

TESTIMONY OF GAIL HERIOT¹

Thank you for this opportunity to testify before you, the distinguished members of the Task Force on Executive Overreach. My name is Gail Heriot, and I am here in my capacity as an individual member of the United States Commission on Civil Rights and not on behalf of the Commission as a whole. It is an honor to be able to testify before you about this important issue.

I will focus most of my testimony on the Department of Education's Office for Civil Rights ("OCR"), which I believe has often gone far beyond what Congress intended in the enforcement of legislation. In particular I will emphasize OCR's controversial policies on sexual assault on campus and transgender use of toilet, locker room and shower facilities. I should add that the story is similar at many other agencies charged with enforcing civil rights legislation. Overreach is the rule and not the exception.

No doubt the officials who have controlled OCR and other civil rights agencies thought they were doing what was best for the country. But I believe what is best for the country is for it to be a well-functioning representative democracy where significant policy decisions are made by the people's directly-elected representatives, not by bureaucrats. We need to do our best to achieve exactly that.

Note that it is not my intention to lay the blame entirely at the feet of executive branch agencies. Sometimes the courts, by being excessively deferential, have helped make that overreach possible. Sometimes Congress itself has helped make it possible by generously funding agencies that are out of control and by ignoring issues that need to be addressed by legislation. But no matter who is to blame for how we got here, Congress has a special responsibility to get us back. Without Congress's active efforts, no progress along these lines is possible.

I. The Non-Delegation Doctrine and Beyond

Section 1 of Article I of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This language was deliberate. "All" was

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indeed meant to mean “all.”² As John Locke—a political philosopher the founders were very familiar with and admired—put it:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.”

John Locke, *Second Treatise of Government* (1690).

Locke was not unrealistically rigid in his thinking about the function of government. He well recognized the need for the executive to have what he called “power to act according to discretion.” William Blackstone similarly noted that the crown could issue “binding” proclamations that are grounded in the idea that while “the making of laws is entirely the work of ... the legislative branch ..., yet the manner, time, and circumstances of putting those laws into execution must frequently be left to the discretion of the executive magistrate.” William Blackstone. *Commentaries on the Laws of England* (1765). Like Locke, Blackstone would have been very familiar to the founders. See also Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

But while the Constitution certainly permits Congress to endow executive branch personnel with a certain level of discretion, there are limits to Congress’s authority to do so. The classic formulation of the doctrine in this area was articulated in *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), a tariff-setting case, and is generally known as the intelligible principle standard. As the Court in *J.W. Hampton, Jr. & Co.* put it:

If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.³

I express no opinion today as to whether this standard was ever adequate to protect the fundamental principle of representative democracy.⁴ As the nation has

² See *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests “[a]ll legislative Powers herein granted... in a Congress of the United States.”)

³ *J.W. Hampton Jr. & Co.*, 531 U.S. at 409.

grown larger and particularly as its government has grown to regulate more and more, Congress has succumbed to the temptation to confer more discretion on executive branch agencies. At this point, even if the intelligible principle standard was once adequate to protect representative democracy, it has come to be meaningless. Virtually anything short of “We the Members of Congress are going fishing, so please cover for us” will be approved by the courts.⁵

What is important to note is that just because the courts might approve it, that doesn’t mean Congress should confer such broad discretion on an agency. I would urge that in future legislation Congress be much more clear about what it wants administrative agencies with rule-making power to do with that power.

That said, only a little of the executive overreach we see today is the result of Congress’s having conferred too much rule-making power on an administrative agency. Even when Congress has stoutly withheld such authority, some agencies have come up with ways to take it anyway. For example, the Equal Employment Opportunity Commission (“EEOC”) doesn’t even have substantive rule-making authority under Title VII of the Civil Rights Act of 1964.⁶ Yet it has managed to

⁴ I do note that Chief Justice Taft, a former President himself, justified the Court’s decision upholding executive power to set tariffs by noting that “[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all.” It should be noted, however, that the founders wanted legislation to be hard to pass. They would not have agreed that the more pies Congress can stick its fingers into, the better.

See also *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative”).

⁵ See, e.g., *Whitman v. American Trucking Association, Inc.*, 531 U.S. 457 (2001) (holding that Congress may give the EPA rulemaking authority to set “ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on... criteria... and allowing an adequate margin of safety, are requisite to protect the public health”); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946) (holding that Congress may give the SEC the power to reject corporate reorganizations that “unduly or unnecessarily complicate the structure” or “unfairly or inequitably distribute voting power among security holders.”); *NBC v. U.S.*, 319 U.S. 190 (1943) (holding that Congress may grant the FCC the power to allocate broadcasting licenses in “the public interest, convenience, and necessity”).

⁶ For a discussion of the legislative history of Title VII, especially Sen. Everett Dirksen’s role in attempting to ensure that the EEOC would not become too powerful and would limit itself to mediating cases between complainants and employers, see Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964*

transform what was supposed to be a limitation on its power into a greater power. Rather than promulgate rules pursuant to a notice and comment procedure—rules that could be challenged in court—it exercises its massive control over workplace practices by issuing “guidances,” which are devilishly difficult to challenge in court. Especially when combined with the power to conduct long and expensive investigations followed by equally long and expensive litigation, most employers get the message that it is better to knuckle under to the EEOC’s sometimes-fantastical “interpretations” of Title VII. Resistance is usually futile.

If Congress wants to rein in the power of bureaucrats to make law, it will need to address not just over-delegation, but also the ability of bureaucrats to “legislate” through guidances.

II. OCR’S Enforcement of Title VI and Title IX

The Department of Education is charged with enforcing Title VI of the Civil Rights Act of 1964, which prohibits race, color and national origin discrimination in federally-funded programs or activities, and also with enforcing Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally-funded education programs or activities. The Department of Education has the power to issue rules pursuant to both Title VI and Title IX. All such rules must be specifically approved by the President.

Both Title VI and Title IX prohibit only actual discrimination (a/k/a “disparate treatment”). The Supreme Court has explicitly rejected the argument that Title VI was intended by Congress to cover situations of disparate impact in

Civil Rights Act and Its Interpretation, 151 U. PENN. L. REV. 1417, 1490 (2003). See also Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* 97-99 (1990). In view of the EEOC’s later history, Dirksen’s efforts must be labeled a failure. Indeed, the EEOC’s own web site hints at how it was able to exercise more power than had been expected from examining Title VII itself:

Because of its lack of enforcement powers, most civil rights groups viewed the Commission as a ‘toothless tiger.’ Nevertheless, EEOC made significant contributions to equal employment opportunity between 1965 and 1971 by using the powers it had to help define discrimination in the workplace.

See EEOC 35th Anniversary: 1965 - 1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public, available at <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html>

Alexander v. Sandoval.⁷ There is no good reason to suppose Congress had something different in mind for Title IX.

As the Supreme Court noted (but did not decide) in *Alexander v. Sandoval*, this does not necessarily mean that an agency charged with rulemaking authority cannot issue rules that are grounded in a theory of disparate impact. Suppose, for example, OCR learns that some medical schools require applicants to pass a strength and endurance test in order to be admitted as a student, and they do this precisely because they hope to exclude as many female applicants as possible. Such would be a clear violation of Title IX. On the other hand, suppose that a much smaller number of other medical schools also require a strength and endurance test that tends to exclude more female than male applicants, but they do it because they sincerely believe, not wholly without evidence, that physicians who lack that strength and endurance do not make as good doctors as those who have it but may have marginally less stellar academic credentials. Such would not be a violation of Title IX. I nevertheless believe that if OCR were to determine, based on substantial evidence, that it could not without risk of substantial error distinguish the violations of Title IX from the non-violations, it would have the authority to promulgate a rule prohibiting the use of strength and endurance tests in medical school admissions.

In a perfect world, such a rule would be unnecessary, since we would be able to distinguish with ease bad motivations from good. But we are not in such a world. Sometimes the most effective way to enforce prohibitions on badly-motivated behavior is to prohibit a bit of behavior known to be associated with bad motivations, even if doing so will occasionally sweep innocent actors in with the wrongdoers. It is on this principle that legislatures commonly prohibit the possession of burglary tools in addition to prohibiting burglary.

There must be limits to such authority. I can think of two very important ones. First, such “over-inclusive” rules—which I might loosely call prophylactic or remedial rules—must indeed be *rules*, subject to all the procedures, including notice and comment, that rules are subject to under the Administrative Procedure Act. In the case of rules promulgated pursuant to Title VI and Title IX it also includes the requirement of Presidential approval.

Under the Administrative Procedure Act, “general statements of policy” and so-called “interpretative rules” (the two categories often collectively called “guidances”) are exempt from the notice and comment procedure. But neither applies to efforts to transform Title VI and Title IX into disparate impact prohibitions and hence cannot help OCR to expand its authority in that way. A

⁷ 532 U.S. 275 (2001.)

general statement of policy can only alert regulated persons how an agency intends to exercise its discretionary authority in enforcing the underlying statute (or a rule lawfully promulgated pursuant to the statute). It essentially identifies the agency's enforcement priorities. But since neither Title VI nor Title IX supports statutory disparate impact liability, OCR cannot alert regulated persons that it intends to give priority to violations that don't exist. Similarly, an interpretative rule can only interpret the text of the statute (or the text of a rule lawfully promulgated pursuant to the statute). OCR cannot transmogrify Title VI and Title IX into disparate impact statutes through the issuance of an interpretative rule.

The bottom line is that a mere guidance cannot impose new duties on regulated persons not contained in the original statute (or rule lawfully promulgated pursuant to the statute).⁸ That can only be done, if at all, by rule.

Second, even when acting by rule, there are serious limits on the ability of OCR to simply adopt its own policy preferences, whether in the form of liability for disparate impact or otherwise. The same limits that are applied to Congress's power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article" must apply here as well.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held unconstitutional the Religious Freedom Restoration Act ("RFRA") as it applied to states. RFRA prohibited states (among others) from substantially burdening religious exercise except in those cases when the burden is in furtherance of a compelling governmental interest and is the least restrictive means for furthering that interest. As it applies to states, Congress relied as its authority under Section 5 of the Fourteenth Amendment for its power to enact RFRA.

The Court stated that it is the province of the judiciary to define what is and what is not a violation of the Equal Protection Clause of the Fourteenth Amendment and that while Section 5 gives Congress maneuvering room to enact prophylactic or remedial legislation to deal with such violations, the legislation must be "congruent and proportional" to the violation. RFRA as it applied to states was not. The same principle works well here too.

A rule promulgated pursuant to Title VI or Title IX would have to be "congruent and proportional" to an actual violation of those enactments. OCR cannot simply promulgate a rule prohibiting disparate impact in all contexts. That would increase the scope of those statutes by several orders of magnitude—all

⁸ See, e.g., *Chamber of Commerce v. Dept. of Labor*, 147 F.3d 206 (D.C. Cir. 1999).

without evidence that of actual discrimination that cannot be remedied through ordinary disparate treatment liability.

If it wants to promulgate a “congruent and proportional” disparate impact rule, the rule would have to be highly contextualized and backed up by evidence that actual discrimination is going on that cannot be otherwise controlled. For example, suppose that following the promulgation of Title VI, previously discriminatory private colleges and universities in overwhelmingly white states, like Maine, Iowa and Vermont had hurriedly adopted strong preferences for in-state applicants. Suppose further when asked why, college and university officials were evasive and self-contradictory, causing OCR to conclude that their real motivation was to avoid admitting African American students. Under the circumstances, if OCR were to respond by promulgating a rule (not a guidance) prohibiting private colleges and universities from adopting preferences for in-staters, it would likely be regarded as a congruent and proportional response to the problem. On the other hand, if it were to include public colleges and universities in that rule, given their long tradition of giving preferential treatment to in-staters on the ground that their parents were likely taxpayers who help finance these schools, I suspect it would fail the “congruent and proportional” test.

All of this is by way of background. The fundamental point is that OCR routinely issues guidances that that are untethered to any plausible violation of Title VI or Title IX or to any rule lawfully promulgated pursuant to those statutes. The Obama Administration cannot be blamed for this alone. It has been going on for a long time.

For example, in December of 2000, just at the close of the Clinton Administration, OCR issued a guidance document in connection with its Title VI enforcement duties entitled, “The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers.” In that document, OCR states that the use of exams like the SAT can constitute a violation of Title VI.

But anyone familiar with these tests knows how much effort is made to ensure that they do not give any unfair advantage to members of the racial majority or to national origin groups that are otherwise considered advantaged. There is virtually no chance that OCR could plausibly prove that a college or university is using a standardized test like the SAT in order to exclude African Americans or any other racial group from admissions. Indeed, it is much more plausible that a college or university that elects to forgo these tests is motivated by race than it is that one

that elects to retain them is so motivated. One doesn't have to love the SAT to acknowledge that it isn't a tool of racism.

More recent examples of the OCR's guidances untethered to any actual Title VI or Title IX requirement are abundant.⁹ But for simplicity's sake I will concentrate on just two—its Dear Colleague Letter issued on April 4, 2011 (hereinafter “the Sexual Violence Guidance”) and related documents¹⁰ and its very recent Dear

⁹ For my critique of the Dear Colleague Letter, dated October 26, 2010 from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (the Bullying Guidance”), see Dissenting Statement of Commissioner Gail Heriot, With Which Commissioners Peter Kirsanow and Todd Gaziano Concur in U.S. Commission on Civil Rights, Peer-to-Peer Violence + Bullying: Examining the Federal Response 181 (September 2011). For my critique of the underlying policies of the Dear Colleague Letter, dated January 8, 2014 from Catherine E. Llamon, Assistant Secretary for Civil Rights, U.S. Department of Education and Jocelyn Samuels, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (the School Discipline Guidance”), see Statement and Rebuttal by Commissioner Gail Heriot in U.S. Commission on Civil Rights, School Discipline and Disparate Impact 97 (April 2012). Note that I was writing about the school discipline issue after OCR had initiated its policy, but before the actual School Discipline Guidance was issued.

See also Letter dated February 26, 2015 from Commissioners Gail Heriot and Peter Kirsanow to the Honorable Thad Cochran, the Honorable Roy Blunt, the Honorable Hal Rogers and the Honorable Tom Cole (discussing OCR policies and guidances and recommending against increasing OCR's budget).

¹⁰ E.g., Questions and Answers on Title IX and Sexual Violence (April 29, 2014); Know Your Rights: Title IX Requires Your School to Address Sexual Violence (April 29, 2014); Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights (May 2013).

OCR originally labeled the University of Montana agreement as a “blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.” Letter of May 9, 2013 from Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice and Gary Jackson, Seattle Office Regional Director, Office for Civil Rights, Department of Education to Royce Engstrom, President, and Lucy France, University Counsel, University of Montana at 1, available at <http://www.thefire.org/departments-of-justice-and-department-of-education-office-for-civil-rights-joint-findings-letter-to-the-university-of-montana/>. OCR has since sometimes backed away from its characterization of this document as a national model, although its signals to regulated universities about the Montana Agreement's intended effect have been mixed. After months of national criticism of this document, Assistant Secretary for Civil Rights Catherine Lhamon said in a letter to FIRE that “the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy.” Letter from Catherine E. Lhamon, to Greg Lukianoff, President, Foundation for Individual Rights in Education, Nov. 14, 2013, available at <http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire>. But a few

Colleague Letter dated May 13, 2016, jointly issued by OCR and the Civil Rights Division of the Department of Justice (hereinafter the “Transgender Guidance”).

a. The Sexual Violence Guidance

The Sexual Violence Guidance has received lots of criticism.¹¹ I almost hesitate to pile on. But when members of the law faculties of both Harvard University¹² and the University of Pennsylvania¹³—hardly bastions of conservative

months after that, at a June 2, 2014 roundtable on sexual assault hosted by Senator Claire McCaskill, Acting Assistant Attorney General for Civil Rights Jocelyn Samuels repeatedly offered the terms of the University of Montana resolution agreement as a national model. Testimony of Greg Lukianoff Before the U.S. Commission on Civil Rights at 8, July 25, 2014.

More recently, OCR sent a letter to the University of New Mexico summarizing the findings of its investigation into UNM’s policies and practices for handling sexual harassment and assault. The letter demanded that UNM adopt a definition of sexual harassment very similar to the one contained in the much-criticized Montana Agreement. See Letter to Robert G. Frank, President of the University of New Mexico, April 22, 2016, available at <https://www.justice.gov/opa/file/843901/download>; Hans Bader, “Justice Dept. demands censorship at the University of New Mexico,” April 23, 2016, available at <http://libertyunyielding.com/2016/04/23/justice-department-demands-censorship-university-new-mexico/>.

¹¹ See Anonymous, “An Open Letter to OCR,” Inside Higher Ed, October 28, 2011, available at <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>; Laura Kipnis, “My Title IX Inquisition,” The Chronicle of Higher Education, May 29, 2015, available at <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>; Jacob E. Gersen, “How the Feds Use Title IX to Bully Universities,” Wall Street Journal, January 24, 2016, available at <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725>; Jessica Gavora, “How Title IX Became a Political Weapon,” The Wall Street Journal, June 7, 2015, available at <http://www.wsj.com/articles/how-title-ix-became-a-political-weapon-1433715320>; Anemonia Hartocollis, “Professors’ Group Says Effort to Halt Sexual Harassment Has Stifled Free Speech,” The New York Times, March 24, 2016, available at <http://www.nytimes.com/2016/03/24/us/professors-group-says-efforts-to-halt-sexual-harassment-have-stifled-speech.html>; and George Will, “The legislative and judicial branches strike back against Obama’s overreach,” The Washington Post, February 19, 2016, available at https://www.washingtonpost.com/opinions/the-legislative-and-judicial-branches-strike-back-against-obamas-overreach/2016/02/19/15f403b8-d672-11e5-be55-2cc3c1e4b76b_story.html.

¹² See Rethink Harvard’s Sexual Harassment Policy, Boston Globe (October 15, 2015)(letter signed by 28 members of Harvard law faculty)(noting that “large amounts of federal funding may ultimately be at stake,” the signatories nevertheless took the position that “Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats” and should do so), available at <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWmNqbM/story.html>.

thought—express deep misgivings over the sexual harassment policies their respective institutions were forced by OCR to adopt on account of this guidance, it is clear that something is wrong.

To be crystal clear: I regard sexual violence as deplorable. The question is not whether it should be tolerated on campus. There is no question that it should not be. The only question relevant that should be relevant to OCR is “What does *Title IX* require colleges and universities to do to prevent it?” Much of the task of keeping women (and men) safe on campus must be done by local police and prosecutors. The rest is largely done by colleges and universities themselves. If OCR has a role, its role is limited to ensuring that colleges and universities do not deliberately root out and punish sexual assault less aggressively than similar crimes because they wish to disadvantage women relative to men (or vice versa).

The Sexual Violence Guidance raises serious concerns. First of all, it has required many universities to change the burden of proof used in sexual harassment disciplinary proceedings.¹⁴ Before that, many universities used the “clear and convincing” standard instead of the “preponderance of the evidence” standard that OCR now requires.¹⁵ Yet nowhere in the text of Title IX (or in OCR rules) can such a requirement be found. It is simply a case of OCR imposing its own policy preferences in the name of enforcing Title IX. Given the importance of safeguarding the rights of accused students, the “clear and convincing” standard would seem to be the more appropriate one in at least some situations.¹⁶ Further, “Questions and

¹³ See Open Letter from Members of the Penn Law School Faculty, Wall Street Journal Online (February 17, 2014) (letter signed by 16 members of University of Pennsylvania law faculty) (“Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness”), available at http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

¹⁴ Sexual Violence Guidance at 11.

¹⁵ At a Commission briefing the subject on July 25, 2014, Ada Meloy of the American Council of Education said that in her experience, the clear and convincing standard was much more common than the preponderance of the evidence standard. U.S. Commission on Civil Rights Briefing Transcript at 202 (July 25, 2014), available at http://www.usccr.gov/calendar/trnscript/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

¹⁶ See Hans Bader, “Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX,” April 11, 2011, available at <https://cei.org/blog/education-department-changes-burden-proof-sexual-harassment-cases-under-title-ix>.

Answers on Sexual Violence” discourages cross-examination of accused students by their accusers.¹⁷ Yet one federal district court has held that cross-examination is constitutionally required on due-process grounds when an accuser’s credibility is an important issue in a disciplinary proceeding.¹⁸

First Amendment issues loom large in this area. Defining “sexual harassment,” as OCR’s official materials do, to include students’ “telling sexual or dirty jokes,” spreading “sexual rumors” (without any limitation to false rumors), “circulating or showing e-mails or Web sites of a sexual nature,” or “displaying or distributing sexually explicit drawings, pictures, or written materials”¹⁹ can easily cover speech protected by the First Amendment, according to testimony of UCLA law professor Eugene Volokh presented at a Commission briefing.²⁰ Nonetheless, risk-averse colleges and universities have jumped to adopt the vague harassment standards set forth by OCR.²¹

OCR has pushed past the limits of its legal authority in addressing sexual assault and harassment on college and university campuses. Congress has a duty to exercise its oversight responsibilities and bring enforcement activities conducted in the name of Title VI and Title IX back under control.

b. The Transgender Guidance

¹⁷ Questions and Answers about Sexual Violence at 38, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁸ *Donohue v. Baker*, 976 F. Supp. 137 (N.D.N.Y. 1997); see also Hans Bader, White House Task Force Attacks Due Process and Cross-Examination Rights on Campus, *Washington Examiner*, May 1, 2014, available at <http://www.examiner.com/article/white-house-task-force-attacks-cross-examination-due-process-rights-on-campus>.

¹⁹ OCR, *Sexual Harassment: It’s Not Academic*, <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>; OCR, *Dear Colleague Letter*, Oct. 26, 2010, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

²⁰ Written Statement of Eugene Volokh Before the U.S. Commission on Civil Rights at 1 (July 25, 2013).

²¹ Sexual Harassment Briefing Transcript at 182 (Ada Meloy, a representative from the American Council on Education, testified that the colleges and universities are redoubling their efforts to prevent sexual harassment and assault in response to OCR’s flurry of activity), available at http://www.usccr.gov/calendar/trnscrpt/CommissionBriefingTranscript_July-25-2014_%20final.pdf.

The guidance that everybody is talking about these days is the Dear Colleague Letter dated May 13, 2016, jointly issued by OCR and the Civil Rights Division of the Department of Justice (hereinafter the “Transgender Guidance”).

It would be an understatement to say that the Transgender Guidance goes beyond what Title IX, which was passed in 1972, actually requires. If someone had said in 1972 that one day Title IX would be interpreted to force schools to allow anatomically intact boys who psychologically “identify” as girls to use the girls’ locker room, he would have been greeted with hoots of laughter. OCR is simply engaged in legislating.

Let’s not forget what Title IX actually states. Its key prohibition is as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. § 1681(a).

That key prohibition is subject to a number of exceptions, including this one:

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

20 U.S.C. § 1686.

Based on those sections, the then-existing Department of Health, Education and Welfare (predecessor to the Department of Education) promulgated the following implementing rule, which President Gerald Ford approved on May 27, 1975:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33.

So far, so good. Note that the terms “gender,” “gender identity,” and “transgender” do not appear anywhere in Title IX or its implementing rules. Title IX prohibits discrimination on the basis of sex and sex only. If it isn’t sex

discrimination, it isn't prohibited. And if it isn't sex discrimination, no exceptions for situations where "discrimination" may be permissible are needed.

In the 1970s, nobody would have thought that a girl and an anatomical boy who thinks of himself as a girl were members of the same "sex." They would have said the girl was a girl, and the boy, no matter how feminine he might be, was a boy. This is not to say that they would not have cared about such a student's welfare or that they would not have recognized that his "gender dysphoria" (as it is called in DSM-5²²) might sometimes require that special provisions be made. But they never would have said that such a student was in fact "a girl" or that if a school failed to group him with the actual girls for the purposes of "separate toilet, locker room, and shower facilities" organized "on the basis of sex" that it was misclassifying him.

OCR has not pointed to a single case in which *anyone* during the 1970s used the statutory terms "sex" or "discrimination," in a manner consistent with the Transgender Guidance. I have diligently searched for such a usage in a newspaper, magazine or legal source to no avail. I do not believe any such usage existed at the time, but if it did, it would have been very rare.

Instead what I found is that the term "transgender" was coined specifically to contrast with the term "transsexual" and was intended to describe individuals who had adopted the habits and traits of the opposite sex *without having actually attempted to cross over into "becoming" a member of the opposite sex* (such as through surgical alteration of the body). In 1969, Virginia Prince, an anatomical male who dressed as a woman and who preferred, but did not insist on, feminine pronouns, wrote in the underground magazine *Transvestia*, which she edited:

"I, at least, know the difference between sex and gender," she wrote, "and have simply elected to change the latter and not the former. If a word is necessary, I should termed 'transgenderal.'"

Virginia Prince, *Change of Sex or Gender*, 10 *Transvestia* 53, 60 (1969), quoted in Richard Elkins & Dave King, *The Transgender Phenomenon* 82 (2006).

Prince's term did not catch on for decades. Neither the *Washington Post* nor the *New York Times* used the term "transgender" or "transgenderal" between January 1, 1960 and December 31, 1979. The *Compact Oxford English Dictionary* (2d ed. 1991) did not contain any form of the term. It first appeared in the *Westlaw*

²² Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013). The International Statistical Classification of Diseases and Related Health Problems, 10th ed. (or "ICD-10"), uses the term "gender identity disorder."

database for law review articles in 1993, when it appeared in an article in the New York Law School Law Review.

But over the years, the concept of “gender” has been used, particularly in the LGBT community, specifically as a contrast with the concept of “sex.” While “sex” is seen as a biological term, “gender” is seen as a term that refers to various cultural traits associated with sex, but separate from sex itself. Nothing highlights the fact that the two concepts are different better than the term “cisgender,” which had to be coined in the 1990s in order to describe those individuals whose gender and sex match.²³

For OCR to turn around and suddenly claim that when Congress used the word “sex” in Title IX, it was understood or intended to really mean “gender” would thus be far-fetched—so far-fetched that OCR doesn’t claim it. Instead, its argument—insofar as it has one—is constructed on two Supreme Court cases—*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).²⁴ The Transgender Guidance—at least in its more lucid passages—appears to be arguing that the logic of those cases, if played out in the cases involving “separate toilet, locker room, and shower facilities” requires that boys who identify as girls be grouped with actual girls.

OCR is wrong on that. Start with *Price Waterhouse*: It concerned a woman who allegedly had not been promoted because she was perceived as having an overly aggressive personality. The court reasoned that if a male employee with the same aggressive personality would have been promoted, then she was indeed discriminated against on account of her *sex* within the meaning of Title VII.

Fine. But let’s try that same line of reasoning in connection with the Transgender Guidance: Suppose a school has a student who is anatomically male, but who identifies psychologically as female. Would a female student with the same psychological identification been permitted to use the girls’ locker room? Yes, of course. But that’s very different from *Price Waterhouse v. Hopkins*, because Title IX and its implementing regulations actually permit schools to “provide separate toilet,

²³ Google definitions defines “cisgender” as “denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender.”

²⁴ OCR also relies on *G.G. v. Gloucester County School Board*, No. 15-2056, 2016 WL 1567467 at *8 (4th Cir. Apr. 19, 2016). But *G.G.* came out as it did only because the panel majority (over a vigorous dissent) considered itself to be bound by Supreme Court precedent to defer to OCR. OCR is attempting to bootstrap that into an actual substantive endorsement of its interpretation.

locker room, and shower facilities on the basis of sex.” More important, applying the *Price Waterhouse* line of reasoning ends up proving too much. ***Consider instead an anatomically male student who identifies as male. It is still true that his female counterpart—an anatomical female who also identifies as male—would have been permitted to use the girls’ locker room. Yet we know that schools are explicitly authorized to have separate toilets, locker rooms and shower facilities for each sex.*** This takes these cases outside the *Price Waterhouse* situation.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), is just more of the same.²⁵ Applying its logic to the Transgender Guidance would force the conclusion that sex-specific “toilet, locker room and shower facilities” are a violation of Title IX—until one remembers that they are explicitly authorized by 34 C.F.R. § 106.33.

If anything, *Price Waterhouse* and *Oncale* demonstrate the perils of making up law on the fly. If Title IX really forbids gender identity discrimination, that will not always work to the benefit of transgender students. Suppose a student who is anatomically female, but who identifies as male feels uncomfortable using the girls’ restroom at a school. The school therefore arranges for her to use the faculty’s restroom, which accommodates only a single person at a time, and she is pleased with this arrangement. But now the other anatomical females are envious. They

²⁵ The plaintiff in that case was a male roustabout on an oil platform in the Gulf of Mexico. He alleged that on several occasions he had been sexually harassed and even threatened with rape by his fellow male crew members. A unanimous Supreme Court held that he nevertheless could sue for sexual harassment under Title VII and that the crucial factual issue was “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” 523 U.S. at __ (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993)(Ginsburg, J., concurring)). Hence plaintiff *Oncale* need only to prove that a similarly-situated female would not have been treated as badly as he was. If one tries to apply the same logic to the Transgender Guidance, it again fails to support the Guidance. It’s true that an anatomically female student who identifies as female is permitted to use the girls’ rest room, while an anatomically male student who identifies as female is not. But that’s because separate toilet facilities for each sex are explicitly authorized by the law. Attempting to cram the *Price-Waterhouse/Oncale* line of reasoning in this hypothetical only results in a dead end: If the boys who identify as boys were girls who identify as boys, they would be allowed to use the girls’ restroom too. That means that separate restrooms must be a violation of Title IX generally—until we shake ourselves and remember that separate restroom facilities for each sex are explicitly authorized by the law. *Oncale* and *Price-Waterhouse* are both about cases in which the employees suffered an actual disadvantage on account of their sex. The Transgender Guidance tries to apply this where what’s at stake is simply which of two equal groups the individual students will be assigned to.

want to use the single-user faculty restroom too. Each one of them can make the claim that if she were of the opposite gender identity, she would be permitted to use a private restroom. And they will be right. They would in fact have been better off if their gender identity had been male. Yet the school is just trying to accommodate the needs of its transgender student.²⁶

Given the inapplicability of *Price Waterhouse* and *Oncale*, the only way I see to justify the Transgender Guidance is to show that an anatomical male student who “identifies” as female really is a girl in some relevant sense. But at that point we are entering an Alice-in-Wonderland world.

Don’t get me wrong. There is no reason in the world that any federal, state or local government should be telling anyone that he or she needs to conform to the expectations of others regarding members of his or her sex. That’s what freedom is all about. But it’s one thing to butt out of an individual’s decision to dress and behave like a member of the opposite sex and it is quite another to declare that this makes that individual an actual member of the opposite sex and mandate that every federally-funded school in America act accordingly.

We are teaching young people a terrible lesson. If I believe that I am a Russian princess, that doesn’t make me a Russian princess, even if my friends and acquaintances are willing to indulge my fantasy. Nor am I a Great Horned Owl just because—as I have been told—I happen to share some personality traits with those feathered creatures. I should add that very few actual transgender individuals are confused in this way. They understand perfectly that their sex and their gender do not align. Some choose surgery to make their bodies better align with their gender. Most choose not to.

Note that my overriding point has thus far been that OCR is not enforcing Title IX and that it is instead enforcing its own concept of what the law *should* be. That is in keeping with the theme of this hearing. The Transgender Guidance is fundamentally anti-democratic. Not only is it at odds with what the 92nd Congress intended when it passed Title IX, it is at odds with what the American people want in 2016. For example, when a Houston ordinance that, among other things, banned

²⁶ Note that I agree with OCR that *Price Waterhouse* is valid precedent for its conclusion that transgender students cannot be *penalized* for their gender non-conforming personality traits and actions. Suppose, for example, an anatomically female student who identifies as male is made to stay after school, because her loud, aggressive manner is considered “unladylike” and a boy with the same traits would not have been subjected to the same penalty. Such a case would fit neatly into the *Price Waterhouse* decision, since unlike the cases involving restrooms, locker rooms, etc., there is no explicit exception to the ban on sex discrimination that permits this particular form of disparate treatment.

discrimination on the basis of gender identity came up for a vote last November, it was defeated 61% to 39%, precisely because many voters thought it would lead to restroom and locker room rules like those promoted in the Transgender Guidance. When Target stores announced that they would welcome anatomically male shoppers in the women's room, 1,258,306 individuals pledged to boycott (as of May 18, 2016). We are being governed by unaccountable bureaucrats rather than by our elected representatives.

For the record I should add that the Transgender Guidance is likely bad policy (and not simply because it is anti-democratic and goes against the public's wishes). It is usually a mistake to force a one-size-fits-all solution onto a situation where views and circumstances differ and may be subject to change over time. It has always been perfectly legal for federally-funded schools to have separate restrooms based on gender identity if that is what they want to do. For that matter, it has always been perfectly legal (though idiotic) for these schools to have separate restrooms based on social security number or number of letters in students' surnames. Neither Title IX nor Title VI outlaws such discrimination. The law does not ban something just because it's silly. If separate restrooms by gender rather than sex are a good idea, perhaps we would have evolved in that direction if OCR has not pre-empted such evolution by issuing the Transgender Guidance.

Here's why I doubt that evolution would result in restrooms uniformly separated by gender rather than sex (although many individual schools and businesses might adopt such a practice). First of all, not all transgendered individuals prefer that solution—at least not at all times. Toilet, locker room, and shower facilities are not places where one goes to commune with people whose traits are similar to one's own. It's a place one goes to relieve nature's call, etc. Toilet facilities in particular are configured to respond to anatomy, not one's taste in clothing. Put more pointedly, some anatomically males who identify with the feminine gender may nonetheless prefer to use the urinal in the men's room. It's quicker.

Second, sex is binary; one is either male or female with precious few exceptions. Gender, on the other hand, is multi-faceted and much more variable. It will be difficult to contain it in binary toilet, locker room and shower facilities. According to the National Transgender Discrimination Survey conducted by UCLA's Williams Institute, 31% of transgender respondents identified either strongly (10%) or somewhat (21%) with the identity "Third Gender," while 38% identified either strongly (15%) or somewhat (23%) with the identity "Two Spirit." See Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination*

Survey 6 (January 2014). See also Sam Escobar, *I'm Not Male I'm Not Female: Please Don't Ask Me About My Junk*, *Esquire* (March 31, 2016); Ernie Grimm, *My Gender is Bunny*, *San Diego Reader* (March 25, 2009). If gender rather than sex is to control toilet, locker room and shower facility use, we eventually are going to need more than just two sets of facilities.

Third, because anyone can claim to be transgender, separating by gender rather than sex encourages pranksters and voyeurs. It will never be possible to gainsay a voyeur who enters a restroom for nefarious reasons claiming to be transgender unless he is caught red-handed peeping at or even assaulting his victims. Who will be able prove that he is a liar? Indeed, there have already been cases in the news that suggest what lies ahead. Last year, a man dressed as a woman was caught in a woman's room at a mall peeping into stalls. This was not his first arrest for such conduct. But what if it had been? Police would surely shy away from prosecuting him, since his presence alone would have been insufficient to prove his intent.²⁷

III. Some Thoughts on Solutions

One might ask why schools, colleges, and universities pay any attention to OCR. The answer, of course, is they do it for the money. OCR has control over their federal funding, the loss of which would be devastating to most educational institutions' finances. They can't take any chances. Whatever OCR wants them to do, they'd better do it, since it is very difficult for them to turn to the courts for protection. The Administrative Procedure Act does not provide a cause of action, since the issuance of a guidance is not ordinarily considered a final agency action (although it is possible that a court would find that, under certain circumstances, an action for a declaratory judgment is available.) Even if OCR never follows through with a threat to withdraw funds, an OCR investigation is very costly for the institution involved. The better part of valor is usually just to do what OCR wants.

I do not believe Congress can get OCR (or any other civil rights agency) back on track merely by chastising its leaders for going beyond what the law authorizes

²⁷ *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall*, *Police say*, *NBCWashington.com* (Nov. 17, 2015). See also M. Diworth, *Palmdale Man Arrested for Videotaping in Women's Bathroom*, *The Antelope Valley Times* (May 14, 2013); Sam Pazzano, *Predator who Claimed to be Transgender Declared Dangerous Offender*, *Toronto Sun* (Feb. 26, 2014)(man falsely claiming to be transgender to get access to shelter in order to sexually assault women).

them to do. If Congress wants to send a message, agency budgets will have to be reduced significantly.

Even reducing agency budgets, however, will likely be not enough. In a blog post at the Library of Law and Liberty website, my colleague at the University of San Diego Professor Michael Rappaport has written that the root of the problem at OCR may be the large sums of money at stake for each institution. I quote his suggestion in full:

Lawlessness at the Office for Civil Rights—and How to Address It

By Michael Rappaport

One of the areas of alleged lawlessness by the Obama Administration has been the Office for Civil Rights of the Department of Education (OCR). OCR has been pushing the agenda of a rape culture on college campuses. OCR has used guidances and “Dear Colleague” letters to effectively impose a series of questionable practices on colleges, such as depriving the accused of fair procedures.

There are numerous problems with this agenda. Some of them are substantive, such as the muddying of the definition of consent. Some of them are procedural, such as depriving the accused of procedural rights. But a third set of problems are legal. The problem is that the rules that OCR is imposing are questionable as a matter of law and have not been tested in the courts.

This is hardly an accident. The Office strategically imposes these standards through guidances because it knows that it is much more difficult for the guidances to be challenged in court ahead of time.

Instead, OCR uses the threat of a loss of federal funds to force universities to conform to its wishes – a threat that has worked even against the likes of Harvard University, one of the most powerful institutions in the country. If the a college does not conform to the Office’s interpretation of Title IX, the college risks losing large amounts of federal funds.

While the Office’s decision is subject to judicial review, if the college loses on judicial review, then the college can lose all federal funding. For most colleges, this is a devastating result – one that they would not risk. Therefore virtually all colleges cave, agreeing to the Office’s views. As a result, there are virtually no adjudications of whether OCR’s determinations are legal. The risk of all federal funds being eliminated is simply too much for colleges to bear.

But there is a way to change the law that would allow judicial review

without such a threat. Congress should pass a statute that provides that when a college does not follow an OCR interpretation, and that interpretation has not been judicially reviewed by the relevant Circuit Court, the college will only lose a limited amount in federal funds, such as \$5000. In this way, OCR cannot coerce colleges into following its interpretation of the law without judicial review.

It is hard to see how one might oppose this reform – unless of course one believes that the executive branch should be able to operate without judicial supervision. People who believe this should be forced to acknowledge it in public.

It is possible that some version of this idea could be made to work. It is a proposal that deserves serious consideration. It may be necessary, for example, that an irrebuttable presumption will be necessary that OCR is acting pursuant to a guidance when it has an extant guidance that is applicable to the facts of the case. That would prevent OCR from arguing that it is acting only pursuant to the statute itself and not in any way pursuant to its guidance (and hence not subject to the \$5000 limit).

Even this proposal won't cover all the problems of overreach by OCR (or by the EEOC or other similar agencies). One problem that arises with some regularity is the seemingly interminable investigation. These investigations impose huge costs on the regulated party. Even without the threat that OCR can cut off funds pursuant to Title VI or Title IX, just the expense of the investigation can cause schools to knuckle under.

Here is my suggestion: Perhaps there needs to be a point in these investigations at which enough is enough. At that point—call it the “outside point”—schools (or in the case of the EEOC and Title VII, employers) should be able to recoup their expenses—at least if it is ultimately determined by a court that the school (or employer) did not violate the law.

Congress could accomplish this by creating a statutory remedy and cause of action in federal court for this purpose. After the “outside point”, the school (or employer) would be able to take the initiative by filing a lawsuit. The agency could then counterclaim for a determination that the school (or employer) violated the law. The court could then determine liability. In the absence of liability, it could award the regulated party all expenses incurred in dealing with the investigation past the “outside point.”

There are difficulties in drafting such legislation. How should the “outside point” be defined? What kinds of expenses should be allowed? How can we ensure that the expenses will be taken out of the agency's enforcement budget rather than out of some other part of the agency's budget? But I do not believe that they are insurmountable difficulties. Tackling those difficulties

strikes me as likely superior to the status quo.