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An Executive Unbound: The Obama Administration's Unilateral Actions

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Abstract

Abusive, unlawful, and even potentially unconstitutional unilateral action has been a hallmark of the Obama Administration. When Congress refuses to accede to President Barack Obama's liberal policies, the Administration often ignores the restraints imposed upon the executive branch by the Constitution, and when the Administration disagrees with duly enacted laws or finds it politically expedient not to enforce them, it waives legal requirements. Under the U.S. constitutional system, Congress is charged with enacting the law, and the Executive is charged with enforcing it. The individual liberties of all Americans are at stake when one branch usurps the role of another. As the Framers knew well, the "accumulation of all powers ... in the same hands" is the "very definition of tyranny."

> "We can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."
>
> —President Barack Obama[1]

The rule of law is a bedrock principle of Anglo–American jurisprudence. It stands for the belief that all—including government officials—are subject to the law and not above it. America's Founding Fathers understood this principle, and the Constitution reflects it in two ways. First, instead of placing the legislative, executive, and judicial powers in one person, the Constitution divides federal power among three distinct but coordinate branches. Second, Article VI of the Constitution requires all federal officeholders to take an oath or

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Key Points

- Abusive, unlawful, and even potentially unconstitutional unilateral action has been a hallmark of the Obama Administration.
- When Congress refuses to accede to President Obama's liberal policies, the Administration often ignores the restraints imposed on the executive branch by the Constitution in order to impose "laws" by executive fiat.
- When the Administration disagrees with duly enacted laws or finds it politically expedient not to enforce them, it often ignores them, skirts them, or claims the Executive has prosecutorial discretion not to enforce them rather than fulfilling its constitutional obligation to take care that those laws be faithfully executed.
- Examples include suspending implementation of the Obamacare employer mandate, abdicating the Administration's duty to defend the law in court, implementing the DREAM Act, and unconstitutional "recess" appointments.
- As the Framers understood, the "accumulation of all powers ... in the same hands" is the "very definition of tyranny."

affirmation to "support" the Constitution. Together, these provisions were intended to ensure that ours remains "a government of laws, and not of men."[2]

The Founders also understood that, while a strong federal government was a necessity, if left unchecked, it could encroach on the liberties of its citizenry. To help prevent this, the Founders realized that, as James Madison wrote in *Federalist* 51, "[a]mbition must be made to counteract ambition."[3] Accordingly, they devised a system of checks and balances through the Constitution that divided the powers of the federal government among the three branches.

Article I of the Constitution grants enumerated legislative powers to Congress. The Constitution assigns the Executive the duty to enforce the law, and Article II, section 3 requires that the President "shall take Care that the Laws be faithfully executed." The President also takes an oath to "preserve, protect and defend the Constitution."

Academics and judges have long grappled with the scope of executive power. What exactly does the Take Care Clause require? Certainly, it is not within the President's power to *create* the laws: that is Congress's job. The Constitution defines the process for enacting federal law: Article I, section 7 provides that bills must be passed by the House of Representatives and the Senate and then presented to the President for his or her signature or veto (which can be overridden by a two-thirds majority in each house of Congress).

As Supreme Court Justice Joseph Story noted in his *Commentaries on the Constitution*, the President may "point out the evil, and ... suggest the remedy," but he lacks the power to enact or amend laws on his own.[4] The President may "even call Congress into session, but it remains the prerogative of Congress to decide what laws will be enacted."[5]

While neither the legislative nor the executive branch is at liberty to ignore court rulings on constitutional issues in cases before the courts, both branches have the independent authority and duty to assess the constitutionality of laws to ensure that their actions are in accordance with the constitutional design. However, while he or she must make sure to take actions that are in accord with the Constitution, the President "may not decline to follow a statutory mandate or prohibition simply because of policy objections."[6]

The Take Care Clause

Though the language of the Take Care Clause is relatively straightforward, there is no question that Presidents (and other executive branch officials) have considerable discretion about what actions they take or do not take. The role of the President cannot be reduced to a catalog of "ministerial" acts.[7] Moreover, courts generally are reluctant to delineate when presidential discretion has been abused or has crossed the line into abdication of a constitutional duty. So, as a practical if not legal matter, the President enjoys wide discretion in how to execute the law, particularly when forced to make tough choices due to resource constraints.

Nonetheless, the Take Care Clause has meaning. The President's duty to "faithfully execute[]" the law does not mean that he may act in such a way as to implement "laws" not passed by Congress or to amend or effectively repeal extant laws. But how do the American people, and how can courts, distinguish between making tough choices and simply ignoring the law or creating new law? The answer is not always easy.

Some contend that a President can refuse to enforce a law when he has a genuinely held, good-faith belief that the law in question is unconstitutional because the Constitution is itself the highest law that must be "faithfully executed." Most would concede that as a matter of prosecutorial discretion,

1. Mary Bruce, *Obama Offers Mortgage-Relief Plan: "We Can't Wait" for Congress*, ABC News (Oct. 24, 2011), http://abcnews.go.com/blogs/politics/2011/10/obama-offers-mortgage-relief-plan-we-cant-wait-for-congress/.
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
3. The Federalist No. 51 at 268 (James Madison) (Carey and McClellan ed., 2001).
4. 3 Joseph Story, Commentaries on the Constitution of the United States, § 1555, at 413 (1833).
5. *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary,* 113th Cong. (Dec. 3, 2013) (statement of Professor Jonathan Turley). The testimony of Prof. Turley and three other witnesses is available at http://judiciary.house.gov/hearings/113th/hear_12032013.html.
6. In re: Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013).
7. *See* Marbury, 5 U.S. (1 Cranch) 137.

senior executive branch officials, who are appointed by the President, may prioritize law enforcement resources and refuse to enforce a particular law against a particular individual or small category of individuals on a case-by-case basis.

The President cannot effectively amend a law by exempting entire categories of lawbreakers from the application of that law, particularly if done for political or policy reasons.[8] If the President disagrees with an otherwise constitutional law for policy reasons or if he would prefer not to enforce a law for political reasons, he must still enforce that law as the Take Care Clause requires.[9] To decline to enforce the law in these situations would "cloth[e] the president with a power to control the legislation of congress, and paralyze the administration of justice."[10] As the Supreme Court has stated, "[o]nce a bill becomes law, it can only be repealed or amended through another, independent *legislative* enactment...."[11]

After all, the Constitution does not grant the President the power to dispense with or suspend the law. The Framers were familiar with this practice by British kings, and "charg[ing] the President with the 'faithful execution' of the laws underscored" that the Constitution did not confer a dispensing power to the executive.[12] Without limits, prosecutorial discretion becomes the exception that subsumes the rule. Further, the constitutional obligation of the President to "take Care that the Laws be faithfully executed" certainly means that the President cannot break the law, order others to do so, or authorize members of the public to do so.[13]

A Unilateral Presidency: Potentially Unlawful or Unconstitutional Actions

Unfortunately, time and again, President Barack Obama has signaled his willingness to "go it alone," acting without congressional approval. Indeed, he has trumpeted this as a virtue of his Administration rather than a vice.[14] While it might not be possible to define in all instances precisely when an action crosses the line and falls outside the scope of the President's statutory or constitutional authority, what follows is a list of unilateral actions taken by the Obama Administration that we think do cross that line.

"Amending" Obamacare. Passed in March 2010, the Patient Protection and Affordable Care Act,[15] or "Obamacare," generally requires that businesses employing 50 or more full-time employees provide health insurance or pay a fine per each uncovered employee.[16] Section 1513(d) of the law provides that this employer mandate provision "shall apply to months beginning after December 31, 2013."

Yet, in response to complaints from the business community that this requirement was too burdensome, on July 2, 2013, the Obama Administration announced that enforcement of the employer mandate would be delayed until January 2015.[17] The law

8. *See, e.g.*, Robert Delahunty & John Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas L.R. 781, 792–94 (2013).
9. This is the long-held view of the Office of Legal Counsel in the United States Department of Justice, which provides advice to the President on constitutional matters. *See* 14 U.S. Op. Off. Legal Counsel 37, 1990 WL 488469 (Feb. 16, 1990); "[T]he bedrock principle was not legislative supremacy but popular sovereignty. The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige, a president to stand firm against a congressional statute in order to defend the Constitution itself." Akhil Reed Amar, America's Constitution: A Biography 179 (2005).
10. Michael McConnell, *Obama Suspends the Law*, Wall St. J., July 8, 2013, http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html (quoting Kendall v. United States, 107 U.S. 123 (1838)).
11. Clinton v. City of New York, 524 U.S. 417, 428, n. 12 (1998) (emphasis added).
12. *Id.* at 808, n. 169.
13. Of course, the President still retains broad authority to pardon a perpetrator after a crime has been committed. U.S. Const. art. II, § 2, cl. 1.
14. "[W]herever and whenever I can take steps without legislation ... that's what I'm going to do." President Barack Obama, State of the Union Address (January 28, 2014). In this year's State of the Union, the President announced that he "will issue an Executive Order requiring federal contractors to pay their federally-funded employees a fair wage of at least $10.10 an hour." *Id.* While the legal justification for this action is as yet unknown, it is possible that it will run afoul of the Service Contract Act of 1965. *See* Andrew Kloster, *Federal Contract "Minimum Wage" Hike Likely Unlawful*, The Foundry, Jan. 28, 2014, *available at* http://blog.heritage.org/2014/01/28/state-union-live-blog/.
15. Pub. L. No. 111-148, as amended.
16. 26 U.S.C. § 4980H.
17. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. Dept. of the Treasury, Treasury Notes (Jul. 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx..

does not authorize the President to push back the employer mandate's effective date, and this action improperly relegates the implementation date explicitly set forth in the law to the status of a "mere recommendation, which the President may choose to ignore."[18]

Additionally, the Office of Personnel Management issued a proposed rule to allow Members of Congress and their staffs to receive generous taxpayer-funded premium support.[19] Congress explicitly considered and rejected proposed amendments to Obamacare that would have created a specific allowance for a congressional health care subsidy; indeed, such an exemption seems inconsistent with the congressional decision not to provide for such a subsidy under Section 1312(d)(3)(D) of the law, which explicitly states that "[n]otwithstanding any other provision of law ... the only health plans that the Federal Government may make available to Members of Congress and congressional staff shall be health plans that are" created under Obamacare or offered through an Obamacare exchange.[20]

Of course, Congress could fix this problem by amending the law, but opening up President Obama's signature policy achievement for additional amendments might subject other provisions to attack and possible revision. Instead, the Administration opted to stretch the law to save Obamacare—at the taxpayers' expense.[21]

On November 14, 2013, the Administration announced in a letter to insurance commissioners that for one year, it would decline to enforce certain Obamacare requirements against insurance companies offering non-compliant plans and encouraged state insurance commissioners not to enforce the law as well.[22] The letter announcing this non-enforcement has no basis in law, and the President has threatened to veto legislation that would codify and authorize the one-year extension.[23]

The letter to the insurance companies might not protect them from future IRS actions against their non-compliance, and it almost certainly would not provide a valid defense against civil lawsuits filed by private parties for violations of the statute. Moreover, as the president of the National Association of Insurance Commissioners notes:

> This decision continues different rules for different policies and threatens to undermine the new market, and may lead to higher premiums and market disruptions in 2014 and beyond.... Changing the rules through administrative action at this late date creates uncertainty and may not address the underlying issues.[24]

Inventing Labor Law Exemptions. The Worker Adjustment and Retraining Notification (WARN) Act of 1988 prohibits large employers from initiat-

18. H.Con.Res. 45, 113th Cong. (as introduced). The U.S. Department of the Treasury has indicated that it will use 2014 to "test" the rules and regulations before fully implementing them in 2015. The Department justifies this delay on the grounds that they have made inadequate progress towards developing adequate and simplified reporting requirements and that, because it will be impractical to determine which employers have made the requisite "shared responsibility" payments and which have not during this "test" period, they will suspend the payment obligation during this time period. *See* Mazur, *supra* note 17.
19. Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60653-01 (Aug. 8, 2013) (codified at 5 C.F.R. 890).
20. 42 U.S.C. § 18032(d)(3)(D). Robert E. Moffit et al., *Congress in the Obamacare Trap: No Easy Escape*, Heritage Foundation Backgrounder No. 2831 (Aug. 2, 2013), http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape; John Malcolm & Andrew Kloster, *A Nation of Men, Not Laws: President Promises Congress that Obamacare Will Not Apply to Them*, Executive Branch Review (Aug. 7, 2013), http://www.executivebranchproject.com/a-nation-of-men-not-laws-president-promises-congress-that-obamacare-will-not-apply-to-them/.
21. Sen. Ron Johnson (R–WI) filed suit challenging the validity of this rule. Johnson v. U.S. Office of Personnel Management, No. 14-CV-00009 (E.D. Wis. filed on Jan. 7, 2014).
22. Letter to Insurance Commissioners, Department of Health and Human Services (Nov. 14, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF.
23. Office of Management and Budget, Statement of Administration Policy on H.R. 3350, Keep Your Health Plan Act of 2013, Nov. 14, 2013, *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr3350h_20131114.pdf.
24. Julie Rovner, *Insurers Aren't Keen on Obama's Pledge to Extend Coverage*, KALW (Nov. 15, 2013), http://kalw.org/post/insurers-arent-keen-obamas-pledge-extend-coverage.

ing statutorily defined mass layoffs unless they give 60-day advance notification to employees.[25] The Department of Labor (DOL) is responsible for issuing guidance to employers related to their WARN Act obligations.

On July 30, 2012, the DOL issued a guidance letter telling employers that they did *not* need to issue notice to employees before making layoffs resulting from the anticipated federal budget cuts commonly known as sequestration.[26] Further, the Office of Management and Budget (OMB) informed government contractors that the government would compensate them for legal costs, as determined by a court, if and when employees laid off during sequestration sued those contractors for lack of WARN Act notice.[27] Thus, not only did the DOL encourage employers to withhold notices that the WARN Act would require if sequestration were to occur—an outcome all reasonable observers should have anticipated—but OMB also offered to reimburse those employers at the taxpayers' expense if challenged for failure to give that notice.[28]

The WARN Act notices would have gone out days before the 2012 election, and some have suggested that the DOL guidance was drafted so that workers would not receive notice of impending layoffs because they might blame the President, thereby imperiling his re-election efforts.[29] Whatever the reason, the failure to give WARN Act notice before implementing layoffs resulting from sequestration has already led to lawsuits by aggrieved workers demanding compensation for the days they would have worked during the 60-day notice period.[30]

Waiving the TANF Work Requirement. In 1996, Congress passed and President Bill Clinton signed into law a comprehensive welfare reform that conditions receipt of welfare benefits on working (or preparing for work) under Section 407 of the Temporary Assistance for Needy Families (TANF) program. This requirement has been a huge success: Welfare rolls dropped by 50 percent, and the poverty rate for minority children reached the lowest levels in history.

On July 12, 2012, however, the Department of Health and Human Services notified states of Secretary Kathleen Sebelius's "willingness to exercise her waiver authority" so that states may eliminate Section 407's work participation requirement.[31] This announcement contradicts the law, which provides that waivers granted under other sections of the law "shall not affect the applicability of section 407 to the State."[32] Despite this unambiguous language, the Obama Administration continues to flout the law with its "revisionist" interpretation.

Ignoring a Statutory Deadline. The Nuclear Waste Policy Act, signed into law by President Ronald Reagan in 1983, requires the Nuclear Regulatory Commission to make a decision regarding nuclear waste storage at Yucca Mountain within three years of a license application submitted by the Department of Energy (DOE).[33] For years, activists have sought to block applications, but in 2008, DOE submitted an application.

Despite the legal requirement, the Obama Administration refused to consider the application. The Administration's legal excuse was that Congress had

25. 20 U.S.C. § 2102(a)(2012).
26. Letter from Jane Oates, Assistant Secretary, U.S. Department of Labor, to State Workforce Agencies, Administrators, and Liaisons (July 30, 2012).
27. Memorandum from Daniel Werfel, Controller, Office of Federal Financial Management, to Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies (September 28, 2012). Employers are under no statutory obligation to send out these notices; if they do not, however, they are prohibited by law from ordering plant closings or issuing mass layoffs.
28. This may also violate the Antideficiency Act, which prohibits federal employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation" or "involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1).
29. Kedar Pavgi, *Employees Sue Contractor Over Sequestration Layoffs*, Government Executive (June 20, 2013), http://www.govexec.com/contracting/2013/06/employees-sue-contractor-over-sequestration-layoffs/65249/.
30. Austin Wright, *Sequester Sparks Laid-off Workers' Suit*, Politico (June 20, 2013), http://www.politico.com/story/2013/06/sequester-sparks-laid-off-workers-suit-93070.html.
31. Memorandum from the Office of Family Assistance, Department of Health & Human Services to States administering TANF Program (July 12, 2012), *available at* http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203.
32. 42 U.S.C. § 615(a)(2)(B)(2012).
33. 42 U.S.C. § 10134(d)(2012).

not provided enough money to fund the entire Yucca Mountain project, so that processing the application in compliance with the law would be pointless. Yet on August 13, 2013, in *In re: Aiken County*,[34] the U.S. Court of Appeals for the D.C. Circuit granted the extraordinary remedy of mandamus, ordering the Obama Administration to do its duty and proceed with the Yucca Mountain application and noting that "the Commission is simply flouting the law."[35]

"Recess" Appointments Made While the Senate Was in Session. Article II, Section 2 of the Constitution provides that the President may "fill up all Vacancies that may happen during the Recess of the Senate." Otherwise, the President must receive the advice and consent of the Senate for ambassadors, judges, and higher-level executive officers.

In January 2012, President Obama made four "recess" appointments to the National Labor Relations Board (NLRB) and Consumer Financial Protection Bureau, claiming that, since the Senate was conducting only periodic pro forma sessions, it was not available to confirm those appointees.[36] Yet the Senate was not in "the Recess," and a three-judge panel of the D.C. Circuit struck down the appointments to the NLRB as unconstitutional in *Noel Canning v. NLRB*. That court reasoned that the Recess Appointments Clause is not an alternative to Senate confirmation and "serve[s] only as a stopgap for times when the Senate was unable to provide advice and consent."[37]

The Administration's response to this ruling was disdainful. The chairman of the NLRB announced that the board disagreed with the decision and, since it had "important work to do," would continue to operate.[38] White House Press Secretary Jay Carney insisted that the decision would not impede the NLRB's work despite the fact that the board lacked a lawful quorum to act.[39] Now two other appellate courts have also struck down purported "recess" appointments, and the *Noel Canning* case is pending before the Supreme Court.[40]

The constitutional deficiency of these appointments is only the beginning of the problem. Once on the NLRB, the "recess" appointees rubber-stamped a number of questionable policies, such as requiring employers to post a list of "worker rights" (invalidated by two federal appellate courts) and snap elections for union representations (pending before the D.C. Circuit).[41] This illegitimate board also encouraged unionization by "card check," which has employees publicly sign membership cards, even though NLRB member Nancy Schiffer stated that she believes the board lacks the authority to mandate card check.[42]

A Unilateral Presidency: Abusive Actions

In addition to unlawful or unconstitutional actions, the Obama Administration has abused its executive power by asserting broad claims of prosecutorial discretion, abandoning its defense of laws in court, and issuing expansive waivers to existing

34. *In re: Aiken County*, *supra* note 6.

35. *Id.* at 259.

36. Despite the President's interpretation that the Senate was "unavailable" for business while it conducted *pro forma* sessions, the Senate passed and the President signed into law a major piece of legislation, the Temporary Payroll Tax Cut Continuation Act of 2011, during one of those sessions.

37. Noel Canning v. NLRB, 705 F.3d 490, 502 (D.C. Cir. Jan. 25, 2013).

38. Statement by Mark Pearce, Chairman of the NLRB (Jan. 25, 2013), http://www.nlrb.gov/news-outreach/news-story/statement-chairman-pearce-recess-appointment-ruling.

39. Press Briefing by Jay Carney, Press Secretary (Jan. 25, 2013), http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013.

40. NLRB v. New Vista Nursing and Rehabilitation, 719 F.3d 203 (3rd Cir. 2013); NLRB v. Enterprise Leasing Co. Southeast, 722 F.3d 609 (Fourth Cir. 2013); *contra* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (upholding an intrasession recess appointment). The case currently pending before the Supreme Court is NLRB v. Noel Canning, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3702 (June 24, 2013) (No. 12-1281).

41. National Association of Manufacturers v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (invalidating the poster rule); Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013) (invalidating the poster rule); Chamber of Commerce v. NLRB, No. 12-5250 (D.C. Cir. 2013) (appeal pending from lower court decision striking down snap elections rule).

42. *See* Sean Higgins, *NLRB Nominee: Agency Could Not Enact Card Check on Its Own*, Wash. Examiner, July 23, 2013. Pro-union groups have long lobbied Congress to mandate unionization by card check, which would allow unions to avoid election by secret ballot and instead unionize by having employees publicly sign membership cards. In 2007, the NLRB ruled that employees who recently used card check had the right to immediately force a secret vote on whether they really wanted to join that union. Dana Corp., 351 NLRB 434 (2007). Once President Obama packed the NLRB with pro-union members, it promptly overturned *Dana Corp*.

laws. While some of these actions might not be challengeable in court for technical legal reasons related to the standing of parties to file suit, these actions invoke unreasonable legal positions that were adopted seemingly for partisan political reasons.

Abdicating the Administration's Duty to Defend the Law in Court. In 2008, then-candidate Obama's campaign platform included repeal of the Defense of Marriage Act (DOMA). When Obama was asked about the constitutionality of DOMA during that campaign, he said, "DOMA was an unnecessary encroachment," but he was "sympathetic to the political pressures involved [in its passage]."[43] He indicated that his "preference would be to work through a legislative solution" and that he was "not sure what chances it would have to be overturned [by a court]."[44]

Because of this ambivalence, the Obama Administration's Department of Justice (DOJ) initially followed the long-standing policy of defending the constitutionality of DOMA. Historically, the DOJ would defend all laws against constitutional challenges as long as reasonable arguments could be made in their defense. This was to "ensure[ ] the government speaks with one voice" and "prevent[ ] the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes."[45] Acknowledging that there were reasonable constitutional arguments in favor of DOMA, in the 2009 case of *Smelt v. United States*, the Obama Administration argued that "DOMA is rationally related to legitimate government interests and cannot fairly be described as born of animosity...."[46]

Two years later, however, the Administration did an about-face and stated that it would no longer defend the constitutionality of DOMA, necessarily implying that there were no reasonable arguments in favor of DOMA's constitutionality. In fact, in a letter announcing this change, Attorney General Eric Holder maintained that DOMA violated the Fifth Amendment's guarantee of equal protection as applied to same-sex couples who are legally married under state law and that the congressional record of DOMA's passage demonstrated "precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against."[47] The DOJ also determined that classifications based on sexual orientation warrant heightened scrutiny by courts.

Holder stated that the Administration would continue to enforce DOMA—while not defending it and later affirmatively attacking it in court. This is a "have your cake and eat it too" approach to faithfully executing the law. When *United States v. Windsor*, a challenge to the constitutionality of the definition of marriage for purposes of federal law and benefits in Section 3 of DOMA, reached the Supreme Court, the majority noted that it "poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative."[48]

Strings-Attached No Child Left Behind Waivers. The No Child Left Behind Act of 2001 (NCLB) requires public school districts that receive federal funding to meet state-defined goals for math and reading proficiency by the 2014–2015 school year and to make "adequate yearly progress" toward those goals. Schools that fall short face penalties such as the transfer of students to other schools and even complete restructuring. With the 2014 universal proficiency deadline looming, many states feared they would not meet the requirements, which some considered unrealistic. While many on both sides of the aisle in Congress agree that No Child Left Behind is broken, no amendment to the law has been made.

On September 23, 2011, President Obama announced that states could request a waiver from the requirements in exchange for agreeing to implement the Administration's preferred education policies, such as the controversial Common Core nation-

43. Mark Segal, *Obama Talks to Gay Press*, Bay Area Reporter, Sept. 18, 2008, *available at* http://ebar.com/news/article.php?sec=news&article=3323.

44. *Id.*

45. Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 K.Y.L.J. 485, 502 (1995). Days was Solicitor General from 1993–1996.

46. Defendant's Motion to Dismiss at 25, Smelt v. United States, Case No. SACV09-00286 DOC, (C.D. Cal. 2009) (internal quotation omitted).

47. Letter from Eric Holder, U.S. Attorney General, to John Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

48. United States v. Windsor, 133 S.Ct. 2675, 2688 (2013).

al standards and testing that have not been passed by Congress.[49] While NCLB does authorize waivers, this sort of quid pro quo arrangement is abusive and allows the Administration to condition waivers on states' agreeing to new mandates from the U.S. Department of Education, particularly the type of requirements that could lead to national standards and tests, in derogation of local and parental control over the education of children.[50]

As Senator Marco Rubio (R–FL) pointed out in a letter to Secretary of Education Arne Duncan, federal law prohibits the federal government from prescribing a nationwide curriculum.[51] The statute that created the Department of Education states, "No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution ... except to the extent authorized by law."[52] No law authorizes the Administration to require that a state must "volunteer" to accept Common Core or other curriculum standards as a condition for the Secretary's exercise of statutory waiver authority.

In defense of the waivers, President Obama asserted that "Congress has not been able to fix these flaws ... so I will," and Secretary Duncan claimed that "there's a level of dysfunction in Congress that's paralyzing."[53] Once again, the excuse of congressional inaction is used to defend the Administration's power grab.

Intimidating Florida to Stop Its Voter Roll Cleanup. In advance of the 2012 election, Florida began an effort to clean up its voter rolls. In an attempt to remove non-citizens from the voter rolls, state officials compared the list of registered voters with state motor vehicle databases. A DOJ attorney, however, sent a letter to Florida's secretary of state saying that, pursuant to Section 5 of the Voting Rights Act, Florida must seek preclearance from the DOJ or a federal court in Washington and that purging the voter rolls within 90 days of a primary or general election violates Section 8 the National Voter Registration Act (NVRA).[54] The Florida secretary of state responded that the state had already obtained preclearance for the relevant laws.[55]

Pursuing its NVRA claim, the DOJ sued Florida in federal court, seeking to enjoin the state from continuing the program. By the time the court issued its decision, Florida had voluntarily halted the program, but the judge commented that the NVRA "simply does not apply to an improperly registered noncitizen" and "does not prohibit a state from systematically removing improperly registered noncitizens" during the 90-day period before an election.[56] The law "does not require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance."[57]

In another suit involving Florida's voter roll cleanup, the court noted that "[c]ertainly, the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law before the State can act."[58] Such a reading of Section 8 would "produce an absurd result" in preventing states from

49. Press release, Remarks by the President on No Child Left Behind Flexibility, The White House (Sept. 23, 2011), http://www.whitehouse.gov/the-press-office/2011/09/23/remarks-president-no-child-left-behind-flexibility.

50. Lindsey Burke, *Obama's Ill-advised NCLB Waivers*, National Review Online (Sept. 23, 2011), http://www.nationalreview.com/corner/278184/obama-s-ill-advised-nclb-waivers-lindsey-burke.

51. Letter from Marco Rubio, U.S. Senator, to Hon. Arne Duncan, Secretary of U.S. Department of Education (Sept. 12, 2011), *available at* http://www.rubio.senate.gov/public/index.cfm/files/serve?File_id=7c1cf499-4bfc-4db0-8a5b-5e3cc5291560.

52. Department of Education Organization Act, 20 U.S.C. § 3403(b).

53. Lyndsey Layton, *Obama Prepares to Revamp "No Child Left Behind"*, Wash. Post, Sept. 22, 2011, *available at* http://www.washingtonpost.com/local/education/obama-prepares-to-revamp-no-child-left-behind/2011/09/16/gIQAKUrXIK_story.html.

54. Letter from T. Christian Herren, Chief of the Voting Section, U.S. Dept. of Justice, to Ken Detzner, Florida Secretary of State (May 31, 2012); The NVRA is codified at 42 U.S.C. § 1973gg-6(c)(2(A)(2012).

55. Letter from Ken Detzner, Florida Secretary of State, to T. Christian Herren, Chief of the Voting Section, U.S. Dept. of Justice (June 6, 2012). The Supreme Court struck down the coverage formula of Sec. 5 of the Voting Rights Act, Shelby County v. Holder, 133 S.Ct. 2612 (2013).

56. United States v. Florida, 870 F.Supp.2d 1346, 1350 (N.D. Fla. 2012).

57. *Id.*

58. Arcia v. Detzner, 908 F.Supp.2d 1276, 1283 (S.D. Fla. 2012).

removing "minors, fictitious individuals ... and non-citizens" from its voter rolls.[59] President Obama's DOJ contorted the text of the NVRA in an attempt to thwart Florida's voter roll cleanup.

Department of Education "Guidance" on Sexual Assault. The Administration has also used so-called guidance memoranda in an effort to create binding legal precedent. On April 4, 2011, the Department of Education's Office for Civil Rights issued a "Dear Colleague" letter that invents a new legal requirement for colleges that receive federal funding.[60] According to the letter, Title IX of the Education Amendments of 1972 now requires colleges to use the low "preponderance of the evidence" standard of proof when investigating and disciplining students accused of sexual assault.

Not only was this letter issued without complying with the "notice and comment" requirements of the Administrative Procedure Act,[61] but it also overturned decades of Department of Education precedent that left such discipline up to the states and colleges themselves. Sexual assault is a very serious issue. An agency's arrogant assumption of authority not granted by law is also a very serious issue, and no law authorizes a Department of Education employee to tell states what evidentiary standard must be used when investigating allegations of sexual misconduct at a state university. This "gun to the head" warning letter from the Department of Education is forcing colleges to implement unfair procedures that have never been approved by Congress.

Later, in May of 2013, the Department of Education and the DOJ entered into a settlement agreement with the University of Montana that elected officials of both major parties have criticized on First Amendment and other grounds: for example, for requiring universities to define "sexual harassment" broadly enough to include one student asking another out on a date.[62] This resolution represents yet another example of this Administration's use of closed-door settlements to bind third parties with expansive statutory interpretations that agencies did not and could not implement through normal administrative processes.[63] In a November 14, 2013, letter to a civil rights organization that objected to the settlement agreement, the Department of Education appeared to back down from its previous position, but only due to public pressure.[64]

DREAM Act by Executive Fiat. Congress has repeatedly considered and refrained from enacting a bill known as the DREAM Act that would effectively grant amnesty to many illegal aliens. In June 2012, then-Department of Homeland Security Secretary Janet Napolitano issued a directive to immigration officials instructing them to defer deportation proceedings against as many as an estimated 1.7 million illegal aliens.[65] The directive applies to aliens under age 30 who came to the United States prior to age 16, have graduated from high school or been honorably discharged from military service, and do not have any felony convictions or multiple misdemeanor convictions.

A year before this memo was issued, President Obama said that while "doing things on [his] own is very tempting," that is "not how our democracy functions."[66] On another occasion, the President stated that Congress must enact the DREAM Act

59. *Id.* at 1282.

60. Dear Colleague Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dept. of Education (April 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

61. 5 U.S.C. § 553.

62. Andrew Kloster, *DOJ and Department of Education Mandate Orwellian Speech Restrictions on College Campuses*, The Foundry (May 16, 2013), http://blog.heritage.org/2013/05/16/doj-and-department-of-education-mandate-orwellian-speech-restrictions-on-college-campuses/.

63. *See* William L. Kovacs et al., Sue and Settle: Regulating Behind Closed Doors, U.S. Chamber of Commerce (May 2013) *available at* https://www.uschamber.com/sites/default/files/legacy/reports/SUEANDSETTLEREPORT-Final.pdf (Report detailing how the Environmental Protection Agency has engaged in a pattern of settling cases brought by special-interest groups in an effort to issue new regulations that are binding on third parties).

64. Letter from Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dept. of Education, to Greg Lukianoff, President, Foundation for Individual Rights in Education (Nov. 14, 2013), *available at* http://thefire.org/article/16506.html.

65. Memorandum from Janet Napolitano, Secretary of Homeland Security, to David Aguilar, U.S. Customs and Border Protection (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

66. President Barack Obama, Speech before the National Council of La Raza's Annual Conference (July 25, 2011), *available at* http://www.realclearpolitics.com/video/2011/07/25/obama_the_idea_of_doing_things_on_my_own_is_very_tempting.html.

because "the President doesn't have the authority to simply ignore Congress and say, 'We're not going to enforce the laws you've passed.'"[67] Then, when Congress did not pass the DREAM Act, the Administration claimed that its authority to set priorities and exercise prosecutorial discretion allowed it to institute an amnesty scheme without congressional action, despite the laws against illegal immigration.

If the President may decline to enforce the law against "a class of 800,000 to 1.76 million,"[68] it is absurd to argue that there are any "discernible limits" to prosecutorial discretion. Indeed, as professors Robert Delahunty and John Yoo have noted, if this instance is a legitimate exercise of prosecutorial discretion, then what is the limit? "Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws? Can a President effectively repeal the environmental laws by refusing to sue polluters, or workplace and labor laws by refusing to fine violators?"[69]

Both proponents and opponents of the DREAM Act legislation ought to be able to agree that, whatever the law is at any given time, the President should carry it out; otherwise, the role of Congress in deciding what our laws shall be is usurped, and we no longer function as a constitutional democracy.

Refusal to Enforce Federal Drug Laws. On October 19, 2009, Deputy Attorney General David Ogden instructed the United States Attorneys in select states not to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws" that legalize the use and possession of marijuana for medicinal purposes.[70] The Controlled Substances Act bans the sale, possession, and use of Schedule I drugs, which are those with no accepted medical use, and even after years of lobbying, marijuana is still classified as a Schedule I drug.[71]

Regardless of divergent views that people have about our nation's drug laws and despite the fact that some states have passed laws legalizing the use and possession of marijuana, federal law is still the controlling law, and the President has a constitutional obligation to take care that the federal law is faithfully executed. The Supreme Court upheld the Controlled Substances Act as a valid regulation of interstate commerce and acknowledged that it prevails over state laws to the contrary.[72] Now, claiming prosecutorial discretion and acting under the guise of resource allocation, the Obama Administration is chipping away at federal drug laws by refusing to enforce them in states where doing so might prove to be politically unpopular.

Conclusion

Abusive, unlawful, and even potentially unconstitutional unilateral action has been a hallmark of the Obama Administration. When Congress refuses to accede to President Obama's liberal policies, the Administration often ignores the restraints imposed on the executive branch by the Constitution and imposes "laws" by executive fiat. When the Administration disagrees with duly enacted laws or finds it politically expedient not to enforce them, it often ignores them, skirts them, or claims the Executive has prosecutorial discretion not to enforce them rather than fulfilling its constitutional obligation to take care that those laws be faithfully executed.

In our constitutional system, Congress is charged with enacting the law, and the Executive is charged with enforcing it. The individual liberties of all Americans are at stake when one branch usurps the role of another. As the Framers knew well, the "accumulation of all powers ... in the same hands" is the "very definition of tyranny."[73]

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67. Interview with President Barack Obama, Univision Town Hall (Jan. 25, 2012), *available at* http://latinalista.com/2012/01/transcript-univision-interview-with-president-obama-after-state-of-the-union-address.
68. Delahunty & Yoo, *supra* note 8 at 784.
69. *Id.*
70. Memorandum from David Ogden to Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf.
71. 21 U.S.C. § 812(b)(1).
72. Gonzalez v. Raich, 545 U.S. 1 (2005). Many scholars have criticized the Court's broad reading of the Commerce Clause to reach what they agree is wholly local conduct, but it remains binding precedent.
73. The Federalist No. 47 at 249 (James Madison) (Carey and McClellan ed., 2001).