



More Progress On Restraining Government By Dear-Colleague Letter

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Agencies use informal guidance documents in lieu of formal regulation to clarify and interpret uncertainties in existing law and enforcement.

While there are many legitimate reasons they might want to do that, such forms of subregulatory guidance or “stealth regulation” can also offer a tempting way to extend an agency’s power and authority into new areas, or ban private actions that hadn’t been banned before – all without going through the notice and comment process required by regulation, with its protections for regulated parties.

Fair? Lawful? The Department of Justice under Attorney General Jeff Sessions has lately sought to bring agency use of guidance documents under better control, and in particular end the use of documents that 1) are obsolete, 2) improperly use the process to circumvent the need for formal regulation, or 3) improperly go beyond what is provided for in existing legal authority. Shortly after I covered this issue in December, Sessions revoked 25 guidance documents on such grounds. Caleb Brown interviewed me about all this for a Cato Daily Podcast last week.

Earlier, I covered “rule by Dear Colleague Letter” (as Education Secretary Betsy DeVos has called it) in posts on the regulation of universities during the Obama and Trump eras. Scott Shackford at Reason points out that the rescission of an earlier DoJ guidance letter on overbearing local government use of fines and fees should be read not as blessing those practices as okay, but as reflecting the likelihood that the federal government lacks clear statutory or constitutional authority to intervene against them. (adapted from *Overlawyered*).

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