayers and bondholders. The bankruptcy proceedings were used to deliver ownership shares in the auto-companies to the government and union allies.

A new study reveals that the Obama Administration's preferential treatment of unions increased the cost to taxpayers of the bailout by \$26.5 billion – more than the \$23 billion net cost of the bailout currently estimated by Treasury. George Mason University Law School Professor Todd Zywicki and Heritage Foundation scholar James Sherk released a paper on June 13, 2012, finding that “The extra UAW subsidies cost \$26.5 billion—more than the entire foreign aid budget in 2011. The Administration did not need to lose money to keep GM and Chrysler operating. The Detroit auto bailout was, in fact, a UAW bailout.”

Failing to Defend the Defense of Marriage Act

In 1996 a Republican Congress and President Clinton enacted the Defense of Marriage Act which defined marriage for federal purposes. When the statute was challenged in court, the Obama Administration initially took the routine position of defending the constitutionality of Acts passed by Congress and signed into law. But in early 2011, President Obama decided that he believed that the definition of marriage for federal purposes in the Defense of Marriage Act was unconstitutional.

The President then took the extraordinary step of instructing the Department of Justice to no longer defend the statute in court (leaving that job to Congress). The Administration insisted it would continue to enforce the law (that it now says is unconstitutional) until such time as it was repealed or there was a final

judicial ruling resolving the issue. This dynamic creates great uncertainty, and creates a situation where the Administration is either enforcing an unconstitutional law (as they contend) or refusing to defend a constitutional one.

Recognition of Jerusalem

The Obama Administration refused to enforce the requirement, under the Foreign Relations Authorization Act, Fiscal Year 2003, to record “Israel” as the place of birth on passports for U.S. citizens born in Jerusalem upon request.

Lobbying for Abortion Overseas

The Obama Administration used \$18 million in U.S. taxpayer dollars to influence the vote on a 2011 constitutional referendum in Kenya. Contrary to a long-standing, annually renewed law that prohibits U.S. tax dollars from being used to lobby for or against abortion in other countries, advocacy groups in Kenya received U.S. funds expressly for the purpose of garnering an “overrepresentation” of “yes” votes for a constitution that expands abortion access in Kenya.

Halting the Airport Screening Partnership Program

In January of 2011 the Transportation Security Administration (TSA) Administrator used a “made up” legal standard to deny five airports with pending applications the option to participate in the Congressionally-mandated Screening Partnership Program (SPP). The Administrator also announced a hold on expanding the program beyond the current 16 airports, stating that there was not “any clear or substantial advantage to do so at this time” despite the fact that the program is Congressionally-mandated. Congress responded with a provision included in the FAA Modernization and Reform Act (P.L. 112-95) that clarifies the criteria the TSA must establish to deny an application to participate in the SPP and specifically places the burden on the TSA to prove such criteria have not been met.

Expedited Airport Screening for Members of the Armed Forces

Public Law 112-86 required the Transportation Security Administration (TSA), within 180 days of enactment, to develop and implement expedited security screening for members of the Armed Forces, and when possible accompanying family members, when the service member is in uniform and presents official orders. TSA missed that deadline, however, and instead has only allowed members of the military to use shorter lines that are already available to the general public at two airports nationwide, in violation of both the letter and intent of the law. TSA now claims that it was already complying with the law before it was enacted.

“DREAM Act” Deferred Action

On July 25, 2011, President Obama told the National Council of La Raza that: “I know some people want me to bypass Congress and change the [immigration] laws on my own. But that’s not how our system works. That’s not how our democracy functions. That’s not how our Constitution is written.” Yet on June 15, 2012 Secretary Napolitano issued a memorandum announcing that certain illegal aliens will be considered for relief from removal from the country or from entering into removal proceedings. Those who meet the criteria will be eligible to receive deferred action for a period of two years, subject to renewal, and will be eligible to apply for work authorization despite the fact that such deferred action is not authorized and under the law such individuals are subject to removal.

Administrative Amnesty

Assistant Secretary for Immigration and Customs Enforcement (ICE), John Morton, issued several memos in 2011, commonly referred to as the Morton memos, which detail ICE's use of prosecutorial discretion in immigration enforcement, which the Department of Homeland Security defines as the "authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual."

While the use of prosecutorial discretion is not new, there is a significant difference between its previous narrow application and the establishment of a formal process to systematically, on an ongoing basis, block illegal aliens from being placed into removal proceedings, stop already-initiated removal proceedings, and end deportations for potentially large numbers of criminal aliens.

Withholding Critical Information About Counterfeit Goods

The Customs and Border Protection (CBP) has established a policy of refusal to share un-redacted photographs of potentially counterfeit products, such as computer chips, with the owner. Such un-redacted photos would show specific codes that the rights holder could use to determine whether the product was real or counterfeit. The Fiscal Year 2012 National Defense Authorization Act specifically authorized CBP to provide such information. However, CBP has ignored this clear grant of Congressional authority, and instead of following Congressional intent, has initiated a lengthy rule-making process that would allow for the sharing of un-redacted information with the rights holder only after the importer – rather than the owner – has had the opportunity to establish the product's authenticity.

Medicare Solvency Requirements

Under current law, if Medicare fails certain financial stability tests, the President is required to submit a legislative proposal to remedy any pending funding shortfalls. This requirement is designed to ensure that the President and Congress have the opportunity to address Medicare funding problems in a timely fashion. Despite the fact that Medicare has repeatedly failed the financial stability tests, the President has failed to propose legislation as required by the law.

CIRCUMVENTING THE NORMAL REGULATORY PROCESS

Congress enacted the Administrative Procedure Act and other strictures on the rulemaking process in part to ensure that the public and impacted parties have the opportunity to review, comment on, and offer suggested changes before new regulations take effect. When an Administration circumvents this process they not only deprive such parties of their rights -- they undermine the rule of law.

Abuse of Sue and Settle Tactics

The Obama Administration regularly relies on “sue-and-settle” tactics to avoid Congressional scrutiny and minimize public participation in the rulemaking process, while fast tracking the priorities of environmental groups. In practice, groups like the Sierra Club and the Natural Resources Defense Council will sue the EPA for failing to meet a nondiscretionary duty, usually a statutory deadline. Rather than fighting the lawsuit, EPA officials – many of whom used to work for the very groups that are now suing – will make enormous concessions in a settlement agreement that requires the agency to take a particular action. These settlement agreements are the product of closed-door negotiations between the EPA and environmental groups – states, industry, stakeholders, and the public have no voice in the process. Furthermore, these settlement agreements can be legally binding on future Administrations, raising serious constitutional concerns.

Re-write of Coal Regulations

Almost immediately after President Obama took office, his Administration tossed aside the 2008 Stream Buffer Zone Rule, which had taken over five years of thorough environmental and scientific analysis and public comment to complete. The Interior Department then entered into a lawsuit settlement with environmental groups to rewrite the rule by June 29, 2012. The Administration has spent millions of dollars working to rewrite this rule including hiring new contractors, only to dismiss those same contractors once it was publically revealed that the Administration's new proposed regulation could cost 7,000 jobs and cause economic harm in 22 states. The Department missed the June 29 deadline to produce the final regulation they agreed upon in court and has yet to even release a draft regulation.

In response to the Obama Administration's decision to decimate the Stream Buffer Zone Rule, the House passed the Stop the War on Coal Act. This measure will to protect American jobs and support U.S. energy production by prohibiting the Secretary of the Interior from issuing new rules or regulations that will adversely impact mining jobs and our economy.

Abuse of Guidance Documents

The Obama Administration has been using “guidance documents” to make major policy decisions that should be vetted through the Notice and Comment Rulemaking process. This practice avoids the transparency and public participation requirements associated with the rule making process. A few examples of policy changes that should have been implemented via Notice and Comment include:

- EPA and Corps of Engineers proposed guidance that would treat some roadside ditches as “navigable waters of the United States” for permitting requirements. This change will impose an enormous burden on construction in the United States.
- EPA issued guidance that sets a numeric standard for conductivity levels in streams affected by coal mining, which EPA Administrator Lisa Jackson has conceded was “a sweeping regulatory action.”
- The Fish and Wildlife Service proposed guidance on what landowners must do to conserve the American Burying Beetle. This new guidance threatens to paralyze development in Oklahoma, critical to the construction of pipelines like Keystone.

Refusing to Disclose Regulatory Agenda

The Regulatory Flexibility Act of 1980 requires federal agencies to publish in April and October semiannual regulatory agendas in the Federal Register describing the economically significant regulatory actions an administration plans to develop within the next year. The Obama Administration has failed to meet the statutory deadline of April 30, 2012 to provide Congress and the public with proper notice of those regulations it is writing. Inquiries from Committees about this agenda have been met with vague excuses for why the Administration has failed to meet its deadline and no information on the regulations the Administration will consider should President Obama remain in the White House. The regulatory uncertainty caused by this Administration’s lack of transparency continues to play a

significant role in perpetuating a persistently weak economy and undermines the ability of employers and entrepreneurs to hire new workers, plan for the future, and invest in growing their businesses.

Essential Health Benefits

The President's health care law requires the Department of Health and Human Services (HHS) to issue regulation on essential health benefits that dictate what plans must cover and what consumers must purchase in the exchanges. The statute specifically requires that the Secretary "shall provide notice and an opportunity for public comment." Despite this requirement, the only documents that have been issued by the Administration on the composition of the benefit package for plans that are available in the exchange are a Bulletin and a question/answer document issued by HHS. These documents do not go through the notice and comment and cost-analysis requirements associated with normal rulemaking and do not have legal standing under the Administrative Procedures Act.

Gulf Drilling Moratorium

On May 27, 2010, Secretary of the Interior Ken Salazar published a report at the request of the President entitled Increased Safety Measures for Energy Development on the Outer Continental Shelf (also referred to as the '30 Day Safety Report'). Among other recommendations, the report proposed an immediate six-month drilling moratorium in the Gulf of Mexico that resulted in significant economic harm and job loss, and the Department being held in contempt of court.

In its report, DOI stated that it drew expertise from "within the Federal Government, academia, professional engineers, industry, and other governments' regulatory programs." In particular, the report noted that seven members of the National Academy of Engineering peer reviewed the recommendations – making it appear as if they also supported the recommendation to impose a drilling

moratorium. However, these peer reviewers were not in fact asked to evaluate the moratorium, which was inserted into the report shortly before it was finalized and without any scientific or technical review or analysis of economic impacts.

After the release of the report, the experts were forced to rebut the implication that they had approved the six-month moratorium. In a joint letter they noted “we do not agree with the six-month blanket moratorium on floating drilling. A moratorium was added after the final review and was never agreed to by the contributors.” The experts noted that “A blanket moratorium is not the answer. It will not measurably reduce risk further and it will have a lasting impact on the nation’s economy which may be greater than that of the oil spill.”

Both parties in the House voted to pass the Reversing President Obama’s Offshore Moratorium Act to lift the President’s ban on new offshore drilling by requiring the Administration to move forward on American energy production in areas containing the most oil and natural gas resources.

Banning Uranium Mining in Arizona

On January 9, 2012, the Obama Administration announced a 20-year ban on uranium development on one million acres of land in northern Arizona – one of the most uranium-rich areas in the United States. The Administration’s decision to withdraw these areas from uranium mining terminates a long-standing agreement, forged through compromise between mining interests and environmental groups, and carried out through bipartisan legislation that became law in 1984.

The agreement allowed certain areas in Arizona to be protected through Wilderness designations, while others were to remain open for uranium production. Internal emails obtained by the House Natural Resources Committee raise significant questions into the science used by the Obama Administration to justify the ban. In the emails, scientists within the National Park Service discuss how the potential environmental impacts were “grossly overestimated” in the Administration’s Draft Environmental Impact Statement (DEIS) and that the potential impacts are “very minor to negligible.”

GOVERNMENT BY WAIVER

Because it is impossible to anticipate every possible scenario, often laws explicitly provide the Executive Branch with the ability to waive certain requirements when the national or public interest is better served by a limited waiver than the full application of the law. But like any other authority, waivers can be abused.

When the promise of a waiver is used to coerce individuals, businesses or state and local governments into doing something they would not otherwise do; the waiver process morphs into a new way of making law. When waivers are provided to politically connected applicants or to some individuals or entities but not other similarly situated individuals or entities, the rule of law is undermined.

Education Policy by Waiver

In 2001 Congress enacted the No Child Left Behind (NCLB) education reforms. The legislation imposed numerous requirements on states and local school districts that receive federal funds. While there is bipartisan agreement that the law needs to be reformed, rather than working with Congress to reform the law, the Obama Administration has used the promise of waivers from the requirements of NCLB to compel states to adopt the Administration's own version of education reform policies.

The Administration's proposals have not been considered by Congress, let alone enacted into law, but by attaching strings to the 35 state waivers that have thus far been granted, the Administration is effectively implementing a new law without bothering to go to Congress. The New York Times described it thusly: "In the heat of an election year, the Obama administration has maneuvered around

Congress, using the waivers to advance its own education agenda... The waivers appear to follow an increasingly deliberate pattern by the administration to circumvent lawmakers.”

Health Care Law Waivers

Shortly after the President’s health care law took effect, the Administration began providing waivers to certain plans from the laws costly mandates. Data released in July of 2012 indicated that 1,625 health plans received waivers from the law’s mandates. These plans provide health insurance coverage for 3,914,356 individuals. Yet there are another 1,019,810 Americans who are covered by health plans that were either denied a waiver or were unable to successfully navigate the waiver process. Their health care plans will be required to comply with the costly mandates. Clearly the Administration has not used the waiver process to deal with the one-off situations that could not be anticipated, but rather to free some segments of the health insurance market from costly mandates while imposing them on others.

CREATING NEW PROGRAMS NOT AUTHORIZED BY CONGRESS

Creation of the National Network for Manufacturing Innovation (NNMI)

In its fiscal year 2013 budget request, the Administration proposed the creation of a \$1 billion mandatory program of new manufacturing institutes designed to bridge the gap between public and private research and development efforts. Recognizing that Congressional authorization was required to fund the initiative, the Department of Commerce stated that, “the Administration will propose legislation creating a mandatory account making available \$1 billion.” However, such a proposal has yet to materialize. Nevertheless, President Obama stated on March 9, 2012 that “We’re not going to wait—we’re going to go ahead on our own,” and moved forward with funding a pilot institute, which would serve as proof of concept for the \$1 billion Network of institutes. This pilot institute is being supported by existing funds for fiscal years 2012-2014 supplied by multiple agencies. Despite the fact that this pilot has not been authorized and that these funds were clearly appropriated for other activities, the President has circumvented the legislative process and commenced with the pilot.

CREATING NEW “SUPER” AGENCIES

The Constitution provides that all legislative power is vested in the Congress. While Congress can create agencies to write rules to implement the laws enacted by Congress, constitutionally Congress cannot give up its lawmaking power to some outside entity. Yet in the previous Congress, the Democrat majorities in the House and Senate worked with President Obama to create at least two “super” agencies that test the proposition that it is Congress that passes laws.

IPAB

The President’s health care law created a new 15-member Independent Payment Advisory Board (IPAB) tasked with proposing ways to reduce the growth of Medicare spending. But IPAB does not make just mere recommendations. Under the law, the Secretary of Health and Human Services is directed to implement the Board’s proposals automatically unless Congress affirmatively acts to either alter the Board’s proposals or suspend them. In other words IPAB has the power to reduce what Medicare will pay doctors, hospitals, and other health care providers and their recommendations will have the force of law unless Congress enacts a law to stop them. According to the law that established IPAB, its decisions and the implementation of them are not even subject to judicial review. This is an unprecedented power that has the potential to dramatically impact the availability (by limiting reimbursements) of care for the nation’s seniors.

In March of 2012, the House of Representatives passed a bill to repeal the Independent Payment Advisory Board.

Consumer Financial Protection Bureau

In 2010, the President signed into law legislation creating the Consumer Financial Protection Bureau (CFPB) which was charged with regulating financial transactions of all types to protect consumers. The CFPB has both unprecedented authority and virtually no accountability.

Among other powers, the CFPB has the authority to prevent “abusive” financial products. But rather than defining that term in advance so that consumers and lenders have some idea of what the law means, the head of the CFPB testified before a House Committee that they intend to define and enforce the law based on the “fact[s] and circumstance[s]” of each particular case.

Separately before a Senate Committee, the head of the CFPB testified that their power to require certain disclosures on the part of lenders also gave them the power to provide exceptions or modifications to other statutory disclosure requirements – in other words the power to effectively amend other laws. The head of the CFPB went on to explain that they have other authorities to make exceptions or modifications to other unspecified requirements of the law.

Rather than being headed by a bipartisan commission, as most regulatory agencies are, the CFPB is headed by a single individual. Rather than having to go through Congress and the White House for its budget, the CFPB has the ability to simply withdraw hundreds of millions of dollars from the Federal Reserve to support its operations.

Several House Committees have conducted extensive oversight over the CFPB and the House has voted to make their funding subject to Congressional approval.

CONCLUSION

There is no excuse for this continuous disregard of legislative authority and the Constitutionally-required separation of powers. In some instances, President Obama attempted to garner legislative authority, failed and then acted unilaterally in defiance. In other instances, the President never even sought to find consensus and instead ignored Congress and its authority from the outset. In speeches, the President has proudly acknowledged that he has acted without Congress, contending that he has no other alternative.

This is no way to govern. The President has set a precedent that even his supporters should find troubling. After all, what would now prevent a subsequent President, with opposite policy predilections, from bypassing the checks on his own authority and enacting his own policies in this same manner? The Founding Fathers wisely gave the President many powers, but making law was not one of them. They understood that laws should not be made by one individual acting alone, but rather through elected representatives working to achieve consensus.

House Republicans have acted to prevent and overturn the President's harmful actions in order to return economic growth, opportunity and certainty to the American people and American job creators. However, the majority of the bills the House has passed are sitting idly in the Democrat-led Senate, without any action on the part of Democratic Leader Harry Reid or President Obama.

Throughout our nation's history, presidents have sought common ground and achieved legislative success with opposing party leaders. Many of the laws circumvented in this report were achieved in that manner. Congressional authority must not be disregarded to suit political interests, create unpopular regulations and to avoid the hard work of bipartisan negotiation that has been a hallmark of our Republic since its inception.





THE OFFICE OF
ERIC CANTOR
HOUSE MAJORITY LEADER