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TEXAS

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United States Senate

March 12, 2021

The Honorable Merrick Garland
Attorney General of the United States
Department of Justice
Washington, D.C.

Dear Attorney General Garland:

Congratulations on your confirmation as Attorney General of the United States earlier this week. The task before you – to stand up and defend the rule of law and to guard against the politicization of the Department of Justice seen during the Obama-Biden administration – is significant.

Already there is a test before you to determine whether you will stand up for the rule of law in your new role. In 2019, the Department of Homeland Security promulgated a final rule entitled Inadmissibility on Public Charge Grounds, 84. Fed. Reg. 41,292 (Aug. 14, 2019) ("Public Charge" rule). This rule has been the subject of intense litigation, as those who oppose it on policy grounds have brought numerous suits seeking to invalidate it. But whatever one may think of the underlying policy, there is a strong—and, I believe, correct—argument that the rule is lawful and consistent with the intent of Congress. Then-Judge Barrett, for example, wrote a scholarly dissent arguing that the rule is consistent with its authorizing statute. She wrote, "[a]t bottom, the plaintiffs' objections reflect disagreement with this policy choice . . . . Litigation is not the vehicle for resolving policy disputes. . . . DHS's definition is a reasonable interpretation of the statutory term 'public charge.'" Moreover, in February, the Supreme Court agreed to hear a case challenging the lawfulness of the Public Charge rule.

This week, however, the Department of Homeland Security short-circuited the legal process. DHS announced that because it disagrees with the policy set forth by the final rule, "the Department of Justice is no longer pursuing appellate review of judicial decisions invalidating or enjoining enforcement of" that rule. The Department of Justice accordingly requested the Supreme Court to dismiss the case, and the Supreme Court did so.

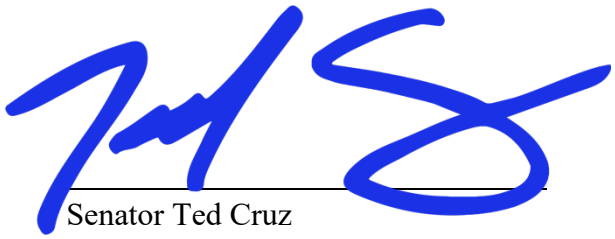
This is deeply troubling and an attack on the rule of law. A new administration has the ability to make policy decisions, but as you well know from your time on the D.C. Circuit, it cannot simply disregard a regulation promulgated by the prior administration. It must take the legal steps necessary to rescind the rule or promulgate an alternative rule in its place. This is an important legal limitation on an administration's ability to act unilaterally.

But the Biden administration is attempting to blow past this important limitation by refusing to defend the lawfulness of a regulation for purely political reasons. This sets a dangerous precedent that would allow an incoming administration to ignore lawful regulations so long as it can find a district court somewhere willing to enjoin them. For example, the EPA has already sent a letter to the Department of Justice instructing it to "seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January

20, 2017, and January 20, 2021." So it appears that for political reasons the Department may be instructed not to defend important environmental regulations like the Navigable Waters Protection Rule.[1]

If you are serious about running the Department of Justice apolitically and adhering to the rule of law, you should instruct the Department to continue to defend the Public Charge rule in the same manner that it defends every other final rule with the force of law, including defending the matter at the Supreme Court. I hope you will live up to your promise to the Senate Judiciary Committee and the American people to preserve the independence of the Department of Justice and reject its politicization.

Sincerely,



Senator Ted Cruz

[1] Notably, despite all the criticism levied against the Trump administration by Democrats for failing to adhere to the rule of law, the Trump administration did not take this stunning approach. For example, even though DACA was not a final rule, the Trump administration repealed the policy and then faced legal challenges for doing so. Apparently, all it had to do was wait for the program to be enjoined by a single district court and then refuse to defend the program on appeal.

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