

**U.S. Senate
Committee on the Judiciary
February 23, 2021**

**“The Nomination of the Honorable Merrick Brian Garland to be
Attorney General of the United States: Day 2”**

**Statement of Professor Josh Blackman
South Texas College of Law Houston**

Written Statement of Professor Josh Blackman

Chairman Durbin, Ranking Member Grassely, thank you for inviting me to testify. My name is Josh Blackman and I am a constitutional law professor at the South Texas College of Law Houston.

I support the confirmation of Judge Garland. He should be swiftly confirmed. In my brief time today, I will discuss three current DOJ policies that I hope Attorney General Garland will maintain. First, DOJ lawyers should not give legal effect to so-called “rulemaking by guidance.” Second, Attorney General Garland should carefully scrutinize consent decrees, especially those reached through so-called “sue and settle.” Third, DOJ should not resume the settlement practice of giving “third party payments” to nonparties; that money should be restored to the Treasury. These three issues may seem fairly low-profile, but each practice will have a huge impact on the separation of powers. And these should be important to people on both sides of the aisle. I hope that Attorney General Garland will retain current DOJ policy with respect to these three issues.

First, the Department of Justice should not enforce “rulemaking by guidance.” In the past, federal agencies avoided the formal rulemaking process, and instead issued various guidance documents. For example, substantive changes to the law were made through “dear colleague letters,” “frequently asked questions,” and even online bulletins--what I called *government by blog post*.¹ These guidance documents are not supposed to have the force of law. However, courts grant *Auer* deference to this “subregulatory dark matter.” In 2018, Associate Attorney General Rachel Brand instructed DOJ lawyers to not treat violations of guidance documents as violations of the law. And President Trump signed Executive Orders 13891 and 13892, which ordered other agencies to adopt the principles from the *Brand Memo*. Unfortunately, President Biden rescinded those two executive orders on his first day in office. At present, the Brand Memo is still codified in DOJ regulations. I hope that Attorney General Garland will maintain the Brand Memo.

¹ Josh Blackman, [Government by Blog Post](#), 11 FIU L. Rev. 389 (2016).

Second, Attorney General Garland should carefully scrutinize consent decrees. These agreements include intricate requirements that DOJ could never impose through regulation or litigation. And these consent decrees can exist in perpetuity. During this time, federal judges and court monitors can oversee state and local governments. Such agreements raise distinct federalism concerns. Indeed, many of these agreements arise from a practice known as “sue and settle.” Organizations and local governments would sue a like-minded agency, knowing there was no adversity, and reach favorable settlements. Fortunately, Attorney General Sessions took actions to restrict these consent decrees. The Justice Department imposed restrictions on consent decrees, including limits on duration, sunset provisions, and means for termination. Critically, under Attorney General Sessions’s guidelines, a consent decree could not be used to achieve a policy goal that could not be obtained through litigation. I hope Attorney General Garland will maintain this policy.

Third, the Department of Justice should return any excess settlement funds to the United States Treasury, rather than make “third party payments” to progressive groups. These payments have been criticized as “settlement slush funds.” The federal government has allowed billions of dollars to be given to third-party non-profit organizations. These special interest groups were not parties in the litigation, and were not victims of the misconduct. Indeed, Senator Grassley has observed that the Justice Department directed funds at organizations that Congress had defunded.² In this way, the executive branch bypassed the Constitution’s appropriations process. In 2017, Attorney General Sessions prohibited the inclusion of “third party payments” in settlements. Any excess funds from settlements would be restored to the United States Treasury. Attorney General Garland should maintain this policy.

Thank you for your time, and I will be happy to answer any questions.

2

<https://www.judiciary.senate.gov/press/rep/releases/grassley-seeks-details-on-obama-admin-settlement-agreements-tied-to-third-party-donations>