

# THE OBAMA ADMINISTRATION'S UNPRECEDENTED LAWLESSNESS

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#### INTRODUCTION

Upon taking office, the Constitution requires the President to take a simple, yet powerful, oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>1</sup> Inherent in preserving, protecting, and defending the Constitution is the command in Article II, Section 3 that "[the President] shall take Care that the Laws be faithfully executed."<sup>2</sup>

President Obama and his Administration have not taken care that the laws be faithfully executed. This Administration has embarked on an unprecedented pattern of lawlessness. And this is not just a Republican observation. As noted liberal Professor Jonathan Turley—who voted for President Obama—stated to Congress, "We are seeing the emergence of a different model of government in our country—a model long ago rejected by the Framers . . . . What we are witnessing today is one of the greatest challenges to our constitutional system in the history of this country."<sup>3</sup> In Professor Turley's words, "What's emerging is an

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1. U.S. CONST. art. II, § 1, cl. 8.

2. U.S. CONST. art. II, § 3.

3. *Authorization to Initiate Litigation for the Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Rules*

imperial presidency, an über-presidency . . . where the President can act unilaterally.”<sup>4</sup> The Constitution and federal statutes are supposed to be the supreme law of the land,<sup>5</sup> and the rule of law requires that the President enforce the laws duly enacted by Congress. In spite of this mandate, the Obama Administration has relegated the Constitution and federal statutes to advisory guidelines, allowing the executive to pick and choose which laws the President wants to enforce.

Some have argued that the Obama Administration’s lawlessness is justified by prosecutorial discretion.<sup>6</sup> Others have posited that even if this Administration’s actions have not been justified by prosecutorial discretion, this Administration is not disregarding the law any more than previous presidential administrations. This Article will show that both claims are patently false. In comparison to the most notable instances where previous presidential administrations have failed to enforce federal law, the Obama Administration has undertaken an unprecedented campaign to disregard federal law and undermine the separation of powers.

## I. THE TAKE CARE CLAUSE

Article II, Section 3 of the Constitution states, “[the President] shall take Care that the Laws be faithfully executed.”<sup>7</sup> The Take Care Clause, in short, requires the President to enforce the laws of the United States. As one scholar aptly explained, “The take care duty, the duty to enforce law faithfully, is, in many respects, the most basic responsibility the Constitution imposed upon the

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*Comm.*, 113th Cong. (2014) (statement of Jonathan Turley, Professor, The George Washington University Law School), available at <http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-Turley-20140716.pdf> [<http://perma.cc/DH66-MFTL>].

4. Greg Richter, *Jonathan Turley: America Becoming ‘Imperial Presidency,’* NEWSMAX (June 4, 2014, 7:22 AM), <http://www.newsmax.com/Newsfront/Jonathan-Turley-Obama-presidency-power/2014/06/04/id/575014/> [<http://perma.cc/F5TX-MPVM>].

5. U.S. CONST. art. VI, cl. 2.

6. *See, e.g.*, Memorandum from Sec’y Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), [http://conaway.house.gov/uploadedfiles/dhs\\_6\\_15\\_12\\_immigration\\_memorandum.pdf](http://conaway.house.gov/uploadedfiles/dhs_6_15_12_immigration_memorandum.pdf) [<http://perma.cc/DH5S-3NXN>].

7. U.S. CONST. art. II, § 3.

Chief Executive.”<sup>8</sup> By obligating the President to enforce the laws enacted by Congress, the Constitution denies the President the power to operate as a monarch who picks and chooses which laws to enforce based on his personal or political preferences.

In the words of President Obama’s former Administrator of the White House Office of Information and Regulatory Affairs, Professor Cass Sunstein, “The ‘take Care’ clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws.”<sup>9</sup> Consequently, “the ‘take Care’ clause does not authorize the executive to fail to enforce those laws of which it disapproves.”<sup>10</sup>

#### A. *The Take Care Clause’s History*

English monarchs long claimed the unilateral power to suspend duly enacted laws.<sup>11</sup> This power included both the suspension power, which allowed the monarch to categorically suspend a statute’s operation entirely, and the dispensation power, which allowed the king to issue individuals what amounted to a “license to transgress the law.”<sup>12</sup>

These suspension and dispensation powers existed to let the king adapt to changing circumstances when he believed Parliament’s objectives could not be achieved without ignoring the law.<sup>13</sup> The exercise of this power, therefore, was understood as a convenience to best accomplish the will of Parliament rather than an expediency for the king to circumvent the rule of law.

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8. Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 801 (1999).

9. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985).

10. *Id.*

11. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 804 (2013).

12. Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1650–51 (2008) (quoting Carolyn A. Edie, *Tactics and Strategies: Parliament’s Attack upon the Royal Dispensing Power 1597–1689*, 29 AM. J. LEGAL. HIST. 197, 198 (1985)).

13. Delahunty & Yoo, *supra* note 11, at 805 (citing *The Trial of Sir Edward Hales*, in 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1166 (T.B. Howell ed., 1816)).

Accordingly, the power pertained only to those laws that the king was directly in charge of enforcing.<sup>14</sup>

James II, however, used the dispensing power to accomplish his own policy objectives against Parliament's express will.<sup>15</sup> As a result, the power "gradually eroded"<sup>16</sup> until the English Bill of Rights declared that "the pretended Power of suspending of Laws, or the Execution of Laws, by regal Authority without Consent of Parliament, is illegal" and that "the pretended Power of dispensing with Laws, or the Execution of Laws by regal Authority, as it hath been assumed and exercised of late, is illegal."<sup>17</sup> Accordingly, "by 1789, no one familiar with history would have supposed that the English phrase 'executive Power,' as used for a century after the English Bill of Rights, encompassed either a dispensation or suspension power."<sup>18</sup>

So when Article II of the U.S. Constitution was written, the power to refuse enforcement of the laws was viewed as a monarchical abuse of power. "Versed in England's constitutional history, the Framers surely understood that the Constitution's grant of the executive power did not include dispensation, and that to charge the President with the 'faithful execution' of the laws underscored that fact."<sup>19</sup> As a result, the Take Care Clause continued the English tradition of denying this power to the executive, emphasizing that the President of the United States is not a king.

### B. *The Take Care Clause's Text*

By commanding that the "[the President] shall take Care that the Laws be faithfully executed,"<sup>20</sup> the Take Care Clause imposes a duty on the President, rather than conferring any additional power. This interpretation is confirmed by dictionary definitions around the time of our Founding. According to the 1828 edition

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14. *Id.* at 804 (quoting Sir Matthew Hale, *THE PREROGATIVES OF THE KING* 177 (D.E.C. Yale ed., 1976)).

15. *Id.* at 805-06.

16. John F. Manning, *Textualism and the Equity of the Statute*, 101 *COLUM. L. REV.* 1, 48-49 (2001).

17. Prakash, *supra* note 12, at 1651 (quoting Bill of Rights, 1689, 1 *W. & M.*, c. 2 (Eng.)).

18. *Id.*

19. Delahunty & Yoo, *supra* note 11, at 808.

20. U.S. CONST. art. II, § 3, cl. 3.

of Noah Webster's *American Dictionary of the English Language*, one of the meanings of the verb "take" is "[t]o take care of, to superintend or oversee; to have the charge of keeping or securing."<sup>21</sup> In addition, the term "faithfully," according to the 1755 edition of Dr. Samuel Johnson's *Dictionary of the English Language*, means "strict adherence to duty and allegiance" and "[w]ithout failure of performance; honestly; exactly."<sup>22</sup> These definitions impose a requirement, not a prerogative.

Moreover, the Framers put the Take Care Clause in Section 3 of Article II,<sup>23</sup> rather than in Section 2,<sup>24</sup> where the majority of the executive powers are enumerated.<sup>25</sup> Section 2 empowers the President with the words "[the President] shall have Power."<sup>26</sup> In contrast, Section 3 does not speak of any "Power."<sup>27</sup> Section 3 includes four clauses, three of which impose duties by using the

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21. Delahunty & Yoo, *supra* note 11, at 799.

22. *Id.* (citing 1 Samuel Johnson, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 736 (1755)).

23. Article II, § 3 provides: "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. CONST. art. II, § 3.

24. Article II, § 2 provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States; when called into the actual Service of the United States, he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2.

25. Lawrence Lessig, *The President and the Administration*, 94 COLUM. L. REV. 1, 62 (1994).

26. U.S. CONST. art. II, § 2.

27. U.S. CONST. art. II, § 3.

word “shall”: (1) the President “shall” give Congress “the state of the union”; (2) the President “shall receive ambassadors and other public ministers”; and (3) the President “shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.”<sup>28</sup> The remaining clause in Section 3 speaks of the President’s prerogative, by stating the President “may” convene both Houses of Congress “on extraordinary occasions.”<sup>29</sup> If the Framers meant the Take Care Clause to confer a presidential prerogative, rather than impose a duty, they would have similarly stated that the President *may* take care that the laws be faithfully executed.

The contemporaneous understanding of the Take Care Clause also confirms that it requires the President to enforce federal law. President George Washington, the first person to assume the duties of the Presidency, interpreted the Clause likewise: “It is my duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to [that duty].”<sup>30</sup> During the North Carolina ratifying convention, William Maclaine stated that the Take Care Clause was “[o]ne of the [Constitution’s] best provisions . . . [if the President] takes care to see the laws faithfully executed, it will be more than is done in any government on the continent.”<sup>31</sup> And as Justice James Wilson eloquently described it, the Take Care Clause means the President has “authority, not to make, or alter, or dispense with the laws, but to execute and act [sic] the laws, which [are] established.”<sup>32</sup>

In addition, Alexander Hamilton analyzed the extent of presidential powers in *The Federalist No. 69*, devoting ample time to discussing each power in turn, but omitting discussion of the Take Care Clause.<sup>33</sup> Hamilton therefore indicated that the Take Care Clause was never understood to be a power, but an obligation and affirmative duty. As Hamilton went on to declare in

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28. *Id.*

29. *Id.*

30. *Letter to Alexander Hamilton* (Sept. 7, 1792), in 32 WRITINGS OF GEORGE WASHINGTON 144 (John C. Fitzpatrick ed., 1939).

31. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 136 (Jonathan Elliot ed., 2d ed. 1861).

32. Delahunty & Yoo, *supra* note 11, at 802 (citing 2 JAMES WILSON, *Lectures on Law Part 2*, in COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007)).

33. THE FEDERALIST NO. 69 (Alexander Hamilton); Lessig, *supra* note 25, at 63.

*The Federalist* No. 70, “a government ill executed, whatever it may be in theory, must be, in practice, a bad government.”<sup>34</sup>

C. *Judicial Interpretations of the Take Care Clause*

Only a few Supreme Court cases have interpreted the Take Care Clause. These cases have construed the Clause as a presidential obligation to enforce the laws, rather than a presidential power to enforce the laws only when the President wishes.

In 1838, the Supreme Court in *Kendall v. United States*<sup>35</sup> stated that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”<sup>36</sup> The Court therefore easily rejected the defense of a postmaster, who withheld statutorily required funds from a postal service contractor. The postmaster had argued that, as an agent of the President, he had discretion to enforce the statute as he saw fit.

Likewise, the 1890 case *In re Neagle*<sup>37</sup> did not interpret the Take Care Clause as an additional font of presidential power. The Court explained that through the executive powers, the President “is enabled to fulfill the duty of his great department, expressed in the phrase that ‘he shall take care that the laws be faithfully executed.’”<sup>38</sup> The tools that the Constitution confers upon the President, therefore, serve only to enable him to fulfill his duty to execute law, not to enable him to refuse to fulfill that duty.

Perhaps the Court’s most notable case dealing with the Take Care Clause is the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>39</sup> In that case, the Supreme Court famously held that the President may not change laws to suit his policy preferences.<sup>40</sup> When steel workers threatened to strike during the Korean War, President Truman issued an executive order directing the Secretary of Commerce to seize the nation’s steel mills. President Truman wanted to ensure the mills’ continued

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34. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. 37 U.S. 524 (1838).

36. *Id.* at 613.

37. 135 U.S. 1 (1890).

38. *Id.* at 64.

39. 343 U.S. 579 (1952).

40. *Id.* at 587–88.



operation in light of the industry's importance to the war effort and national defense.<sup>41</sup> The Court rejected a number of arguments raised by the Truman Administration, including an effort to find seizure powers within the Take Care Clause.<sup>42</sup> Justice Jackson declared that the Clause "gives a governmental authority that reaches so far as there is law," affirming "the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules."<sup>43</sup> The President, therefore, exceeds his Take Care Clause duty once he stops adhering to federal law:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.<sup>44</sup>

The Court went on to point out that the executive order in question exceeded presidential authority because it "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."<sup>45</sup> *Youngstown* therefore interpreted the Take Care Clause as a presidential duty, not a prerogative.<sup>46</sup>

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41. *Id.* at 582–84.

42. *Id.* at 646 (Jackson, J., concurring).

43. *Id.*

44. *Id.* at 587–88 (majority opinion).

45. *Id.* at 588.

46. Justice Jackson's famous concurrence in *Youngstown* established a key guiding principle to understanding the proper boundaries of executive authority. Justice Jackson described three different zones of executive authority, each of which analyzes the relationship between Presidential action and Congressional action. *Id.* at 635–38 (Jackson, J., concurring). The President has the greatest authority when he acts with Congress's authorization, but his authority is "at the lowest ebb . . . when the President takes measures incompatible with Congress's expressed will." *Id.* at 637 (Jackson, J., concurring). In that case, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . Presidential claims to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637–38. As a result, when a President refuses to enforce a law Congress has passed (thus acting contrary to the express will of Congress), he walks upon the executive branch's most tenuous ground and can draw only upon a

Modern cases, too, confirm the historical understanding that the Take Care Clause imposes a duty on the President requiring him to enforce federal law. In *United States v. Valenzuela-Bernal*,<sup>47</sup> the Supreme Court described the Clause as imposing a “duty”<sup>48</sup> and a “constitutional obligation.”<sup>49</sup> Likewise, *Morrison v. Olson*<sup>50</sup> referred to the Clause as “[the President’s] constitutionally appointed *duty* to ‘take care that the laws be faithfully executed’ under Article II.”<sup>51</sup> *Clinton v. City of New York*<sup>52</sup> denied the President unilateral authority to ignore duly enacted statutes:

Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.<sup>53</sup>

*Medellín v. Texas*<sup>54</sup> may have put it the most succinctly: “The power to make the necessary laws is in Congress; the power to execute is in the President.”<sup>55</sup> And just this past Term, *Utility Air Regulatory Group v. EPA*<sup>56</sup> unanimously invalidated the EPA’s attempt to change duly enacted law that impeded EPA’s policy goals:

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution’s separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, ‘faithfully execute[s]’ them. The power of executing the laws necessarily includes both author-

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limited reservoir of constitutional authority. This limited reservoir would include the President’s affirmative powers only, such as the Commander in Chief power; the President could not rely on the Take Care Clause to ignore Congress’s will.

47. 458 U.S. 858 (1982).

48. *Id.* at 863.

49. *Id.* at 876 (O’Connor, J., concurring).

50. 487 U.S. 654 (1988).

51. *Id.* at 690 (emphasis added).

52. 524 U.S. 417 (1998).

53. *Id.* at 439.

54. 552 U.S. 491 (2008).

55. *Id.* at 526.

56. 134 S. Ct. 2427 (2014).

ity and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.<sup>57</sup>

Similarly, the President's obligation to enforce the laws does not include the power to disregard duly enacted laws when they become politically inconvenient.

## II. RATIONALES FOR NONENFORCEMENT: UNCONSTITUTIONAL STATUTES AND PROSECUTORIAL DISCRETION

As Justice Jackson's *Youngstown* concurrence explained, the President's authority is at its lowest ebb when he acts directly against the express will of Congress. A President who refuses to enforce a duly enacted law may therefore only rely upon the constitutional authority he possesses apart from Congress and the courts.

Some have asserted that the Take Care Clause categorically prohibits the executive from refusing to enforce even unconstitutional laws.<sup>58</sup> One need not take that position, however, to believe that the Take Care Clause imposes a duty on the President to enforce all constitutional laws, rather than giving the President the prerogative to enforce the laws he chooses.

The more controversial proposition is that the President's prosecutorial discretion allows him to refuse enforcement of certain laws.<sup>59</sup> While the President certainly has some prosecutorial discretion to withhold prosecutions based on certain facts and circumstances, this doctrine does not allow wholesale nonenforcement of particular laws. Ultimately, the President cannot refuse to enforce the law because of his personal policy preferences.

### A. *Nonenforcement of Unconstitutional Statutes*

If the President has any power of nonenforcement at all, it rests in the principle of constitutional supremacy articulated in *Marbury v. Madison* that a law conflicting with the Constitution

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57. *Id.* at 2446 (2014) (internal citation omitted).

58. See, e.g., Prakash, *supra* note 12, at 1619 & n.24.

59. See *id.* at 1617; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2004).

is no law at all.<sup>60</sup> In *Marbury*, the Supreme Court emphasized that the purpose and effectiveness of a written Constitution rests on the invalidity of laws that conflict with it.<sup>61</sup> If the President is to take an oath to uphold the Constitution, enforcing laws that are themselves unconstitutional could not fulfill that duty.<sup>62</sup> Rather, if a President faces a decision between enforcing a law that Congress has passed and enforcing the Constitution, many scholars have argued that he is obligated to enforce the Constitution.<sup>63</sup> Such a situation may occur, for example, “when a decision of the Supreme Court regarding one law renders other previously enacted statutes unconstitutional, so Congress could not have considered the constitutional issue in light of the Court’s views.”<sup>64</sup>

Historically, Presidents have evaluated a law’s constitutionality independent from the judiciary and Congress, and have refused to enforce clearly unconstitutional laws. President Thomas Jefferson, for example, refused to enforce the Alien and Sedition Acts as unconstitutional under the First Amendment, and Jefferson pardoned those convicted under the Acts before his presidency.<sup>65</sup> In a letter to Abigail Adams, Jefferson explained:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power had been confided to them by the Constitution. That instrument

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60. 5 U.S. (1 Cranch) 137, 177–80 (1803).

61. *Id.*

62. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 723 (3rd ed. 2000).

63. Prakash, *supra* note 12, at 1630 (“the intersection of [the Take Care Clause and Supremacy Clause] yields a presidential duty to prefer the Constitution over unconstitutional federal laws, in exactly the same way that the federal and state courts must disregard unconstitutional federal laws in deference to the Constitution”).

64. Dawn E. Johnsen, *A Critical Assessment: Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 *LAW & CONTEMP. PROBS.* 7, 46–47 (2000).

65. TRIBE, *supra* note 62, at 724.

meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.<sup>66</sup>

Presidential nonenforcement of laws based on constitutional objections, however, is fairly rare. As Professor Laurence Tribe has stated, under *Marbury v. Madison*, “the authority to interpret the Constitution in the absence of a binding judicial construction does not imply that the executive branch may simply disregard or nullify a judicial interpretation of the Constitution with which the Executive disagrees.”<sup>67</sup> Similarly, Professor Dawn Johnsen—President Obama’s first nominee to head the Department of Justice’s Office of Legal Counsel—posited:

[T]he President must enforce the laws in a manner that preserves and respects the integrity of the lawmaking process as set forth in Article I, including the roles Article I assigns the President and Congress in determining the content and ensuring the constitutionality of laws. Second, the President’s nonenforcement decisions must promote not the President’s own constitutional views in isolation, but the Constitution itself, which in turn depends upon principled constitutional interpretation by all three branches and a recognition of the judiciary’s special role in that process.<sup>68</sup>

In the same way, Professor Saikrishna Prakash emphasized that “[w]hile Executive Disregard can be invoked at any time after a bill becomes law, it can only be used when the President has constitutional objections.”<sup>69</sup> Occasion to effectively nullify a law due to constitutional objections, therefore, should be an unusual executive action and one taken only where the President actually believes the statute is unconstitutional.<sup>70</sup>

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66. *Id.* at 724–25 (quoting 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50–51 (Albert Bragh ed., 1905) (letter to Abigail Adams, Sept. 11, 1804)).

67. *Id.* at 729.

68. Johnsen, *supra* note 64, at 29.

69. Prakash, *supra* note 12, at 1634.

70. *Id.* at 1653.

B. *Nonenforcement Based on Prosecutorial Discretion*

Where the President has no constitutional objection to enforcing a law, the President does retain some authority to withhold prosecution on an equitable basis depending on the facts and circumstances of a case. As Professor Tribe noted:

The President's power and duty under Article II, § 3, to "take care that the Laws be faithfully executed," has long been thought to encompass a special role in the prosecution of crimes, a role augmented by the power conferred on the President by Article II, § 2, clause 2, "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."<sup>71</sup>

An analogous doctrine in administrative law is that an agency's failure to initiate enforcement proceedings in a particular circumstance cannot be challenged under the Administrative Procedure Act, because that inaction is akin to the proper use of prosecutorial discretion.<sup>72</sup> While "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws,"<sup>73</sup> prosecutorial discretion is naturally applied on a case-by-case basis. At its core, prosecutorial discretion consists of the power to decide whether to bring charges, what charges to bring, where to bring them, and against whom.<sup>74</sup> Professor Tribe is undoubtedly correct that "prosecutors every day make decisions not to bring criminal charges against defendants solely on the ground that, in their view, critical evidence against those defendants has been unconstitutionally obtained and that, as a result, there is not sufficient admissible evidence to go to trial."<sup>75</sup>

But the exception of prosecutorial discretion should not swallow the rule of law. Prosecutorial discretion allows for equitable considerations in particular prosecution or enforcement cases. However, such discretion, it had been thought before the Obama Administration, was not properly used on a "categorical or pro-

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71. TRIBE, *supra* note 62, at 717.

72. See Sunstein, *supra* note 9, at 662 (citing Heckler v. Chaney, 470 U.S. 821 (1985)).

73. Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

74. Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279 (2002).

75. TRIBE, *supra* note 62, at 727.

spective” basis, and “all three branches appear to have viewed executive enforcement discretion as subject to congressional override.”<sup>76</sup> Decades ago, the Fifth Circuit stated that “it is as an officer of the executive department that [the prosecutor] exercises . . . discretion as to whether or not there shall be a prosecution in *a particular case*.”<sup>77</sup> Recently, D.C. Circuit Judge Brett Kavanaugh noted, “[p]rosecutorial discretion does not include the power to disregard other statutory obligations that apply to the executive branch, such as statutory requirements to issue rules, or to pay benefits, or to implement or administer statutory projects or programs.”<sup>78</sup> To hold otherwise would allow the President the expansive suspension power of the old English kings.<sup>79</sup>

Professor Sunstein distinguished valid uses of prosecutorial discretion in the administrative context from ignoring entire laws. Sunstein commented that of course “the executive has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe.”<sup>80</sup> In contrast, “there is a distinction between exercising such discretion and refusing to carry out the obligations that Congress has imposed on the executive.”<sup>81</sup> Thus, even if there may be “difficult intermediate cases,” it would violate the Take Care Clause for a President to invoke prosecutorial discretion as a means of “fail[ing] to enforce those laws of which [the President] disapproves.”<sup>82</sup>

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76. Price, *supra* note 59, at 677.

77. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (emphasis added).

78. *In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013) (Kavanaugh, J.).

79. The pardon power was not seen as suspension or dispensation. Traditional understandings of the pardon portray it not as a policy instrument, but as an instrument for achieving justice or ameliorating political dissent on a case-by-case basis. As Chief Justice Marshall wrote, “A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.” *United States v. Wilson*, 32 U.S. 150, 160–61 (1833). The pardon power carries a scope specifically limited to crimes already committed. The pardon may not apply to acts that have not yet been committed, because it would function as a personal waiver, the impermissible dispensation of the laws. James Pfiffner, *Pardon Power*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 203 (Edwin Meese III et al. eds., 2005). As a result, the pardon power does not encompass an expansive policy of nonenforcement under the guise of prosecutorial discretion.

80. Sunstein, *supra* note 9, at 670.

81. *Id.*

82. *Id.*

When prosecutorial discretion is invoked to ignore entire statutes, it threatens to undermine the constitutional lawmaking process. First, "it can encourage Congress to overregulate certain areas with the expectation that the Executive [will] counterbalance" by executing the laws more leniently.<sup>83</sup> Second, a prerogative of nonenforcement encourages the President to refuse negotiation or input into the lawmaking process, instead holding the ultimate power of broad nonenforcement under the guise of prosecutorial discretion.<sup>84</sup> The President need not negotiate to pass bills to his liking, nor would he need to accommodate an opposing party because he may functionally rewrite a congressional agreement on legislation after the bill becomes law.<sup>85</sup> Finally, it "creates an incentive for Members of Congress to bypass each other in fashioning legislation" and instead negotiate directly with the President, who will hold the only meaningful power to determine the true application and scope of law.<sup>86</sup>

The President cannot constitutionally refuse to enforce a law based on policy disagreements.<sup>87</sup> Professor Johnsen may have put it best: "Its history and purpose confirm that the Take Care Clause denies the President any dispensing or suspending power, that is, the power selectively to enforce laws. The President clearly may not refuse to enforce a law because he disapproves of the policy behind it."<sup>88</sup> The President may have prosecutorial discretion to withhold enforcement, as an equitable matter, due to the facts and circumstances of a particular case. But the President does not have the power to categorically ignore entire laws under the guise of prosecutorial discretion. The Take Care Clause forbids this.

### III. NONENFORCEMENT UNDER PREVIOUS PRESIDENTIAL ADMINISTRATIONS

Part III will examine some of the most notable instances where previous Presidents have refused, or have allegedly refused, to

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83. Delahunty & Yoo, *supra* note 11, at 795.

84. *Id.*

85. *Id.*

86. *Id.*

87. See, e.g., Prakash, *supra* note 12, at 1634; Price, *supra* note 59, at 674.

88. Johnsen, *supra* note 64, at 16.



enforce the law. Some have argued that these historical examples show that President Obama's lawlessness is not unprecedented. But, as will be explained below, these examples are qualitatively different from the lawlessness of the current presidential administration. Historically, Presidents have not categorically and prospectively disregarded entire statutes without constitutional objections, and they certainly have not done so when dealing with domestic rather than foreign policy.

A. *Abraham Lincoln's Suspension of Habeas Corpus*

In the early days of the Civil War, President Lincoln took drastic measures to handle Southern secession. Lincoln's acts included instances of mail interception and censorship, unilateral blockades of Southern ports, and expenditure of unappropriated funds to support military recruiting efforts.<sup>89</sup> Most famously, however, President Lincoln suspended the writ of habeas corpus between Philadelphia and Washington in an attempt to prevent Maryland from seceding and placing the nation's capital in the heart of Confederate territory.<sup>90</sup> On April 27, 1861, President Abraham Lincoln unilaterally suspended the writ of habeas corpus, authorizing military officers to detain Confederate sympathizers indefinitely without a specific charge.<sup>91</sup> By the end of the war, the suspension included states as far north as Maine.<sup>92</sup>

President Lincoln's suspension of the writ of habeas corpus raised serious constitutional problems. The power to suspend habeas corpus was explicitly given to Congress, not the President. Article I, Section 9 places limits on Congress's powers. One of these limits is contained in the Suspension Clause: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety

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89. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 722–24 (2003).

90. *Id.* at 723–24.

91. Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 399 (2007) (citing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 25 (1998)).

92. Calabresi & Yoo, *supra* note 89, at 723 n.301 (citing Abraham Lincoln, Executive Order to the Lieutenant-General Winfield Scott (Oct. 14, 1861), in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3240 (James D. Richardson ed., 1897)).

may require it.”<sup>93</sup> By placing this Clause in Article I, the Framers sought to grant Congress—not the President—the power to suspend habeas corpus.<sup>94</sup>

A federal court accordingly rejected President Lincoln’s suspension of the writ as an unconstitutional executive overreach.<sup>95</sup> Chief Justice Taney, sitting by designation as a circuit court judge, reasoned that because the power to suspend the writ of habeas corpus resides in Article I, which “has not the slightest reference to the executive department,”<sup>96</sup> “I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.”<sup>97</sup> In other words, according to Taney, “[President Lincoln] certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.”<sup>98</sup>

President Lincoln responded to Chief Justice Taney. On July 4, 1861, President Lincoln addressed Congress, arguing that the Constitution failed to explicitly delegate the power of suspen-

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93. U.S. CONST. art. I, § 9.

94. See, e.g., Clay V. Bland, Jr., *A Constitutional Limitations: The Controversy Surrounding the Military Commissions Act of 2006 and the Writ of Habeas Corpus*, 53 LOY. L. REV. 497 (2007) (“In fact, in 1805, President Thomas Jefferson was even denied the congressional authority to suspend the writ. Nevertheless, Congress, pursuant to a proper delegation of the authority, has sanctioned a suspension of the writ of habeas corpus on four occasions.”); Calabresi & Yoo, *supra* note 89, at 723–24 (“The Constitution is silent on whether Congress or the president has the authority to suspend the writ of habeas corpus in times of emergency, but the better argument is surely that this is normally a congressional prerogative.”); Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1482 (2005) (“suspension was always the prerogative of the legislature, and not the executive.”); Brandon L. Garret, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 49 (2012) (describing the Suspension Clause as “limiting Congress’s ability to suspend the ‘Privilege of the Writ of Habeas Corpus’”).

95. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861).

96. *Id.* at 148.

97. *Id.* at 149.

98. *Id.*

sion to any one branch.<sup>99</sup> The Commander in Chief and Take Care Clauses, Lincoln stated, conferred a war power upon the President to enable him “to resist force employed for [the government’s] destruction by force for its preservation.”<sup>100</sup>

Undoubtedly, Lincoln faced uniquely difficult circumstances with an ongoing Civil War, and accordingly he “simply took it for granted that his duty to defend the Constitution and to faithfully execute the laws implicitly authorized him to take whatever steps were necessary to preserve the Republic, even if those steps were not specifically authorized by any particular constitutional provision.”<sup>101</sup> One need not approve of all of Lincoln’s specific actions and, indeed, it has been observed that “Lincoln wielded more raw, unilateral power than any president in American history before or since.”<sup>102</sup> However, Lincoln acted in times of unprecedented unrest and conflict, and he at least posited a competing colorable constitutional interpretation of the Suspension Clause. Lincoln’s suspension of habeas corpus is therefore categorically different from undertaking an unconstitutional action or ignoring a statute simply because of a policy disagreement.

B. *Andrew Johnson’s Constitutional Objections to the Removal Restrictions in the Tenure of Office Act*

Andrew Johnson, a southern Democrat, was Vice President under Republican President Abraham Lincoln. Johnson was originally nominated in order to secure border state votes.<sup>103</sup> After Lincoln was assassinated, the tensions between the Johnson Administration and the Republican Congress escalated. While the Republican Congress sought to punish the southern states in the aftermath of the Civil War, Johnson obstructed their efforts

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99. Vladeck, *supra* note 91, at 406 (citing Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953)).

100. Calabresi & Yoo, *supra* note 89, at 725 (quoting Abraham Lincoln, Special Session Message (July 4, 1861), in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3224-25 (James D. Richardson ed., 1897)).

101. *Id.* at 725.

102. *Id.* at 737.

103. Daniel H. Pollitt, *Sex in the Oval Office and Cover-up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 277 (1998).

by vetoing much of Congress's Reconstruction legislation, including the Freedman's Bureau Bill and the Civil Rights Act.<sup>104</sup>

President Johnson was impeached for his actions in violation of the Tenure of Office Act. President Johnson indicated that he was likely to fire Secretary of War Edwin Stanton and replace him with Southern sympathizer Lorenzo Thomas.<sup>105</sup> Congress retaliated by passing the Tenure of Office Act in March 1867, over President Johnson's veto.<sup>106</sup> The Act required that the President get the advice and consent of the Senate to remove officers.<sup>107</sup> President Johnson then removed Secretary Stanton without the Senate's consent, in violation of the Tenure of Office Act. The House of Representatives then voted, 126–47, to impeach Johnson.<sup>108</sup> The House alleged that Johnson neglected to "take care that the laws be faithfully executed" by violating the Tenure of Office Act.<sup>109</sup> The Senate voted 35–19 to remove Johnson from office, falling one vote short of the necessary two-thirds vote for removal.<sup>110</sup>

Although President Johnson clearly violated the Tenure of Office Act, he did so based on significant constitutional objections that he expressly raised when vetoing the Act.<sup>111</sup> In fact, decades later in 1926, the Supreme Court in *Myers v. United States* vindicated President Johnson's interpretation, finding that the Act

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104. *Id.* at 278; see ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 287–90, 314–15 (1960). Despite President Johnson's veto, the Civil Rights Act became law in 1866 when a two-thirds majority in both houses of Congress voted to override Johnson's veto.

105. Pollitt, *supra* note 103, at 278.

106. *Id.*

107. See Act of Mar. 2, 1867, ch. 154, 14 Stat. 430, 430.

108. 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 2 (1868).

109. Pollitt, *supra* note 103, at 278.

110. *Id.*

111. Prakash, *supra* note 12, at 1681 (citing CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 57–59 (1998)); see Calabresi & Yoo, *supra* note 89, at 752 ("[b]ecause 'it is the President upon whom the Constitution devolves, as head of the executive department, the duty to see that the laws are faithfully executed', the president must be 'allowed to select his agents' and 'ought to be left as free as possible in the matter of selection and of dismissal.' Any other rule would 'reverse the just order of administration and . . . place the subordinate over the superior.'" (quoting Johnson Message to Congress)).

unconstitutionally restricted the President's power to remove officers.<sup>112</sup> President Johnson therefore refused to enforce the Tenure of Office Act due to a legitimate constitutional objection, rather than merely over a difference in policy preferences.

C. *Franklin Roosevelt's Constitutional Objections to Legislative Veto Provisions and Removal Restrictions*

President Franklin Roosevelt undoubtedly had an expansive view of executive power.<sup>113</sup> However, he did not employ sys-

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112. 272 U.S. 52, 176 (1926); see E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1045 n.142 (1975) ("Johnson claimed that the Tenure of Office Act was unconstitutional, a position eventually affirmed by the Supreme Court.").

113. Following the trend set by President Woodrow Wilson, FDR used executive orders liberally during World War II, citing national emergencies. According to the American Presidency Project, FDR issued an average of 290.59 executive orders per year and 3,522 executive orders total. *Executive Orders: Washington-Obama*, The American Presidency Project, <http://www.presidency.ucsb.edu/data/orders.php> (last visited July 28, 2014) [<http://perma.cc/HE3C-HCU2>]. These numbers significantly outpace any other President. President George W. Bush issued only 291 executive orders, and President Barack Obama has issued 188 executive orders total, as of September 20, 2014. *Id.* It is important to note, however, that FDR was a wartime president and the President's National Security Council was not created until President Truman's subsequent tenure in office in 1947. National Security Council, <http://www.whitehouse.gov/administration/eop/nsc> [<http://perma.cc/XB9J-T5C7>] (last visited July 28, 2014). The National Security Council assumed many roles that executive orders once played in the context of war, administering directives to coordinate U.S. foreign policy goals. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 296 n.133 (2001).

Perhaps FDR's most infamous executive order was Executive Order 9,066 in February 1942, which enabled the internment of Japanese Americans. Roosevelt argued that "successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." Exec. Order No. 9,066, 3 C.F.R. 1938 Cum. Supp. 345 (1943). In one of the most shameful chapters of American history, by June 1942, more than 110,000 Japanese Americans were placed into internment camps, scattered throughout the nation. *Roosevelt Signs Executive Order 9066*, <http://www.history.com/this-day-in-history/roosevelt-signs-executive-order-9066> [<http://perma.cc/STE9-736N>] (last visited July 28, 2014). The Court held this practice constitutional, stating that "[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944). While not expressly overruled, Justice Scalia has rightly commented that *Korematsu* was wrongly decided. See Debra Cassens Weiss, *Scalia: Korematsu was wrong, but 'you are kidding yourself' if you think it won't happen again*, ABA JOURNAL (Feb. 4, 2014),

tematic nonenforcement to accomplish policy goals. Rather, President Roosevelt reserved nonenforcement for instances in which he believed Congress exceeded its constitutional authority by encroaching on executive powers through limits on the removal power and through legislative veto provisions.<sup>114</sup>

As President Johnson had done decades before, President Roosevelt confronted Congress over attempts to control presidential removals. And like President Johnson before him, President Roosevelt raised significant constitutional objections. For example, the Urgent Deficiency Appropriation Act contained a rider prohibiting the use of federal funds to pay the salaries of three officials (all of which the House Un-American Activities Committee alleged were subversive) unless Roosevelt reappointed them and the Senate reconfirmed them.<sup>115</sup> Although Roosevelt signed the bill, he objected to the rider as “an unwarranted encroachment upon the authority of both the executive and judicial branches.”<sup>116</sup> Roosevelt declared that the provision was not binding, and refused to submit their names for reappointment.<sup>117</sup> Although the disbursing officers stopped paying the individuals, Roosevelt, through his attorney general, refused to defend the constitutionality of the statute when the three officials brought suit.<sup>118</sup> Throughout his administration, Roosevelt endeavored to assert control over so-called independent agencies through removal, a practice that culminated in *Humphrey's Executor v. United States*.<sup>119</sup> In that case, the Supreme Court retreated from *Myers* and curtailed Roose-

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[http://www.abajournal.com/news/article/scalia\\_korematsu\\_was\\_wrong\\_but\\_you\\_are\\_kidding\\_yourself\\_if\\_you\\_think\\_it\\_won/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/scalia_korematsu_was_wrong_but_you_are_kidding_yourself_if_you_think_it_won/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) [http://perma.cc/CX9P-MZCP].

114. See generally Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 79–93 (2004).

115. *United States v. Lovett*, 328 U.S. 303, 305 (1946) (“Congress provided in § 304 of the Urgent [1074] Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.”).

116. Yoo et al., *supra* note 114, at 82–83.

117. *Id.* at 82–83.

118. *Id.* at 83. Congress appointed a special counsel, and the Supreme Court struck down the law as a bill of pains and penalties prohibited by the Constitution’s prohibition on bills of attainder. *United States v. Lovett*, 328 U.S. 303, 304–318 (1946).

119. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

velt's ability to remove officials of administrative agencies when Congress created for-cause removal limitations for officers.<sup>120</sup> In any event, President Roosevelt's decision to ignore statutory officer removal limitations stemmed from constitutional objections and not simply policy disagreements.

President Roosevelt also stated that he would ignore a legislative veto provision in at least four different statutes, on the basis that they were an unconstitutional infringement on executive power.<sup>121</sup> First, Roosevelt signed the Lend-Lease Act of 1941 into law before the United States entered World War II.<sup>122</sup> The Act allowed the U.S. government to transfer military resources to "the government of any country whose defense the President deems vital to the defense of the United States," but the statute also gave Congress the power to end the executive's emergency authority by concurrent resolution.<sup>123</sup> Roosevelt believed this latter provision, the legislative veto, was an unconstitutional infringement on his Commander in Chief power.<sup>124</sup> He stated:

The Constitution contains no provision whereby the Congress may legislate by concurrent resolution without the approval of the President . . . . It is too clear for argument that action repealing an existing Act itself constitutes an Act of Congress and, therefore, is subject to the foregoing requirements. A repeal of existing provisions of law, in whole or in part, therefore, may not be accomplished by a concurrent resolution of the two Houses.<sup>125</sup>

Nevertheless, Roosevelt signed the legislation. He discussed his misgivings with the Act in a letter to Attorney General Robert Jackson, explaining that "the emergency was so great that I signed the bill in spite of a clearly unconstitutional provision contained in it."<sup>126</sup> Roosevelt, however, never had the oppor-

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120. Yoo et al., *supra* note 114, at 86–87.

121. *Id.* at 92–93. Cf. *INS v. Chadha*, 762 U.S. 919, 958–59 (1983) (striking down one-House legislative veto as unconstitutional).

122. Pub. L. No. 77-11, 55 Stat. 31 (1941).

123. *Id.*

124. See Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1358 (1953).

125. *Id.*

126. *Id.* at 1354. Jackson later questioned the authenticity of Roosevelt's claims, suggesting that Roosevelt's reason for not disclosing his hesitations regarding the bill were political in nature. Louis Fisher, *The Legislative Veto: Invalidated, It Sur-*

tunity to question this provision in practice. Second, Roosevelt objected to a legislative veto provision in a bill that created a Naval Affairs Committee that had to approve all naval real estate transactions, warning that “permitting such committee vetoes would ‘disregard principles basic to our form of government.’”<sup>127</sup> Third, he vetoed Congress’s attempt to create the 1937 New York World’s Fair Commission, because that bill also contained a legislative veto allowing “a commission composed largely of members of Congress to appoint executive staff and to administer public expenditures[,] constitut[ing] an unconstitutional invasion of the province of the executive.”<sup>128</sup> Fourth, during the debate surrounding the Executive Reorganization Act of 1939, Roosevelt further criticized the legislative veto, asserting that the concurrent resolution in that Act “could not ‘repeal executive action taken in pursuance of law.’”<sup>129</sup>

As Professor Yoo noted, “political necessity forced Roosevelt to blunt the force of his constitutional objections” on occasion.<sup>130</sup> As a result, FDR’s examples of nonenforcement were confined to instances where Roosevelt had significant constitutional objections to legislative veto provisions and removal restrictions.

#### D. Harry Truman’s Seizure of the Steel Mills

On April 4, 1952, while the U.S. was fighting the Korean War, the United Steel Workers of America gave notice of a nationwide strike beginning on April 9.<sup>131</sup> Mediation attempts had broken down after steel companies rejected a proposed settlement drafted by the Federal Wage Stabilization Board.<sup>132</sup> Believing

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*vives*, 56 L. & CONTEMP. PROBS. 273, 281 (1993). Jackson argued that Roosevelt did not disclose his views because it would have favored the position of his opponents and alienated many of his supporters, as his supporters considered the concurrent resolution constitutional. *Id.* at 281–82.

127. Yoo et al., *supra* note 114, at 92 (quoting 90 Cong. Rec. 6154 (1944) cited in, H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1018–19 (1975)).

128. Yoo et al., *supra* note 114, at 82 (quoting Franklin D. Roosevelt, A Veto of A New York World’s Fair Appropriation as an Invasion of the Province of the Executive (May 19, 1937) in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 206 (Samuel I. Rosenman ed., 1941)) (internal quotations omitted).

129. Yoo et al., *supra* note 114, at 105–06.

130. *Id.* at 93.

131. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

132. *Id.* at 582–83.



that the imminent strike would jeopardize the country's national defense, President Truman issued Executive Order 10,340 on April 8, 1952, directing the Secretary of Commerce to seize and operate most of the country's steel mills.<sup>133</sup> In doing so, the President ignored the Taft-Hartley Act's procedure for delaying strikes, which allowed the President to seek an injunction from a court to delay a strike for eighty days.<sup>134</sup> The steel companies sued the Secretary of Commerce.<sup>135</sup>

The Supreme Court held that President Truman lacked the power to seize the steel mills.<sup>136</sup> Justice Black, writing for the majority, held that the President exceeded his powers under the Constitution, which gives Congress the exclusive power to decide whether to seize private property for public use.<sup>137</sup>

President Truman exceeded his executive authority in seizing the steel mills. Like Lincoln's unilateral suspension of habeas corpus, however, the act was taken during a time of war, and President Truman asserted that his presidential authority increased during war to such a degree that this action was warranted.

#### E. *Richard Nixon's Appropriations Impoundment*

The inter-branch fight between President Richard Nixon and Congress over impounding appropriated funds actually did not involve any executive lawlessness. Rather, after Congress limited the President's authority to impound appropriated funds, Nixon abided by that statute.

Historically, Presidents had impounded funds—that is, had failed to spend funds appropriated by Congress—as far back as Thomas Jefferson.<sup>138</sup> For example, Andrew Jackson impounded congressional funds for domestic reasons,<sup>139</sup> while Lincoln and Grant tried to restrict Congress's spending by impounding funds for public work projects.<sup>140</sup>

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133. *Id.* at 583.

134. *Id.* at 704–05.

135. *Id.* at 583.

136. *Id.* at 588–89.

137. *Id.*

138. See 11 ANNALS OF CONG. 11, 14 (1803) (address to Congress by President Thomas Jefferson, Oct. 17, 1803).

139. See HORACE E. READ ET AL., MATERIALS ON LEGISLATION 513 (4th ed. 1982).

140. See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 148–49, 165–66 (1975).

In President Nixon's 1974 proposed budget, Nixon attempted to rein in government spending and reduce the deficit.<sup>141</sup> Nixon attempted to do this by refraining from spending nearly \$12 billion of congressional appropriations.<sup>142</sup> The Nixon Administration justified these impoundments by arguing that they were authorized by the language of the statutes passed by Congress.<sup>143</sup>

Congress, however, wanted the money to be spent. In response, Congress passed the 1974 Congressional Budget and Impoundment Act,<sup>144</sup> which "tighten[ed] congressional control over Presidential impoundments and establish[ed] a procedure under which Congress could consider the merits of impoundments proposed by the President."<sup>145</sup> Under the Act, the President could "propose a rescission"—that is, attempt to impound appropriated funds—but the President would be forced to spend the money unless Congress authorized the rescission.<sup>146</sup>

After Congress passed the 1974 Congressional Budget and Impoundment Act, President Nixon signed the bill,<sup>147</sup> and subsequently abandoned his practice of impoundment.<sup>148</sup> Nixon did not try to ignore the law and continue to impound funds in violation of the congressional legislation. Rather, he abided by the Act.

#### F. Ronald Reagan and the Iran-Contra Affair

It is disputed whether the Reagan Administration violated arms control statutes in selling arms to Iran, and whether the Administration violated the Boland Amendment by funding

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141. Norman Pine, *The Impoundment Dilemma: Crisis in Constitutional Government*, 3 YALE REV. L. & SOC. ACTION 99, 99 (1972).

142. 1974 Congressional Budget and Impoundment Control Act—Timeline, THE BANCROFT LIBRARY, UNIV. OF CAL., BERKELEY, <http://bancroft.berkeley.edu/ROHO/projects/debt/budgetcontrolact.html> [<http://perma.cc/M9NE-FCHK>] (last visited Sept. 28, 2014).

143. See *Train v. City of New York*, 420 U.S. 35 (1975).

144. Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

145. U.S. GEN. ACCOUNTING OFFICE, GAO/T-OGC-99-56, IMPOUNDMENT CONTROL ACT: USE AND IMPACT OF RESCISSION PROCEDURES (1999).

146. *Id.*

147. See 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 587 (1974).

148. See Gathy S. Neuren, Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 703 n.62 (1984); see also Bradley Graham, *White House Backing off Impounding*, WASH. POST, June 30, 1974, at A2, col. 1.

the Nicaraguan Contras. The Iran-Contra Affair was an isolated incident in the area of foreign policy, rather than an attempt to disregard federal law completely.

1. *Arms Sales to Iran*

After Ayatollah Khomeini overthrew the Iranian Shah and attacked the American Embassy in Tehran, the United States imposed economic sanctions and an arms embargo on Iran.<sup>149</sup> The signing of the Algiers Accord in 1981 lifted the U.S.-imposed trade sanctions but continued the weapons embargo.<sup>150</sup> Wary of Soviet influence in Iran, National Security Advisor Robert McFarlane and members of the National Security Council staff recommended reversing the United States' weapons embargo policy, on the theory that opening arms sales to Iran would counter Soviet influence.<sup>151</sup> The Reagan Administration turned down the proposal.<sup>152</sup>

Afterwards, Israel presented similar proposals to the United States. Israel knew that Iran required missiles to contend with Iraq's tank and air superiority during the Iran-Iraq War,<sup>153</sup> and the Israelis wanted to strengthen Iran against Iraq.<sup>154</sup> In 1985, after Hezbollah hijacked TWA flight 847 and took U.S. citizens hostage, several Israeli officials and businessmen suggested that Israel could potentially use arms sales to obtain the release of American hostages in Lebanon.<sup>155</sup> Israel indicated that the Iranians were willing to open a dialogue, and that they believed they could influence Hezbollah to release the American hostages, but that the Iranians would require "something to show for the dialogue" and it would "probably be weapons."<sup>156</sup>

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149. Sarah Lovering, *President Reagan and the Iran-Contra Affair: A Lesson in Leadership Failures*, 14 LBJ J. PUB. AFF. 58, 59 (2002).

150. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981.

151. JOHN TOWER ET AL., THE TOWER COMMISSION REPORT 20–21 (1987).

152. *Id.* at 22.

153. *Id.* at 23.

154. *Id.* at 23 & n.4.

155. *Id.* at 22–25; William E. Smith, *Terror Aboard Flight 847*, TIME, June 24, 2001, <http://content.time.com/time/magazine/article/0,9171,142099,00.html> [<http://perma.cc/59GM-3ADP>].

156. TOWER ET AL., *supra* note 151, at 25.

McFarlane informed President Reagan of the possibility, and the President indicated that he was interested.<sup>157</sup>

In August 1985, Robert McFarlane met with David Kimche, Director General of the Israeli Foreign Ministry.<sup>158</sup> According to McFarlane, Kimche made a proposal for Israel to sell 100 TOW missiles to Iran in exchange for the release of hostages, and for the United States to sell replacements to Israel.<sup>159</sup> When and how President Reagan responded to the idea is “quite murky” according to the Tower Commission Report.<sup>160</sup> McFarlane claimed that Reagan approved the deal, reasoning that “if Israel chose to transfer arms to Iran, in modest amounts not enough to change military balance and not including major weapon systems, then it could buy replacements from the United States.”<sup>161</sup> But Secretary of Defense Caspar Weinberger recalled that Reagan rejected the deal at a meeting with Weinberger and Secretary of State George P. Shultz.<sup>162</sup> White House Chief of Staff Donald Regan recalled that the President was “upset” when he first learned about the sale in September—after it had taken place—and that McFarlane said the Israelis had “simply taken it upon themselves to do this.”<sup>163</sup> Regardless of which account is to be believed, the United States went on to complete additional sales of weapons directly to Iran.<sup>164</sup>

It is disputed whether the United States’ arms sales to Iran violated federal statutes, such as the Arms Control Export Act. As President Obama’s former State Department Legal Adviser Harold Koh wrote, the statute “left ambiguous whether the executive branch could transfer weapons abroad secretly, so long as that transfer occurred as part of an intelligence operation conducted under other laws.”<sup>165</sup> The Independent Counsel that

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157. *Id.*

158. *Id.* at 26.

159. *Id.* at 27.

160. *Id.* at 26.

161. *Id.* at 27.

162. *Id.* at 28.

163. *Id.*

164. *Id.* at 50–51.

165. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1266 (1987); see also David J. Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT’L L. 696, 698–713 (1987) (detailing loopholes in arms sale statutes).

investigated the Iran-Contra Affair concluded that “the sale of U.S. arms to Iran [was] in contravention of stated U.S. policy and in *possible* violation of arms-export controls.”<sup>166</sup>

## 2. *Funding the Nicaraguan Contras*

The United States’ arms sales to Iran resulted in profits of almost \$20 million.<sup>167</sup> During one of Israel’s attempts to broker an agreement with Iran in 1986, Israel suggested to U.S. Lieutenant Colonel Oliver North that it could send some of this money to support the Nicaraguan Contras—a group that opposed the ruling regime in Nicaragua that had aligned itself with the Soviet Union.<sup>168</sup>

But in December 1982, Congress had passed the first Boland Amendment, a statute “prohibiting the Department of Defense and the Central Intelligence Agency from spending funds to overthrow Nicaragua or provoke conflict between Nicaragua and Honduras.”<sup>169</sup> On October 3, 1984, “Congress cut off all funding for the Contras and prohibited DoD, CIA, and any other agency or entity ‘involved in intelligence activities’ from directly or indirectly supporting military operations in Nicaragua.”<sup>170</sup>

Approximately \$3–4 million of the proceeds from the Iran arms sales were diverted through Israel to fund the Contras.<sup>171</sup> The Tower Commission that investigated the Iran-Contra Affair found “no evidence to suggest that the president was aware of LtCol North’s activities.”<sup>172</sup> In November 1986, Attorney General Edwin Meese III learned that profits from the Iran arms sales were being used to aid the Contras.<sup>173</sup> At President Reagan’s direction, the Attorney General and the Tower Commission conducted an investigation that resulted in the firing of several individuals in the Reagan Administration, including

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166. 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, at xiii (1993) (emphasis added).

167. TOWER ET AL., *supra* note 151, at 52.

168. *Id.* at 53.

169. *Id.* at 56; see Bretton G. Sciaroni, *Boland in the Wind: The Iran-Contra Affair and the Invitation to Struggle*, 17 PEPP. L. REV. 379, 383 n.20 (1990).

170. TOWER ET AL., *supra* note 151, at 56.

171. S. REP. NO. 100-7, at 41 (1987).

172. TOWER ET AL., *supra* note 151, at 61.

173. Lovering, *supra* note 149, at 62.

individuals in the CIA, National Security Council (NSC), and the White House.<sup>174</sup>

It is disputed whether the diversion of the Iran arms sales proceeds to the Contras violated the Boland Amendment. The Tower Commission noted that the Boland Amendment was subject to conflicting interpretations: “[S]everal of its Congressional supporters believed that the legislation covered the activities of the NSC staff,” but “LtCol North and VADM Poindexter received legal advice from the President’s Intelligence Oversight Board that the restrictions on lethal assistance to the Contras did not cover the NSC staff.”<sup>175</sup> The Independent Counsel, in contrast, found that “the provision and coordination of support to the contras violated the Boland Amendment ban on aid to military activities in Nicaragua.”<sup>176</sup>

Ultimately, the Iran-Contra Affair provides an example of subordinates’ possible lawlessness rather than clear presidential lawlessness. Although President Reagan had a responsibility, like any President, to be aware of the actions of his subordinates and to bear ultimate responsibility for them, President Reagan’s actions in the Iran-Contra Affair did not exemplify a President actively suspending or dispensing with federal statutes. Moreover, President Reagan took serious steps in response to the scandal, firing those responsible and ensuring his Administration upheld the law in the future. In any event, the Iran-Contra Affair is an isolated incident involving foreign affairs, and provides no precedent for a President to categorically ignore statutes dealing with domestic policy.

### G. George W. Bush’s Signing Statements

When presidents sign bills passed by Congress, they frequently issue a “signing statement” as commentary on the new law.<sup>177</sup> Presidents have used signing statements to describe a

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174. TOWER ET AL., *supra* note 151, at 1–2; Sciaroni, *supra* note 169, at 380.

175. TOWER ET AL., *supra* note 151, at 56.

176. WALSH, *supra* note 165, at xiv.

177. Some have argued that presidential signing statements of any kind are unconstitutional, on the basis that a President should have to veto any bill that contains objectionable provisions. See Steve Sheppard, *Presidential Signing Statements: How to Find Them, How to Use Them, and What They Might Mean*, 2006 ARK. L. NOTES 87, 87. That argument, however, has been rejected in historical practice. It is not entirely clear why

bill's purpose, to advocate for a particular interpretation of a bill or one of its provisions, to criticize Congress, or to explain how the executive intends to enact or interpret a bill.<sup>178</sup> Frequently, the signing statement serves as a vehicle to express constitutional objections to a bill and the executive branch's accompanying intent to refuse enforcement.<sup>179</sup>

Signing statements have long formed a component of executive practice, enabling the President to assert executive power preemptively as Congress passes a bill. James Monroe was the first President to sign a bill but then not enforce specific provisions of that bill.<sup>180</sup> Andrew Jackson, John Tyler, James K. Polk, and Ulysses S. Grant also issued statements that expressed doubts about legislation they signed into law.<sup>181</sup> Andrew Johnson, likewise, employed signing statements "to construe the legislation in a manner that preserved its constitutionality," as he did when criticizing part of the Public Works Appropriation Act as an unconstitutional delegation of executive power to congressional committees.<sup>182</sup> Franklin Roosevelt also employed the signing statement, attaching, for example, his objections and refusal to abide by the removal restrictions mentioned above in the rider to the Urgent Deficiency Appropriation Act.<sup>183</sup>

Various Presidents have issued signing statements saying they would not abide by legislative vetoes. President Ford "entered no fewer than six vetoes and five signing statements criticizing the legislative veto," grounding his objections on the need to preserve the Constitution's separation of powers framework.<sup>184</sup> Ford explained that "legislative-veto provisions 'purported to involve the

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the President should not be able to put the government on notice that he will not enforce an unconstitutional provision in the future.

178. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308–09 (2006) (Describing a memo now-Justice Samuel Alito penned during his time at the Department of Justice describing how a signing statement could be used to address questions of statutory interpretation).

179. *Id.* at 308.

180. *Presidential Signing Statements: Hoover - Obama*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> [<http://perma.cc/5E2R-F2TZ>] (last visited Nov. 17, 2014).

181. *Id.*

182. Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 653 (2005).

183. Yoo et al., *supra* note 114, at 82–83.

184. Yoo et al., *supra* note 182, at 674.

Congress in the performance of day-to-day executive functions in derogation of the principle of separation of powers, resulting in the erosion of the fundamental constitutional distinction between the role of the Congress in enacting legislation and the role of the executive in carrying it out.”<sup>185</sup> President Carter likewise objected to the legislative veto via signing statement, announcing “his intention to treat legislative vetoes as ‘report and wait’ requirements” while challenging the constitutionality in court.<sup>186</sup> President Reagan also continued to use signing statements against unconstitutional legislative veto provisions.<sup>187</sup>

Although the data confirm that Bill Clinton actually issued more signing statements than George W. Bush,<sup>188</sup> President Bush’s signing statements were viewed as more controversial. One commentator noted that Bush “quietly claimed the authority to disobey more than 750 laws enacted since he took office.”<sup>189</sup>

But President Bush’s signing statements were not mere policy objections; they were constitutional objections. According to a 2007 report by the American Constitution Society, President Bush issued 363 objections concerning his Article II authority as the unitary executive, 13 objections concerning the Vesting Clause and Take Care Clause, 147 objections concerning his authority over foreign affairs, and 76 objections concerning his Commander in Chief power.<sup>190</sup> To take a notable example, when Bush signed the Detainee Treatment Act into law in 2005, he included a signing statement that he would interpret the provision “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limi-

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185. *Id.* at 675.

186. *Id.* at 685.

187. *Id.* at 697.

188. AM. PRESIDENCY PROJECT, *supra* note 180.

189. Charlie Savage, *Bush challenges hundreds of laws*, BOSTON GLOBE, April 30, 2006, at A1.

190. See NEIL KINKOPF & PETER SHANE, AM. CONSTITUTION SOC’Y FOR LAW & POLICY, INDEX OF PRESIDENTIAL SIGNING STATEMENTS: 2001-2007 (2007), <http://www.acslaw.org/files/Signing%20Statement%20Chart%20-%20Neil%20Kinkopf%20and%20Peter%20Shane.pdf> [<http://perma.cc/7UGP-YNDK>].



tations on the judicial power.”<sup>191</sup> This statement seemed to suggest that Bush would not completely enforce the bill.<sup>192</sup> Bush issued other similar signing statements, such as the statement on the PATRIOT Act reauthorization.<sup>193</sup> Bush’s signing statements garnered negative media attention, and eventually prompted the American Bar Association to create a task force to analyze the constitutionality of presidents “attaching legal interpretation to federal legislation they sign.”<sup>194</sup>

The Constitution presumes that the branches will work against each other because they have a selfish incentive to jealously guard their own power.<sup>195</sup> Though some viewed President Bush’s signing statements as controversial, the practice of signing statements used to register constitutional objections to infringements on executive authority protects the Constitution’s core framework. During his campaign, then-Senator Obama lambasted President Bush’s use of signing statements, proclaiming that Bush’s use of signing statements was evidence of the fact that Bush thought he could “make laws as he goes along.”<sup>196</sup> Obama called President Bush’s use of signing statements a “clear abuse” of presidential power.<sup>197</sup> And candidate Obama adamantly argued that he was “not going to use signing statements as a way of doing an end-run around Congress.”<sup>198</sup> But President Obama has issued at least thirty signing statements,<sup>199</sup> and has

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191. See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1919 (Dec. 30, 2005).

192. Bradley & Posner, *supra* note 178, at 308.

193. See Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (Mar. 9, 2006).

194. Bradley & Posner, *supra* note 178, at 309.

195. See THE FEDERALIST NO. 51 (James Madison).

196. Obama 2008: *Bush Used Signing Statements to “Accumulate More Power,”* REALCLEARPOLITICS (Apr. 18, 2011), [http://www.realclearpolitics.com/video/2011/04/18/obama\\_2008\\_bush\\_used\\_signing\\_statements\\_to\\_accumulate\\_more\\_power.html](http://www.realclearpolitics.com/video/2011/04/18/obama_2008_bush_used_signing_statements_to_accumulate_more_power.html) [<http://perma.cc/TCU8-FXLY>].

197. Karen Tumulty, *Obama circumvents laws with ‘signing statements,’ a tool he promised to use lightly*, WASH. POST, June 2, 2014, [http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a\\_story.html](http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html) [<http://perma.cc/DE9S-4M7G>].

198. REALCLEARPOLITICS, *supra* note 196.

199. Tumulty, *supra* note 197; see also Sheppard, *supra* note 177.

received criticism for his use from Democrats, including Representatives Barney Frank and David Obey.<sup>200</sup>

When used to preserve the Constitution's separation of powers, a signing statement may protect the President from relinquishing constitutional power or acceding to congressional encroachment on executive power. But the use of signing statements to accomplish policy objectives, rather than constitutional preservation, would constitute a wholly inappropriate use of the signing statement under the Take Care Clause. Policy objections must be addressed through a veto rather than a signing statement.<sup>201</sup> As President Obama stated, "I will not use signing statements to nullify or undermine congressional instructions as enacted into law."<sup>202</sup>

H. *George W. Bush's Memorandum Directing Texas to Obey the International Court of Justice*

*Medellín v. Texas*<sup>203</sup> exemplifies executive overreach. Jose Medellín was a Mexican national who had lived in the United States since preschool.<sup>204</sup> He was a member of the "Black and Whites" gang and was convicted and sentenced to death for brutally gang raping and murdering two young girls in Houston.<sup>205</sup> Medellín argued that he was denied his rights under the Vienna Convention, which gives a detained foreign national the right to communicate with his consulate.<sup>206</sup> The International Court of Justice (ICJ), in *Avena*, held that fifty-one Mexican nationals—including Medellín—were entitled to reconsideration of their state court convictions.<sup>207</sup> President George W. Bush then issued a memorandum instructing state courts to adhere to the

200. Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, N.Y. TIMES, Aug. 8, 2009, [http://www.nytimes.com/2009/08/09/us/politics/09signing.html?\\_r=0](http://www.nytimes.com/2009/08/09/us/politics/09signing.html?_r=0) [<http://perma.cc/8MPH-9YZD>].

201. Cf. *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the line item veto unconstitutional).

202. Tumulty, *supra* note 197.

203. 552 U.S. 491 (2008). Prior to serving in the Senate, I served as the Solicitor General of Texas; in that capacity, I represented Texas, litigating against the Bush Administration in *Medellín v. Texas*. See Ted Cruz, *Defending U.S. Sovereignty, Separation of Powers, and Federalism in Medellín v. Texas*, 33 HARV. J.L. & PUB. POL'Y 25 (2010).

204. *Medellín*, 552 U.S. at 500.

205. *Id.* at 501.

206. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292.

207. *Medellín*, 552 U.S. at 497-98.

ICJ's ruling in *Avena* and reconsider the Vienna Convention claims of the fifty-one Mexican nationals, even though state laws barred reconsideration.<sup>208</sup>

The Supreme Court rejected Medellín's argument and held that *Avena* and the President's memorandum did not constitute "directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."<sup>209</sup> On the contrary, the Court declared the President does not have the unilateral power to implement the decisions of a foreign tribunal, like the ICJ, relying on a non-self-executing treaty.<sup>210</sup> That power belongs to Congress alone, and the President may not use the decision of an international tribunal alone to overturn state laws.<sup>211</sup>

In *Medellín*, the Bush Administration sought to disregard constitutional limits on federal power, attempting to hold the ruling of a foreign court as paramount over duly enacted Texas law. The Take Care Clause, in contrast, requires the President to uphold the laws of this nation, of which the Constitution, not the ruling of the International Court of Justice, is supreme. Accordingly, the Supreme Court refused to enforce the President's order.<sup>212</sup>

#### I. Presidents Not Complying with the War Powers Resolution

The War Powers Resolution<sup>213</sup> was passed in 1973 over President Nixon's veto as an attempt to demarcate the reach of executive authority in deploying armed forces abroad without a congressional declaration of war.<sup>214</sup> The Constitution gives certain war powers to the President and others to Congress. According to Article II, Section 2, "[t]he President shall be Commander in Chief of the Army and Navy of the United States."<sup>215</sup> Under Article I, Section 8, Congress is given the power to "declare War, grant Letters of Marque and Reprisal, and make

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208. *Id.* at 498.

209. *Id.*

210. *Id.* at 525.

211. *Id.* at 525–26.

212. *Id.* at 498–99.

213. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (1982)).

214. See *War Powers*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/war-powers.php> [<http://perma.cc/43GG-GLE7>] (last visited July 31, 2014).

215. U.S. CONST. art. II, § 2.

Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>216</sup>

The War Powers Resolution is Congress’s statement on how to balance the competing war powers vested in the Constitution. The Resolution generally forbids the President from continuing military operations beyond sixty days without express congressional approval.<sup>217</sup>

Presidents have systematically ignored the War Powers Resolution since its passage.<sup>218</sup> Every President since 1973, including President Obama, has ignored the law.<sup>219</sup> They have all claimed that the War Powers Resolution is a usurpation of the Commander in Chief power.<sup>220</sup>

Ultimately, the long history of Presidents disregarding the War Powers Resolution, or complying with it while continuing to object to its validity, stems from a constitutional objection to Congress encroaching on the President’s Commander in Chief power. Regardless of what one believes is the proper balance of authority over the war powers—and I personally believe Congress must be vigorous in asserting its constitutional authority over declaring war—all would acknowledge that Presidents have asserted constitutional grounds for not complying with

216. U.S. CONST. art. I, § 8.

217. 50 U.S.C. § 1542 (2012); see Kim R. Holmes, *Sorry history of the war powers debate*, WASH. TIMES, Sept. 4, 2013, <http://www.washingtontimes.com/news/2013/sep/4/holmes-sorry-history-of-the-war-powers-debate/> [<http://perma.cc/38QJ-GN79>].

218. President Ford took military action in violation of the War Powers Act’s Congressional consultation requirement to rescue captured Americans aboard the *Mayaguez*, which had been captured by Cambodians. See Yoo et al., *supra* 182, at 670. Reagan did not seek Congress’s authorization to deploy forces to Lebanon in 1982. See Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1026 (2006). In 1999, Clinton asserted his Commander in Chief power to initiate military action in Yugoslavia without the consent of Congress. Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35. President Obama imposed a no-fly zone over Libya in March 2011 without receiving congressional approval. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, [http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&_r=0) [<http://perma.cc/9KNT-VWRE>].

219. John Isaacs, *War Powers Resolution consistently ignored*, THE HILL (July 21, 2011, 6:35 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/172803-war-powers-resolution-consistently-ignored> [<http://perma.cc/J5H5-6M5S>].

220. *Id.*

the War Powers Resolution. Even though Presidents have stated they will not be bound by this law categorically, they have done so pursuant to a constitutional objection and not a mere policy disagreement.

#### IV. THE OBAMA ADMINISTRATION'S UNPRECEDENTED NONENFORCEMENT OF FEDERAL LAW

Unlike the presidential actions explained above, President Obama has categorically disregarded entire domestic policy statutes without any colorable constitutional objection.<sup>221</sup> There is no basis in history for this sweeping view of executive power. Reasonable constitutional objections formed the basis for Lincoln's suspension of habeas corpus, Johnson's objections to removal restrictions, Roosevelt's objections to removal restrictions and legislative veto provisions, and refusals to abide

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221. President Obama's lawlessness has hardly been contained to nonenforcement of domestic policy statutes. For example, the Supreme Court, in *NLRB v. Noel Canning*, unanimously rejected President Obama's unconstitutional "recess" appointments to the National Labor Relations Board. 134 S. Ct. 2550 (2014). While the Obama Administration attempted to make a constitutional argument supporting these appointments, the Administration once again ignored Congress—this time by pretending that the President, rather than Congress, had the power to determine when Congress was not in session. In that sense, *Noel Canning* is yet another example of President Obama ignoring Congress.

The Recess Appointments Clause of the Constitution provides, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2. In 2011, President Obama nominated three people to the National Labor Relations Board. *Noel Canning*, 134 S. Ct. at 2557. On January 4, 2012, after their nominations stalled in the Senate, the President invoked the Recess Appointments Clause to appoint all three to the NLRB. But the President did so one day after the Senate had just began its new session for the year, and right in the middle of a three day gap between *pro forma* sessions of the Senate. *Id.* The second session of the 112th Congress began the day before the appointments, on January 3, 2012, and at the time of the appointments, the Senate was holding *pro forma* sessions every three days. *Id.* Thus, according to the Senate, it was in session and not in recess.

The Court unanimously rejected the Obama Administration argument that "recess" ought to be understood in terms of the Senate's practical availability at the moment of appointment to provide advice and consent. *Id.* In other words, if the Senate believed it was still in session, although the Senate was not practically available at that particular moment, the President wanted the authority to declare that the Senate was in recess and make a recess appointment. Although *Noel Canning* held that the term "recess" may apply to adjournments during a congressional session, the Court firmly asserted that the power to determine when the Senate is in recess rests with the Senate alone.

by the War Powers Resolution. While Truman's seizure of the steel mills, Reagan's arms sales, and Bush's memorandum instructing Texas to obey the International Court of Justice may have been examples of a President disregarding federal law due to policy differences, those three instances were isolated outliers in American history and all involved foreign affairs.

In contrast, President Obama has repeatedly ignored domestic policy statutes because he disagrees with them as a policy matter.<sup>222</sup> This nonenforcement usurps Congress's legislative power and sets a dangerous precedent that allows future Presidents to disregard the duty to take care that the laws be faithfully executed. Imagine if a future Republican President were to disregard financial regulation like Sarbanes-Oxley or Dodd-Frank, or campaign finance regulation like McCain-Feingold, or environmental laws, because the President disagreed with the underlying policy. Democrats would be furious, and rightfully so. Yet the following examples of President Obama's disregard of federal law establish a pattern of suspending laws based on the policy prerogatives of this Administration.

#### A. *Obamacare*

President Obama's strategic nonenforcement of Obamacare—his "signature legislative achievement"—is the most egregious example of this Administration's failure to take care that the laws be faithfully executed.<sup>223</sup> In at least six major ways, the Obama Administration has ignored and contravened the express text of the Affordable Care Act, even though there are no colorable constitutional rationales for doing so.

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222. President Obama has refused to enforce laws. A milder form of this is the refusal to defend in court duly-enacted statutes when there is a reasonable argument for their constitutionality. For example, President Obama refused to defend in court the Defense of Marriage Act, which defined "marriage" as "a legal union between one man and one woman as husband and wife" for purposes of federal law. Defense of Marriage Act, Pub. L. No. 104-199, §§ 2-3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)); see Letter from Attorney Gen. Eric H. Holder, Jr., to John A. Boehner, Speaker, U.S. House of Representatives, (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [<http://perma.cc/8TCR-MGBD>]

223. Jonathan Weisman & Sheryl Gay Stolberg, *G.O.P. Maps Out Waves of Attacks Over Health Law*, N.Y. TIMES, Nov. 20, 2013, <http://www.nytimes.com/2013/11/21/us/politics/gop-maps-out-waves-of-attacks-over-health-law.html> [<http://perma.cc/T298-CM9F>].

First, without statutory authority, the Obama Administration unilaterally delayed the health insurance requirements imposed by Obamacare. Obamacare establishes the types of plans health insurance companies can offer consumers.<sup>224</sup> These stringent requirements led to “at least 4.7 million” health plans being cancelled as of December 2013.<sup>225</sup> These cancellations occurred, of course, despite the President’s repeated assurances that “if you like your health care plan, you keep your health care plan” after the passage of Obamacare.<sup>226</sup>

Perhaps because the President saw that the devastating effects of Obamacare’s requirements were not aligning with his promises, his administration unilaterally declared that individuals could continue purchasing health care plans in 2014 even if those plans violate the express requirements of the Affordable

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224. See, e.g., 42 U.S.C. § 18022(b) (2012) (specifying several requirements for health benefits, including, for example, maternity and newborn care, prescription drug services, and chronic disease management). Other Obamacare requirements include: restrictions on criteria influencing premium rates to age, tobacco use, and family size (§ 2701); requirement that insurance companies to accept all applicants (§ 2702); requirement that insurance companies to renew all existing plans at the option of the individual (§ 2703); prohibition on pre-existing condition exclusions (with respect to adults, except with respect to group coverage) (§ 2704); prohibition on eligibility requirements based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability (§ 2705); prohibition on exclusion of state-licensed health care providers from health insurance coverage network ranges (§ 2706); and requirements for imposing minimum insurance benefit package requirements (§ 2707).

225. *Policy notification and current status, by state*, ASSOCIATED PRESS, Dec. 26, 2013, <http://news.yahoo.com/policy-notifications-current-status-state-204701399.html> [<http://perma.cc/SZ7U-PDR4>] (ACA standards have resulted in “at least 4.7 million” cancellations).

226. President Barack Obama, *Remarks by the President in Town Hall on Health Care*, Aug. 15, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-In-Town-Hall-On-Health-Care-Grand-Junction-Colorado/](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-In-Town-Hall-On-Health-Care-Grand-Junction-Colorado/) [<http://perma.cc/QJ4E-XX99>] (“if you like your health care plan, you keep your health care plan”); see also President Barack Obama, *Remarks by the President on Supreme Court Ruling on the Affordable Care Act*, June 28, 2012, <http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-president-supreme-court-ruling-affordable-care-act> [<http://perma.cc/5X4Q-FMY4>] (“if you’re one of the more than 250 million Americans who already have health insurance, you will keep your health insurance”); President Barack Obama, *Remarks by the President on Health Insurance Reform, University of Iowa Field House, Iowa City, Iowa*, Mar. 25, 2010, <http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-university-iowa-field-house-iowa-city-iow> [<http://perma.cc/574J-KDDV>]. (“You like your plan? You’ll be keeping your plan.”).

Care Act and its regulations.<sup>227</sup> Months later, following Obamacare's disastrous rollout, the Administration extended this delay to 2016, past the mid-term elections.<sup>228</sup> The Act, however, was required by statute to take effect on January 1, 2014.<sup>229</sup> To make matters worse, the President remarkably threatened to veto any legislation that codified this lawless exemption that the Administration unilaterally imposed.<sup>230</sup> That is the opposite of taking care that the laws be faithfully executed; that is usurping Congress's legislative power while then blocking Congress from enacting the precise policy supported by the President.

Second, President Obama effectively delayed Obamacare's individual mandate for two years by massively expanding existing exemptions from the individual mandate to allow anyone claiming hardship an exemption. The individual mandate is a statutory command that imposes monetary penalties on most people who fail to maintain health insurance coverage required by Obamacare.<sup>231</sup> This was "Congress's solution" to "prevent[] cost-shifting by those who would otherwise go without [health insurance]" and "force[] into the insurance risk pool more healthy individuals."<sup>232</sup> After Obamacare's failed rollout, the Administration said it would allow people to opt out of the individual mandate for two years if they simply filled out a form attesting

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227. See Gary Cohen, *Letter to Insurance Commissioners*, Center for Consumer Information and Insurance Oversight, Nov. 14, 2013, <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF> [<http://perma.cc/8L24-CZFZ>]; *In reversal, Obama to allow canceled health plans*, ASSOCIATED PRESS, Nov. 14, 2013, <http://www.pbs.org/newshour/rundown/2013/11/obama-to-announce-fix-for-canceled-health-plans.html> [<http://perma.cc/SHA7-49UV>].

228. Louise Radnofsky, *Obama Gives Health Plans Added Two-Year Reprieve*, WALL ST. J., Mar. 5, 2014, <http://online.wsj.com/articles/SB10001424052702303369904579421541748450598> [<http://perma.cc/L33C-YUVU>].

229. The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

230. Jeff Mason & Roberta Rampton, *White House: Obama would veto Republican healthcare bill*, REUTERS, Nov. 15, 2013, <http://www.reuters.com/article/2013/11/15/us-usa-healthcare-veto-idUSBRE9AE03X20131115> [<http://perma.cc/452E-SW95>] ("President Barack Obama would veto a bill sponsored by a Republican congressman that would allow insurers to offer healthcare plans slated to be canceled because they do not meet the new U.S. healthcare law's standards, the White House said on Thursday.").

231. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

232. *Id.* at 2585.



that the Obamacare health insurance exchange plans were too expensive.<sup>233</sup> Strikingly, just months earlier, the President and Senate Democrats chose to force a government shutdown instead of accepting a one-year delay of the individual mandate.<sup>234</sup> So just like President Obama's threat to veto legislation implementing his unilateral waiver of Obamacare's health insurance requirements, here again the President and Democrats blocked legislation that would have achieved the same policy objective that the President unlawfully imposed through executive fiat.

Third, the Obama Administration has decreed that Obamacare's out-of-pocket caps will not apply in 2014. Obamacare caps the amount of out-of-pocket costs that people have to spend on their own health insurance.<sup>235</sup> So according to federal law, starting in 2014, individuals and families would have to spend no more than \$6,350 and \$12,700, respectively.<sup>236</sup> But just like it delayed the health insurance requirements, the Obama Administration unilaterally delayed enforcement of the out-of-pocket caps—burying the announcement of the delay in one of 137 Affordable Care Act FAQs found on the Department of Labor's website.<sup>237</sup>

Fourth, this Administration ignored the plain text of Obamacare when it delayed the employer mandate—twice. Obamacare penalizes employers who employ over fifty “full-time” employees if they do not offer health care coverage that the government deems to be “affordable,” and the employee consequently receives a federal subsidy to purchase an insurance plan in a state health insurance exchange.<sup>238</sup> Yet the Obama Administration announced, in a blog post, that it would not enforce the employer

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233. *ObamaCare's Secret Mandate Exemption*, WALL ST. J., Mar. 12, 2014, <http://online.wsj.com/news/articles/SB10001424052702304250204579433312607325596> [<http://perma.cc/3WPC-NAHH>].

234. John McCormack, *Cruz Endorses House Compromise to Fund Government and Delay Obamacare's Individual Mandate*, WEEKLY STANDARD, Sept. 30, 2013, [http://www.weeklystandard.com/blogs/cruz-endorses-house-compromise-fund-government-and-delay-obamacares-individual-mandate\\_757378.html](http://www.weeklystandard.com/blogs/cruz-endorses-house-compromise-fund-government-and-delay-obamacares-individual-mandate_757378.html) [<http://perma.cc/SV8Y-7GR3>].

235. 42 U.S.C. § 18022(c)(1) (2012).

236. *Revenue Procedure 2013-25*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/pub/irs-drop/rp-13-25.pdf> [<http://perma.cc/P2BG-NWQX>].

237. *FAQs about Affordable Care Act Implementation Part XII*, U.S. DEP'T OF LABOR (Feb. 20, 2013), <http://www.dol.gov/ebsa/faqs/faq-aca12.html> [<http://perma.cc/Y559-ZEEZ>].

238. 26 U.S.C. § 4980H (2012).

mandate in 2014.<sup>239</sup> Months later, it delayed the employer mandate for medium-sized employers until 2016.<sup>240</sup>

Fifth, the Administration drastically expanded the individual and employer mandates and is sending billions of dollars in subsidies to insurance companies beyond what the text of Obamacare allows by granting federal subsidies to buy health insurance in all states instead of only in those states that create health insurance exchanges. According to the statute, the employer mandate is only supposed to be assessed if at least one full-time employee is enrolled in a health insurance exchange for which a federal tax credit subsidy is available.<sup>241</sup> These federal subsidies are available only when an individual purchases a health plan “through an Exchange established by the State.”<sup>242</sup> According to Obamacare’s text, the subsidies are not available if the health plan is purchased through an exchange not established by a state, such as a federally established exchange. Consequently, no federal subsidies should be available in the 36 states that have refused to create health insurance exchanges.<sup>243</sup> A three-judge panel of the D.C. Circuit has already affirmed this plain text reading of Obamacare.<sup>244</sup> Although the Fourth Circuit refused to enforce the statutory text, that decision has been appealed to the Supreme Court, and the case will be decided this

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239. Valerie Jarrett, *We’re Listening to Businesses about the Health Care Law*, WHITE HOUSE BLOG (July 2, 2013, 6:00 PM), <http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law> [<http://perma.cc/9UDK-RV9B>]; Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREASURY NOTES (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> [<http://perma.cc/R238-C5UH>].

240. Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST, Feb. 10, 2014, [http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb\\_story.html](http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html) [<http://perma.cc/PA8V-TKK6>].

241. 26 U.S.C. § 4980H(a)–(b) (2012).

242. *Id.* § 36B(c)(2)(a) (emphasis added).

243. Sarah Hurtubise, *Obamacare Architect Argued Years Ago That States Without Exchanges Can’t Get Subsidies*, DAILY CALLER, July 25, 2014, <http://dailycaller.com/2014/07/25/obamacare-architect-argued-years-ago-that-states-without-exchanges-cant-get-subsidies/> [<http://perma.cc/Q2A8-B65Z>].

244. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

Term.<sup>245</sup> If subsidies are not available in states that do not form exchanges, the individual mandate will apply to significantly fewer people in those states—because the individual mandate applies only if the annual cost of the least expensive coverage *minus subsidies* exceeds 8% of projected household income.<sup>246</sup> But instead of following the plain text of Obamacare, the Administration is granting federal subsidies in every state, including those that have not created state health insurance exchanges.<sup>247</sup> The Administration lawlessly interpreted “Exchange established by the State” to include federally established exchanges.<sup>248</sup>

Sixth, the Obama Administration ignored the text of Obamacare to grant subsidies to members of Congress and their congressional staff. Obamacare and other federal statutes contain explicit language requiring members and their staff to get their health insurance through exchanges without subsidies.<sup>249</sup> Specifically, members and most congressional staff are required, by Obamacare, to purchase *individual* health plans from exchanges just like millions of Americans.<sup>250</sup> But the federal subsidies for health insurance that members and staff have received in the past are only available if their plans were “*group* insurance polic[ies],” to quote a federal statute.<sup>251</sup> The ACA makes no pro-

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245. *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3102 (U.S. Nov. 7, 2014) (No. 14-114).

246. Elizabeth C. Keenan et al., *Will There Be Tax Credit Subsidies for Health Coverage Purchase on The Federal Exchange?*, MONDAQ, July 24, 2014, <http://www.mondaq.com/unitedstates/x/329840/Healthcare/Will+There+Be+Tax+Credit+Subsidies+for+Health+Coverage+Purchased+on+the+Federal+Exchange> [<http://perma.cc/Y56W-PA6V>].

247. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377–78 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 602).

248. *Id.* at 30,377–78, 30,387; 45 C.F.R. § 155.20 (cited in 26 C.F.R. § 1.36B-1(k) (2013)).

249. In the past, members and congressional staffs have received a federal health care subsidy that covered almost 75% of their total premium costs. *Questions and Answers—Health Insurance Coverage: Members of Congress and Congressional Staff*, OFFICE OF PERS. MGMT., <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204attachment2.pdf> [<http://perma.cc/Z8F-8LZ5>]. These federal subsidies, however, were only available for health benefits plans that met a specific statutory definition: “a *group* insurance policy . . . for the purpose of providing, paying for, or reimbursing expenses for health services.” 5 U.S.C. § 8901(6) (2012) (emphasis added).

250. 42 U.S.C. § 18032(d)(3)(D) (2012).

251. 5 U.S.C. § 8901(6) (emphasis added). These federal subsidies are only available for health benefits plans that meet a specific statutory definition: “a *group* insurance policy . . . for the purpose of providing, paying for, or reimbursing expenses for health services.” *Id.* (emphasis added).

vision for the government to continue to pay premiums on behalf of members and their congressional staff.<sup>252</sup> Yet, because that requirement is onerous, the Administration granted the request from Senate Democrat Majority Leader Harry Reid to disregard the plain language of the statute.<sup>253</sup> According to the Administration, the individual health plans Members and staff bought through health exchanges qualify as “group” plans, enabling the Administration to give these subsidies to Members and staff unlawfully.<sup>254</sup>

All of these refusals to enforce the plain text of Obamacare share a crucial element in common: The President is categorically suspending statutory text without believing that the statute is unconstitutional. Rather, as President Obama’s politically-appointed Assistant Secretary for Tax Policy explained,<sup>255</sup> the Administration’s refusal to enforce Obamacare is rooted in policy considerations of “adapt[ation]” and “flexibi[lity],” as well as “concerns about the complexity of the requirements and the need for more time to implement them effectively.”<sup>256</sup> These failures to enforce Obamacare may prove beneficial to those Congress intended to regulate, and they may also prove more convenient for the administrative agencies who failed to promulgate appropriate regulations according to statutorily established timelines.<sup>257</sup> The Ad-

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252. Robert Pear, *Wrinkle in Health Law Vexes Lawmakers’ Aides*, N.Y. TIMES, July 30, 2013, <http://www.nytimes.com/2013/07/30/US/politics/wrinkle-in-health-law-vexes-lawmakers-aides.html> [<http://perma.cc/K3TL-BSUL>].

253. Niels Lesniewski, *Obama Solves Health Care Problem for Lawmakers, Staff (Updated)*, ROLL CALL (Aug. 2, 2013, 9:15 AM), <http://blogs.rollcall.com/wgdb/reid-says-issue-with-health-care-for-lawmakers-staff-is-resolved/> [<http://perma.cc/73QG-8V7B>].

254. Letter from John O’Brien, *Federal Employees Health Benefits Program: Members of Congress and Congressional Staff*, OFFICE OF PERS. MGMT., Aug. 7, 2013, available at <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204.pdf> [<http://perma.cc/3JZP-YVU3>].

255. *President Obama Announces More Key Administration Posts*, THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y (Nov. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/11/14/president-obama-announces-more-key-administration-posts> (Mark J. Mazur for Assistant Secretary for Tax Policy) [<http://perma.cc/8DPK-43K7>].

256. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREASURY NOTES (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> [<http://perma.cc/G7CL-8XS7>].

257. See Simon Lazarus, *Delaying Parts of Obamacare: ‘Blatantly Illegal’ or Routine Adjustment?*, THE ATLANTIC (July 17, 2013, 11:19 AM), <http://www.theatlantic.com/national/archive/2013/07/delaying-parts-of-obamacare-blatantly-illegal-or-routine-adjustment/277873/> [<http://perma.cc/TL7J-PL7V>] (arguing that the suspensions are

ministration has argued that prosecutorial discretion justifies the failure to enforce Obamacare. But prosecutorial discretion does not allow wholesale suspension of statutory provisions, which is precisely what this Administration has done in lawlessly implementing its signature legislative achievement. The Constitution does not recognize convenience and political expediency as reasons for executive suspension of laws. To the contrary, the Take Care Clause requires faithful enforcement of all laws—even laws the President wishes he did not have to enforce.

### B. Immigration

Obamacare is not the only statute that President Obama has ignored on policy grounds. He has also ignored immigration law. President Obama recently announced that he would unilaterally grant amnesty to around five million illegal immigrants.<sup>258</sup> This prompted Professor Turley, a noted liberal, to observe, “What the President is suggesting is tearing at the very fabric of the Constitution.”<sup>259</sup> In fact, years earlier, the President expressly acknowledged he had no authority to do this. In March 2011, he said, “With respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed.”<sup>260</sup> Moreover, President Obama remarked that if he granted any additional amnesty, “I would be ignoring the law in a way that I think would be very difficult to defend legally.”<sup>261</sup>

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justified as “a minor temporary course correction . . . necessary to faithfully execute the overall statute and purposes of the ACA’s framers.”).

258. Michael D. Shear & Robert Pear, *Obama’s Immigration Plan Could Shield Five Million*, N.Y. TIMES, Nov. 19, 2014, [http://www.nytimes.com/2014/11/20/us/politics/obamacare-unlikely-for-undocumented-immigrants.html?\\_r=0](http://www.nytimes.com/2014/11/20/us/politics/obamacare-unlikely-for-undocumented-immigrants.html?_r=0) [http://perma.cc/8SUT-B6C9].

259. Katie Pavlich, *Liberal Law Professor Jonathan Turley: Obama’s Executive Amnesty Threat ‘Tears at the Very Fabric of The Constitution,’* TOWNHALL.COM, Nov. 17, 2014, <http://townhall.com/tipsheet/katiepavlich/2014/11/17/libera-law-professor-jonathan-turley-i-hope-obama-doesnt-get-away-with-executive-amnesty-n1919710#!> [http://perma.cc/MD9B-5YWG].

260. President Barack Obama, Remarks by the President at Univision Town Hall, (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [http://perma.cc/MUW6-Q9FK].

261. Alessandra Hickson, *Obama: Can’t stop deportations of parents, would be ‘ignoring the law,’* NBC LATINO (Sept. 17, 2013, 8:18 PM), <http://nbclatino.com/2013/09/17/obama-cant-stop-deportations-of-parents-would-be-ignoring-the-law/> [http://perma.cc/8BVA-72Q4].

The President's November 2014 amnesty did much more than just "prioritize" resources for removing illegal immigrants—it purported to affirmatively grant work authorizations for the millions of illegal immigrants covered by the edict. Prosecutorial discretion, of course, cannot justify the Administration's affirmative act to try to grant work authorizations, as prosecutorial discretion only deals with government *inaction* based on the individual facts and circumstances of a particular case.

In anticipation of this objection, the Administration's Office of Legal Counsel (OLC) released a memo that unsuccessfully tries to justify these work authorizations on the basis that the Immigration and Nationality Act delegated the President this authority.<sup>262</sup> The memo misreads 8 U.S.C. § 1324a(h)(3) in a manner that would give the President *carte blanche* to grant work authorization to any alien who is in the United States illegally.

Section 1324a(h)(3)—entitled "Definition of unauthorized alien"—is a subsection of the federal prohibition on hiring illegal immigrants, and it defines which illegal immigrants count as "unauthorized alien[s]" who cannot be hired. It provides, in full:

As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General [now the Secretary of Homeland Security].

The OLC memo interprets this definitional subsection not as a mere definition, but as an independent source of power for the DHS Secretary to grant work authorizations to any class of aliens.<sup>263</sup> Under this reading, when § 1324a(h)(3) says "unauthorized alien[s]" are those who are not "authorized to be so employed . . . by the Attorney General," that subsection is implicitly giving the Administration power to grant every single alien an authorization to work. Under that reading, there is no limit on the Administration's unilateral power to grant any illegal al-

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262. The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (Nov. 19, 2014) [hereinafter OLC Immigration Memo].

263. *Id.* at 21 ("This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens.").

ien—including illegal immigrants not covered by the November 2014 amnesty—work authorizations.

The OLC memo’s interpretation of § 1324a(h)(3) is flawed in at least two interrelated ways. First, that subsection is merely a definition of which aliens count as “unauthorized” for work, and it does not purport to grant the Administration any additional power. Second, other provisions of the Immigration and Nationality Act already delineate narrow circumstances when the Administration “may grant work authorization to aliens lacking lawful immigration status”<sup>264</sup>—to quote the OLC memo itself—yet those provisions would be rendered superfluous under the OLC memo’s reading of § 1324a(h)(3). In short, Congress never delegated to the executive branch complete discretion to grant work authorizations to any and all illegal immigrants. Instead, Congress created specific statutory provisions that cabined the Administration’s power to do so, and the OLC memo ignores these structural limits by erroneously construing a definitional subsection, § 1324a(h)(3), to grant the Administration sweeping powers.

The November 2014 amnesty was not the first time the Obama Administration ignored immigration law. Congress rejected—at least ten times since 2001—the Development, Relief, and Education for Alien Minors Act (DREAM Act),<sup>265</sup> which would have allowed certain illegal immigrants a path to citizenship if they arrived in the United States illegally when they were fifteen years old or younger and met other requirements.<sup>266</sup>

Nevertheless, in January 2011, President Obama essentially implemented the DREAM Act through executive fiat. An Obama Administration Department of Homeland Security memorandum declared that “in the absence of Comprehensive Immigration Re-

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264. *Id.* at 22 (citing 8 U.S.C. §§ 1226(a)(3), 1231(a)(7) (2012)).

265. The bill was first introduced in the Senate on August 1, 2001. S. 1291, 107th Cong. (2001). The 2001 bill failed to pass the Senate. Delahunty & Yoo, *supra* note 11, at 787–88. Subsequent variations of the bill have also failed to pass Congress. DREAM Act of 2011, S. 1258, 112th Cong. (2011); DREAM Act of 2011, S. 952, 112th Cong. (2011); DREAM Act of 2011, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, S. 3992, 111th Cong. (2010); DREAM Act of 2010, S. 3963, 111th Cong. (2010); DREAM Act of 2010, S. 3962, 111th Cong. (2010); DREAM Act of 2010, H.R. 6497, 111th Cong. (2010); DREAM Act of 2009, S. 729, 111th Cong. (2009); DREAM Act of 2007, S. 774, 110th Cong. (2007); DREAM Act of 2007, S. 2205, 110th Cong. (2007).

266. Delahunty & Yoo, *supra* note 11, at 788–89.

form, USCIS can extend benefits and/or protections to many individuals and groups by . . . exercising discretion with regard to . . . deferred action”—that is, “an exercise of prosecutorial discretion not to pursue removal from the U.S. of a particular individual for a specific period of time.”<sup>267</sup>

Over a year later, on June 15, 2012, DHS instituted a “deferred action” program, currently known as the Deferred Action for Childhood Arrivals program (DACA).<sup>268</sup> DACA includes a list of eligibility criteria that closely tracks the failed DREAM Act’s criteria including that the individual must have arrived before turning sixteen, and DACA is purportedly based on “an exercise of prosecutorial discretion.”<sup>269</sup> Although the DACA order couches itself in terms of prosecutorial discretion used “on an individual basis,” its instructions describe a broad-ranging program that preemptively applies to a wide scope of individuals who are not yet subject to any kind of removal order.<sup>270</sup> Rather than clarifying a legitimate use of a prosecutor’s discretion to bring or modify charges in a particular case, the order creates a wide-ranging policy framework with instructions to affirmatively apply it to an indeterminate group of people that have yet to be identified.

The Obama Administration has invoked the doctrine of prosecutorial discretion to support its various rounds of immigration amnesty, most recently in the November 2014 OLC memo.<sup>271</sup> But the November 2014 amnesty and DACA are far from legitimate uses of prosecutorial discretion. Simply saying the words “resource allocation,” “individual basis,” and “prosecutorial discretion” does not let the President wave a magic wand and make the Take Care Clause disappear. For example, DACA’s criteria are general, “applying to every member of a

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267. *Id.* at 789–90 (quoting the DHS memo).

268. *Id.* at 791.

269. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/DH5S-3NXN>].

270. *Id.*

271. Delahunty & Yoo, *supra* note 11, at 847; OLC Immigration Memo, *supra* note 262, at 2.



class of perhaps 1.76 million people on the basis of a limited number of common characteristics. It requires no searching, [and no] individualized evaluation of the merits of particular applicants. All who possess the designated characteristics will qualify."<sup>272</sup> And as Justice Scalia has noted, "The husbanding of scarce enforcement resources . . . can hardly be the justification for this [policy], since the considerable administrative cost of conducting as many as 1.4 million background checks, and ruling on the biennial requests for dispensation that the nonenforcement program envisions, will necessarily be deducted from immigration enforcement."<sup>273</sup>

Recall former Obama Administration official Professor Cass Sunstein's words: "[T]here is a distinction" between "set[ting] enforcement priorities" and "allocat[ing] resources" versus "refusing to carry out the obligations that Congress has imposed on the executive."<sup>274</sup> By rejecting the DREAM Act over ten times, Congress imposed on the President the command that he had to follow existing immigration statutes instead of the amendments contained in the DREAM Act. The Administration's November 2014 amnesty and its administrative implementation of the DREAM Act through DACA are not programs where the government decides in certain facts and circumstances not to enforce immigration laws because specific offices need to allocate resources differently. The November 2014 amnesty and DACA are blanket executive decrees that the President will not enforce this law "which it disapproves."<sup>275</sup> Those decrees and their implementation violate the Take Care Clause.

### C. Drugs

The federal Controlled Substances Act assigns mandatory minimum sentences for certain drug crimes.<sup>276</sup> Obama Administration Attorney General Eric Holder, nevertheless, has said the Department of Justice "will no longer pursue mandatory minimum sen-

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272. Delahunty & Yoo, *supra* note 11, at 845.

273. *Id.* at 847–48 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part)).

274. Sunstein, *supra* note 9, at 670.

275. *Id.*

276. Controlled Substances Act, 21 U.S.C. § 841 (2012).

tences for certain low-level, nonviolent drug offenders.”<sup>277</sup> That does not mean the Obama Administration will seek sentences greater than the mandatory minimums for these crimes. Rather, it means these crimes will not be prosecuted at all.

Reasonable minds can disagree about whether mandatory minimum sentences are too harsh for certain drug crimes. In fact, I have cosponsored the Smarter Sentencing Act, which would reduce mandatory minimum sentences for certain low-level, nonviolent drug offenses.<sup>278</sup> But that is the constitutionally permissible way to address this situation—by amending the existing statutes in Congress, rather than the President dispensing with these drug laws.

While the executive’s prosecutorial discretion lets it allocate enforcement resources, as explained above, this discretion does not allow categorical reprieves from federal statutes. Yet the Attorney General has announced that for an entire set of drug crimes, categorically and prospectively, the Obama Administration will not enforce duly enacted criminal laws.<sup>279</sup> A proper exercise of prosecutorial discretion would allow the President to not prosecute outlier cases. But prosecutorial discretion cannot properly be used on a categorical basis, for this violates the Take Care Clause. Once again, the Obama Administration has distorted the separation of powers, usurped Congress’s legislative power, and failed to take care that the laws be faithfully executed.

#### D. Welfare

In 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act, which created the Temporary Assistance for Needy Families (TANF) program.<sup>280</sup> TANF sought to discourage dependency and encourage employment by placing restrictions on welfare alloca-

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277. Dan Merica & Evan Perez, *Eric Holder seeks to cut mandatory minimum drug sentences*, CNN (Aug. 12, 2013, 7:03 PM), <http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/> [<http://perma.cc/8B53-PTJL>].

278. Smarter Sentencing Act, S. 1410, 113th Cong. (2013).

279. Memorandum from Attorney Gen. Eric Holder to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div., Department Policy on Charging Mandatory Minimum Sentences (Aug. 12, 2013), <http://www.popehat.com/wp-content/uploads/2013/08/holder-mandatory-drug-minimums-memo.pdf> [<http://perma.cc/SG62-5Q3M>].

280. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in 42 U.S.C. § 604(a) (2000)).

tions. TANF gave states grants<sup>281</sup> and provided that individuals could only receive benefits for up to five years.<sup>282</sup> It also mandated that recipients engage in work within two years of receiving benefits,<sup>283</sup> and this provision was heralded as the reason TANF succeeded.<sup>284</sup> Welfare reform was a tremendous policy success, helping millions stand on their own feet and achieve the American dream. Welfare rolls were decreased by half and the poverty rate for African-American children reached its lowest point in U.S. history.<sup>285</sup>

The Obama Administration, in an HHS memorandum full of legalese, declared that states no longer had to follow TANF's work requirements and could dispense welfare even if recipients did not meet the TANF statutory standards.<sup>286</sup> In the 1996 Act, however, Congress already provided a list of which statutory provisions the federal government could waive.<sup>287</sup> The only part of TANF that was included in that list of waivable provisions was Section 402, which dealt with *reporting requirements* obligating states to tell HHS that they are complying with TANF.<sup>288</sup> TANF's work requirements—in Section 407—were not listed as waivable. Nevertheless, the Obama Administration's HHS memorandum claims that because the federal government can waive TANF's reporting requirements in Section 402, it also has the authority to waive the substantive work re-

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281. 42 U.S.C. § 603 (2012).

282. *Id.* § 608(a)(7).

283. *Id.* § 602(a)(1)(A)(ii).

284. Robert Rector, *How Obama has gutted welfare reform*, WASH. POST, Sept. 6, 2012, [http://www.washingtonpost.com/opinions/how-obama-has-gutted-welfare-reform/2012/09/06/885b0092-f835-11e1-8b93-c4f4ab1c8d13\\_story.html](http://www.washingtonpost.com/opinions/how-obama-has-gutted-welfare-reform/2012/09/06/885b0092-f835-11e1-8b93-c4f4ab1c8d13_story.html) [<http://perma.cc/GL3K-SXY5>].

285. *Id.*

286. Information Memorandum from Earl S. Johnson, Dir. Office of Family Assistance, to States Administering the Temporary Assistance for Needy Families (TANF) Program and Other Interested Parties (July 12, 2012) [hereinafter Johnson Memorandum], available at <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203> [<http://perma.cc/3DQR-MY3A>] (guidance concerning waiver and expenditure authority under Section 1115).

287. Robert Rector & Rachel Sheffield, *Ending Work for Welfare: An Overview*, THE HERITAGE FOUND. (Aug. 29, 2012), <http://www.heritage.org/research/reports/2012/08/obama-administration-ends-welfare-reform-as-we-know-it> [<http://perma.cc/6ATJ-V48K>].

288. 42 U.S.C. § 602 (2012).

quirements in Section 407.<sup>289</sup> In the sixteen years since the 1996 Act was passed, no Administration had ever asserted this authority,<sup>290</sup> because the statute's clear text forbids waiving TANF's work requirements. Although the Administration couches its argument as a dispute about statutory construction, this outlandish interpretation is just another example of President Obama ignoring duly enacted congressional laws.

## V. CONCLUSION

President Obama's lawlessness is unprecedented in American history. Unlike any President before, President Obama has brazenly disregarded duly enacted statutes passed by Congress in a categorical, sweeping manner without raising any constitutional objections. The Take Care Clause was explicitly included in the Constitution to prevent the President from wielding the suspension and dispensation powers that had been abused by English kings.

Not all Presidents in our history have acted in accordance with federal law. But of the most notable examples of Presidents fighting with Congress, most of these involved legitimate constitutional arguments about whether the executive or legislature had certain powers. Lincoln's suspension of habeas corpus, Johnson's objections to removal restrictions, Roosevelt's objections to removal restrictions and legislative veto provisions, and refusals to abide by the War Powers Resolution were reasonable constitutional disputes between the branches. Foreign affairs concerns were present in the other examples—Truman's seizure of the steel mills, Reagan's arms sales, and Bush's memorandum to Texas to obey the International Court of Justice.

In contrast, President Obama has pretended that various domestic policy statutes do not exist when he disagrees with them based on his own policy preferences. As a United States Senator, Barack Obama had the power to introduce legislation and be part of Congress wielding its Article I legislative power. But as Presi-

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289. Johnson Memorandum, *supra* note 286.

290. Letter from Rep. David Camp and Sen. Orrin Hatch to Kathleen Sebelius, Sec'y, Dep't of Health and Human Services (July 12, 2012), *available at* [http://waysandmeans.house.gov/uploadedfiles/7.12.12\\_tanf\\_work\\_requirements\\_letter.pdf](http://waysandmeans.house.gov/uploadedfiles/7.12.12_tanf_work_requirements_letter.pdf) [<http://perma.cc/425A-UTPP>].

dent, Obama does not have the power to legislate. He does not have the power to refuse enforcement of laws based simply on policy concerns. His repeated assertions of this power to suspend and dispense with duly-enacted laws violate the Take Care Clause and represent a profound threat to our constitutional checks and balances and, ultimately, to individual liberty.