2016

Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion

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COMMENTS

PRESIDENTIAL INACTION AND THE CONSTITUTIONAL BASIS FOR EXECUTIVE NONENFORCEMENT DISCRETION

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INTRODUCTION

The growth of the administrative state and political gridlock in Congress has made presidential control over national policymaking a defining feature of contemporary American politics. In contrast to foreign policy and national defense, where the Constitution clearly establishes the President as the Commander in Chief, the Constitution only explicitly enumerates a few domestic presidential powers, such as the pardon and appointments.[1] Some scholars argue that the Framers intended this imbalance in constitutional specificity, as they meant for the President to possess only weak domestic powers subservient to Congress.[2] Yet, such an interpretation fails to capture the full powers of the presidency as created by the Framers—not to mention how the office of the President has developed over subsequent practice. The Framers created a strong executive vested with the power to execute the laws.[3] The President must also ensure that the laws are faithfully executed, creating a duty to oversee executive officials.[4] These two clauses together, the Vesting Clause and the Take Care Clause, grant the President significant authority to shape domestic

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1 U.S. CONST. art. II.

2 *See* 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, 784 (2013) (arguing that the Constitution does not vest the President with broad domestic powers).

3 U.S. CONST. art. II, § 1, cl. 1.

4 *See* U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed. . . ."); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 45 n.268 (2014) (positing that the Take Care Clause is best interpreted as imposing a duty to ensure faithful execution among the Executive Branch).

policy through the enforcement—as well as the selective nonenforcement—of the laws.

The President's authority in the domestic sphere is unique in that it is largely not an action-oriented power.[5] Scholarship on executive authority often focuses on presidents and executive branch officials acting beyond their statutory authority, but presidents can also wield significant authority by under-enforcing a legislative scheme.[6] When Congress vests executive authority in the President or an executive branch official, it is left to the executive branch to determine when and how to execute the law unless Congress has provided guidelines or has created a mandatory duty. As a result, the President has considerable discretion in executing the law, significantly impacting federal policymaking.[7]

President Barack Obama has repeatedly used nonenforcement discretion during his administration, especially after the Democratic Party lost control of the House of Representatives in 2010.[8] This Comment will look at two such instances—the delay of the employer mandate in the Patient Protection and Affordable Care Act ("ACA") and the immigration enforcement directives announced on November 20, 2014—as vehicles to understand executive nonenforcement discretion. The ACA requires large employers who do not offer health coverage to pay a penalty called the Employer Shared Responsibility starting on December 31, 2013.[9] Having previously delayed enforcement for 2014, the Treasury Department announced in February 2014 that it would phase-in enforcement of the employer mandate beginning in 2015.[10] On immigration, President Obama an-

5 *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1199–200 (2014) (contending that inaction is an important presidential "power" while most of the President's action-oriented powers are in the areas of foreign policy and national defense).

6 *See id.* (arguing that scholarship tends to focus on presidential action while ignoring presidential "inaction" or nonenforcement).

7 *See* Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. SEE ALSO 115, 121–22 (2013) (explaining how Congress can convey upon the President a limited statutory nonenforcement power).

8 The use of nonenforcement discretion can be traced back to President George Washington and was frequently used by Presidents George W. Bush and Ronald Reagan. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–16 (2010) (reviewing examples of nonenforcement by past presidents).

9 26 U.S.C. § 4980H(a) (2015); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256 (2010) (codified as amended in scattered sections of 26 U.S.C.).

10 Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8,544, 8,577 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, and 301); Press Release, Department of the Treasury, Treasury and IRS Issue Final Regulations Implementing Em-

nounced in November 2014 that his administration would change its immigration enforcement policies.[11] First, the Department of Homeland Security ("DHS") would prioritize the removal of certain categories of illegal immigrants over others, focusing on threats to national security and criminals.[12] Second, DHS would extend deferred action to illegal immigrants who are parents of children legally present in the United States.[13]

Both decisions prompted quick condemnation from Republicans in Congress.[14] The House of Representatives filed suit against the Obama Administration over the ACA decision alleging that the Treasury Department unilaterally amended the ACA by delaying the employer mandate for one year without legislation passed by Congress.[15] Similarly, twenty-six states sued DHS in the Southern District of Texas alleging that the enforcement policies violated the President's constitutional duty to enforce the law under the Take Care Clause.[16] On February 16, 2015, the district court judge assigned the case enjoined DHS from proceeding with deferred action.[17] The

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ployer Shared Responsibility Under the Affordable Care Act for 2015 (Feb. 10, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx.

11 Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

12 Memorandum from Jeh Charles Johnson for Thomas Winkowski, R. Gil Kerlikowske, Leon Rodriguez, Alan D. Bersin, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

13 Memorandum from Jeh C. Johnson for Leon Rodriguez, Thomas Winkowski, R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

14 Ashley Parker, *Boehner Says Obama's Immigration Action Damages Presidency*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/us/republicans-immigration-obama.html; Cathy Burke, *Republicans Slam Obamacare's Employer Mandate Delay as 'Train Wreck'*, NEWSMAX (Feb. 10, 2014), http://www.newsmax.com/Newsfront/obama-delays-employer-mandate/2014/02/10/*id*/551999/.

15 Complaint at 23–26, United States House of Representatives v. Burwell, No. 14-cv-01967 (D.D.C. 2014). Other challenges to the ACA delay have been filed. *See, e.g.*, Kawa Orthodontics, LLP v. Secretary, U.S. Dept. of the Treasury, 773 F.3d 243, 246, 248 (11th Cir. 2014) (dismissing challenge for lack of standing); Ass'n of Am. Physicians and Surgeons, Inc. v. Koskinen, 768 F.3d 640, 642–43 (7th Cir. 2014) (finding no standing).

16 Complaint at 26–27, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2014) (No. B-14-254).

17 Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015). A federal district judge in Pennsylvania has also addressed the President's immigration orders finding them to violate the separation of powers and the Take Care Clause. United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 788 (W.D. Pa. 2014). Unlike *Texas v. United States*, *Juarez-*

Fifth Circuit upheld the injunction on November 9, 2015, and the Supreme Court granted *certiorari* on January 19, 2016.[18] Meanwhile, Republicans in Congress attempted to undo President Obama's immigration enforcement decisions through legislation and appropriation.[19] These twin developments in the courts and Congress will set the stage for a showdown and public debate over executive power and the extent of presidential nonenforcement discretion.[20]

The debate has already attracted legal scholarship, but so far most efforts have either been cursory or highly critical of nonenforcement discretion. Supporters of nonenforcement discretion have either stopped their analysis at *Heckler v. Chaney*, the Supreme Court decision that found that there was a presumption of unreviewability for nonenforcement decisions, or have focused their analysis on the legality of particular nonenforcement decisions.[21] Robert Delahunty and John Yoo have written the strongest critique of nonenforcement

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Escobar is not a challenge to the immigration orders, but a finding by a district court judge that the immigration orders did not apply to the defendant who was an illegal alien arrested and detained by DHS. *Id.* at 792.

18 Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) *cert. granted*, 2016 WL 207257 (U.S. Jan. 19, 2016) (No. 15-674). Because the Fifth Circuit did not address the constitutional question, the Supreme Court asked the parties to explicitly brief and argue "[w]hether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3." United States v. Texas, 2016 WL 207257 (U.S. Jan. 19, 2016) (No. 15-674). It was speculated that the late Justice Antonin Scalia inserted this additional question. Julia Preston, *Scalia's Death Fuels Uncertainty on Immigration Case*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/live/supreme-court-justice-antonin-scalia-dies-at-79/scalia-on-immigration/. With his passing, the attorneys for the case and the Justices largely avoided the controversial and difficult Take Care Clause question. Transcript of Oral Argument, United States v. Texas, No. 15-674 (2016).

19 *See* Ashley Parker, *House Approves Homeland Security Budget, Without Strings*, N.Y. TIMES, (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/house-homeland-security.html (reporting the failed attempt by congressional Republicans to gut President Obama's immigration decisions via amendments to the DHS appropriations bill).

20 The judicial route faces numerous obstacles not the least of which is standing. Whether Congress has standing to challenge a president's failure to take care that the laws are faithfully executed is outside the scope of this Comment. For a brief discussion of the standing issue, see Lyle Denniston, *Constitution Check: Could the House Sue the President for Refusing to Carry out the Laws?*, NATL. CONST. CENTER (June 24, 2014), http://blog.constitutioncenter.org/2014/06/constitution-check-could-the-house-sue-the-president-for-refusing-to-carry-out-the-laws/ (discussing the issue of standing).

21 *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (holding that that a refusal to enforce is generally unsuitable for judicial review because of agency discretion); Eric Posner, *The Constitutional Authority for Executive Orders on Immigration is Clear*, N.Y. TIMES (Dec. 16, 2014), http://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/the-constitutional-authority-for-executive-orders-on-immigration-is-clear (arguing the President has the discretionary power to allocate resources among immigration enforcement efforts); Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. SEE ALSO 115, 116 (2013) (defending President Obama's deferred action order for DREAMers).

discretion following President Obama's decision in 2012 to apply deferred action to DREAMers.[22] They argue that the Take Care Clause imposes an absolute duty on the President to enforce all constitutionally valid acts of Congress.[23] The President can only ignore this duty, they claim, in limited situations where the act of Congress is unconstitutional, equitable considerations are present for individual cases, resources are limited, or where there is de facto delegation.[24] To Delahunty and Yoo, these exceptions are defenses rather than sources of nonenforcement discretion, because such discretion cannot exist given the Take Care Clause.[25]

Zachary Price takes a more flexible approach. He recognizes that nonenforcement discretion is a valid exercise of executive power but it is limited.[26] A president cannot use policy-based nonenforcement that applies to categories of individuals.[27] Therefore, according to Price, President Obama's ACA and immigration decisions are invalid exercises of executive power because they take a categorical rather than an individual approach to nonenforcement.[28]

Finally, Jeffrey Love and Arpit Garg argue that nonenforcement creates a separation of powers problem because it allows a president to act unilaterally, contrary to the designs of the Framers.[29] However, the employer mandate delay is valid under a separation of powers theory of nonenforcement discretion, they argue, because the delay served the goals of the enacting Congress by ensuring smooth implementation of the ACA.[30]

These arguments against the Obama Administration's actions either reject executive nonenforcement discretion or find it extremely limited. Yet what they lack is any focus on whether the statute in question imposes mandatory enforcement duties. Law enforcement

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22 DREAMers are illegal aliens who entered the United States before the age of sixteen (usually with their parents), who have not been convicted of a felony, have lived continuously in the United States for five years, and have graduated from high school. Immigration Policy Center, *Who and Where the DREAMers Are: A Demographic Profile of Immigrants Who Might Benefit from the Obama Administration's Deferred Action Initiative*, AM. IMMIGRATION COUNCIL (Aug. 18, 2012), http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are. *See generally* DREAM Act, S. 1291, 107th Cong. § 3(a) (2001) (defining DREAMers).

23 Delahunty & Yoo, *supra* note 2, at 784.

24 *Id.* at 836, 841–42, 845, 851–52.

25 *Id.* at 835.

26 Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674 (2014).

27 *Id.* at 675.

28 *Id.* at 752, 761.

29 Love & Garg, *supra* note 5, at 1202.

30 *Id.* at 1222.

is an executive function, and absent a statutory constraint to the contrary, the President possesses wide discretion over enforcement. If a statute does not include any enforcement guidelines or conditions, as they often do not, then the President can interpret how and when to execute the law. Where the statute imposes mandatory enforcement duties, then the President must carry out the letter of the law unless the President believes the statute is unconstitutional or Congress failed to allocate the necessary resources. This theory of executive nonenforcement discretion best reflects the history and practice of executive power. Delahunty and Yoo's denial of nonenforcement discretion ignores the use of prosecutorial discretion by presidents starting with George Washington.[31] The separation of powers thesis advocated by Love and Garg does not answer whether nonenforcement discretion is constitutional.[32] Price's categorical-individual distinction, while practical, only has limited support in case law.[33] An analysis focused on the discretionary-mandatory distinction best captures the nature of executive nonenforcement discretion.

This Comment establishes a framework for understanding executive nonenforcement discretion. It does not provide an in-depth and definitive examination of whether President Obama's ACA and immigration nonenforcement decisions are constitutional; however, by creating the proper framework to understand nonenforcement problems based on the discretionary-mandatory distinction, it provides an initial answer in the affirmative, namely that the Obama Administration's decisions are constitutional. Part I provides a historical understanding of the Take Care Clause including the pre-ratification context and initial interpretations of the clause during the early years of the United States. Part II discusses the development of prosecutorial discretion as a basis for nonenforcement. Part III explains the jump from prosecutorial discretion to executive nonenforcement in the administrative law context after *Chaney*. Part IV examines executive discretion when a statute creates a mandatory duty. Part V concludes by briefly applying the developed discretionary-mandatory framework to the Obama Administration's decisions regarding the ACA and immigration.

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31 *See* JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 72 (2009) (noting that President Washington set the precedent of under-enforcing the law).

32 Love & Garg, *supra* note 5, at 1201.

33 *See generally* Letter from 136 Law Professors to President Barack Obama, Executive authority to protect individuals or groups from deportation (Sep. 3, 2014), *available at* https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf (discussing how prosecutorial discretion fits into the immigration system).

I. UNDERSTANDING THE TAKE CARE CLAUSE AND EXECUTIVE POWER: HISTORY, TEXT, AND THE FRAMERS

The Vesting Clause and the Take Care Clause of the Constitution are the foundations for executive nonenforcement discretion. A pure textual reading of the clauses might lead to a conclusion that the Framers created a weak President with no enforcement discretion.[34] Such an interpretation is not consistent with the historical context of the Constitutional Convention and proclivities of the Framers who played key roles in crafting the presidency. Popular consensus holds that the Framers created a weak President in reaction to the abuse of the English Kings and their royal appointees, but this ignores the post-revolutionary period of weak executive control that informed the views of James Madison.[35] To understand what the Framers created, one must first look to the British political inheritance and the events contemporaneous to the Constitutional Convention. Viewed through this perspective, the Framers created a strong executive, which entailed discretion, independent from Congress.

A. British Foundations

The British political and legal system had an immense yet contradictory influence on the Framers.[36] On one hand, abuses committed by the royally appointed colonial governors and representatives of the Crown fueled the American Revolution. On the other hand, all of the Framers, except Alexander Hamilton, were raised to pledge allegiance to the King of England.[37] The British system provided the Framers with one of the few working examples of effective—although not necessarily desirable—executive power. British monarchial traditions infuse the American presidency as much as the presidency was designed to avoid the creation of a monarchy.

The royal colonial governors wielded almost unchecked executive power as representatives of the King.[38] As patrons of the King of Eng-

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34 *See* Delahunty & Yoo, *supra* note 2, at 799 (noting that a dictionary definition of faithful requires strict enforcement of the laws).

35 RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 27 (2009).

36 *See generally* CLEMENT FATOVIC, OUTSIDE THE LAW: EMERGENCY AND EXECUTIVE POWER (2009) (discussing British political thought on the Framers and the presidency).

37 RAY RAPHAEL, MR. PRESIDENT: HOW AND WHY THE FOUNDERS CREATED A CHIEF EXECUTIVE 11 (2012). Hamilton was born in the West Indies to a French Huguenot mother. *Id.*

38 *See id.* at 22 (discussing powers of the colonial governors).

land, the colonial governors only owed allegiance to the Crown.[39] Early governors ruled with martial law.[40] Later governors still wielded executive, judicial, and legislative powers in the colonies and could suspend bills passed by the local assemblies at will.[41] All of the delegates to the Constitutional Convention could point to abuses by their former royal governors.[42] The Virginia delegates, several of whom, such as George Mason and Edmund Randolph, would later dissent from the final draft for vesting too much executive power, could cite the governor of Virginia who decreed freedom for any slave who joined the British Army in 1775.[43] The Framers also knew their British history and the reign of King James II. Drawing on the long history of English monarchs suspending acts of Parliament, King James used his suspending and dispensing powers to exempt officials from restrictions on office-holding by Catholic and Protestant dissenters.[44] The Glorious Revolution of 1689 ended King James's rule and the English Bill of Rights made the royal suspension and dispensing power illegal.[45] Aware of this history, the Framers ensured that the President would not have unfettered powers that could lead to tyranny.[46]

The Framers who played important roles in drafting the articles relating to the presidency at the Convention or shaping executive power after ratification all were predisposed to be sympathetic toward British conceptions of executive power. Gouverneur Morris was raised in an aristocratic family as his father was Lord of Morrisania.[47] James Wilson was raised in Scotland and his "aristocratic pretensions" caused him to waiver in his support for independence in the early years of the Revolution.[48] John Rutledge, who played an important role on the Committee of Detail supporting a strong executive, studied at Oxford and was admitted to practice before the Inns of Court in London.[49] Alexander Hamilton was a vocal defender of the monarchy having said that "the British government is the best in the

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 26.

43 *Id.* at 27.

44 The royal suspension and dispensing power allowed the English monarch to ignore acts of Parliament. Price, *supra* note 26, at 691.

45 *Id.*

46 *See id.* at 693 (noting that the Framers rejected a proposal to give the President broad suspension powers).

47 Morrisania comprised much of what is now the Bronx in New York City. RAPHAEL, *supra* note 37, at 11.

48 BEEMAN, *supra* note 35, at 132.

49 *Id.* at 268.

world, and I doubt much whether anything short of it will do in America."[50] These men would have all been familiar with William Blackstone's *Commentaries on the Laws of England*.[51] Blackstone was the most cited author at the Convention after Montesquieu, and his theories were particularly noticeable in Hamilton's writings.[52] Blackstone had a very expansive conception of executive power, particularly over the execution of the laws.[53] He believed that executive discretion was necessary: "For, though the making of laws is entirely the work of . . . the legislative branch . . . the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate."[54] According to Clement Fatovic, the Federalists largely adopted this observation into their belief that it was occasionally necessary to mitigate the severity of the law in the interests of justice, humanity, or right.[55]

B. Weak Executives under the Articles of Confederation

Given the distrust of executive power during the independence period, the American revolutionaries turned to legislature-controlled government. The result, however, was near disaster as government during the Revolutionary War and under the Articles of Confederation was ineffective.[56] This period of weak government was more influential on the Framers who shaped the American presidency than the earlier colonial period of tyrannical governors.[57]

The supporters of a nationalist vision of government and stronger executive power had first-hand experience with the failings of legislative controlled government. Whereas Patrick Henry and George Mason, each opponents of a stronger national government, came of age at a time when the biggest threat to liberty was taxes imposed by overbearing imperial governments and unrestricted exercises of power by royal governors, James Madison came of age as a delegate to the

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50 *Id.* at 168. This position cost him influence at the Convention, and his contributions to the ideas behind the Constitution are limited. However, he played important roles in the ratification debates and during Washington's presidency. *Id.* at 169.

51 *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996) (noting nearly as many copies were said to have been sold in the American colonies as in England).

52 FATOVIC, *supra* note 36, at 125.

53 *Id.*

54 1 WILLIAM BLACKSTONE, COMMENTARIES *261.

55 FATOVIC, *supra* note 36, at 148.

56 *See generally* THE FEDERALIST PAPERS 20 (Isaac Kramnick ed., 1987) (detailing the power vacuum that existed during the period before the Constitutional Convention).

57 BEEMAN, *supra* note 35, at 27.

Continental Congress, where he witnessed the weaknesses of the Articles of Confederation and tyrannical state legislatures acting against the best interests of the nation.[58] Likewise, Gouverneur Morris was a delegate to the Continental Congress from 1777–1779 where he witnessed the government's failures to provide supplies for American troops.[59] The multiple, ineffective committees of the Continental Congress frequently frustrated George Washington while he waged war against the British.[60] As a result, these men viewed a strong executive as a means of giving energy to the central government and correcting the problems of the Articles of Confederation.[61]

The lack of any meaningful executive authority was a crucial failing of the Articles of Confederation. The Continental Congress, as the governing body of the Articles of Confederation, held legislative and executive power. It executed the laws by appointing "such other committees and civil officers as may be necessary for managing the general affairs of the United States under their [Congress'] direction."[62] Eventually these ad-hoc committees became standing committees, but they were often overburdened by their combined legislative and executive responsibilities.[63] When the Continental Congress was in recess, the Articles of Confederation created an executive body composed of one delegate from each state to carry on the business of Congress.[64] However, the committee could only deal in matters that Congress had specified in advance and could not work on important matters of state.[65] This system, which lacked "energy" (a word frequently used by the Federalists when discussing the need for a strong executive),[66] proved incapable of dealing with the problems facing the American states.[67]

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58 *Id.* at 27–28.

59 *Id.* at 46.

60 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 39 (2008).

61 BEEMAN, *supra* note 35, at 56.

62 Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 600 (1994) (quoting ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 (West)).

63 *Id.* at 601.

64 RAPHAEL, *supra* note 37, at 38.

65 *Id.*

66 *See* FATOVIC, *supra* note 36, at 176 (noting energy was a frequent theme that pervaded the Framers' thoughts on the presidency).

67 KRAMNICK, *supra* note 56, at 20. *See also* BEEMAN, *supra* note 35, at 15 (finding that the Articles of Confederation collapsed because state legislatures opposed efforts by the Continental Congress to levy taxes or pay loans).

The states similarly experimented with restricting executive power.[68] Some states completely abolished the executive, and eight states established executive or privy councils.[69] Except for South Carolina, the state constitutions eliminated the role of the governor in the legislative process.[70] The state constitutions created legislature-controlled government which quickly proved incapable of executing the law. Most states were in severe financial crises, so the legislatures freely printed money, passed debtor relief legislation, set aside contracts, and confiscated property.[71] To Madison, legislatures could be just as tyrannical as a strong executive.[72] The inability of the states to confront Shays' Rebellion signaled the death knell of the Articles of Confederation and pressed Madison, Randolph, Gouverneur Morris, Wilson, and Hamilton to call for a constitutional convention to empower the national government in stark contrast to the system of weak executive government created a decade earlier.[73]

C. The Constitutional Convention: Drafting Executive Power and the Take Care Clause

The Framers who would shape the American presidency gathered in Philadelphia in May 1787 to create a system of government dramatically different from the Articles of Confederation. Madison's Virginia Plan calling for a stronger national government would not have been well received a decade earlier during the revolutionary furor, but the failures of the Articles of Confederation and the states had softened distrust toward executive power.[74] Gouverneur Morris and James Wilson were the principal authors and thinkers behind Article II, and they were two of the strongest nationalists at the Convention who wanted to correct the failings of the post-independence institutions.[75] Therefore, any interpretation of presidential power should presumably be consistent with their predilection toward a strong national government.

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68 RAPHAEL, *supra* note 37, at 39–40.

69 *Id.*

70 THE FEDERALIST PAPERS, *supra* note 56, at 21.

71 *Id.* at 25.

72 BEEMAN, *supra* note 35, at 27.

73 *Id.* at 18, 21. In 1786, Daniel Shays led an insurgency of indebted farmers against the Massachusetts government which had adopted a policy of fiscal restraint. *Id.* at 16–17. The Continental Congress, which could not raise money to fund federal troops, was powerless to stop the rebellion, forcing the Governor of Massachusetts to raise $20,000 from private donors to field a militia. *Id.* at 18.

74 FATOVIC, *supra* note 36, at 158.

75 BEEMAN, *supra* note 35, at 56.

Early in the Convention, the debate was set between a single, strong, and independent executive versus an executive committee subservient to the legislature.[76] A week into the Convention on June 4th, the delegates approved a proposal creating a single executive.[77] Wilson argued that a council of executives would dilute authority and deprive the national government of "energy, dispatch, and responsibility."[78] While dissenters would continue to push for an executive council throughout the Convention, the issue was settled for most delegates in favor of Wilson's position of vesting executive authority in one individual.[79] Two months later, after little progress, the delegates submitted a resolution on the executive to the Committee of Detail:

> That a national executive be instituted, *to consist of a single person*; to be chosen by the national legislature, for the term of seven years; to be ineligible a second time; *with power to carry into execution the national laws*; to appoint to offices in cases not otherwise provided for; to be removable on impeachment, and conviction of malpractice or neglect of duty; to receive a fixed compensation for the devotion of his time to publick [sic] service; to be paid out of the publick [sic] treasury.[80]

The Committee of Detail would dramatically rework what would become Article II including the Vesting and Take Care Clauses.[81]

The Committee of Detail removed the executive's "power to carry into execution the national laws" and replaced it with the Vesting Clause ("the executive Power shall be vested in a President of the United States of America")[82] and the Take Care Clause ("he shall take Care that the laws be faithfully executed").[83] Lawrence Lessig and Cass Sunstein argued that this change was meant to weaken the presidency vis-à-vis Congress, removing any discretionary implied power

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76 RAPHAEL, *supra* note 37, at 54.

77 BEEMAN, *supra* note 35, at 134.

78 *Id.* at 127.

79 *See* CALABRESI & YOO, *supra* note 60, at 34 (noting that Mason tried to reintroduce an executive council during the last week of the convention).

80 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hund & James Brown Scott eds., 1920), *available at* http://avalon.law.yale.edu/subject_menus/debcont.asp (emphasis added).

81 The Committee of Detail consisted of Wilson, Rutledge, Randolph, Oliver Ellsworth, and Nathaniel Gorham. *Id.* Rutledge was good friends with Wilson and a strong advocate of executive power, having been governor of South Carolina where he was called "the Dictator." BEEMAN, *supra* note 35, at 267, 269. Gorham and Ellsworth did not play significant roles on the committee. *See id.* at 265 (discussing roles on the committee). Randolph entered the Convention as a vocal supporter of a strong national government, but his support faltered as more power was given to the President. *Id.* at 266.

82 U.S. CONST. art. II, § 1, cl. 1.

83 U.S. CONST. art. II, § 3.

regarding how to carry into execution the laws.[84] This interpretation fails to take into account the Framers' desire for a strong executive and makes the assumption that Wilson would have allowed the Committee of Detail to weaken the presidency by removing enforcement discretion. Both clauses were additionally modified by the Committee of Style where Gouverneur Morris furthered the nationalist agenda producing the current versions.[85]

The Framers intended the Vesting Clause to grant executive power to the President.[86] Hamilton viewed the clause as a general grant of power rather than merely identifying the recipient of the powers enumerated in Article II.[87] Likewise, Madison believed that Article II vested *all executive power* in the President.[88] Steven Calabresi and Kevin Rhodes argue that comparisons of the vesting clauses of Articles I, II, and III support Hamilton and Madison's interpretations. The Vesting Clause of Article III must be read as a grant of power; otherwise, there would be no constitutional source of the judiciary's authority to act.[89] Meanwhile, the Vesting Clause of Article II is linguistically similar to Article III; therefore, the Vesting Clause of Article II must be read as a grant of power.[90] Originally, the vesting clauses in each Article were identical but Gouverneur Morris altered the language found in Article I to the current language so as to limit Congress's powers to the enumerated powers.[91] Unitary Executive theorists such as Calabresi and Prakash require an interpretation that *all* executive power is vested in the President. For the purposes of this Comment, it is enough to reach only so far as to read the Vesting Clause as a grant of executive power.

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84 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 66 (1994).

85 *See* RAPHAEL, *supra* note 37, at 120 (finding that some scholars have argued that Gouverneur Morris exceeded the grant of authority given to the Committee of Style by making significant changes to strengthen the President and the national government). Hamilton and Madison also were appointed to the Committee of Style, although most of the writing was delegated to Morris. BEEMAN, *supra* note 35, at 346.

86 Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 995 (1993). Since the Take Care Clause conditions the powers granted by the Vesting Clause, it is necessary to briefly examine the operation of the Vesting Clause to understand the Take Care Clause.

87 *Id.* at 996.

88 *Id.*

89 Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176 (1992).

90 *Id.* at 1178.

91 Prakash, *Hail to the Chief Administrator*, *supra* note 86, at 996–97. Gouverneur Morris's preference for executive power elicited the observation from Madison that Morris was never "inclined to the democratic side." BEEMAN, *supra* note 35, at 346.

If the Vesting Clause is interpreted as a grant of executive power, then the Take Care Clause is best interpreted as a duty.[92] Unfortunately, there is little recorded debate during the Convention surrounding the Take Care Clause.[93] It appears that the clause may have been included to forbid the President from wielding a suspension power akin to the royal prerogatives of King James II.[94] The Framers, however, did not understand the Take Care Clause as a presidential straitjacket. During the debates on selection of the President, Wilson stressed the importance of keeping the President independent from the legislature otherwise the executive would become a "mere creature" of the legislature.[95] If the Framers intended to give the President no discretion in executing the law, then they would have presumably adopted the plan originally proposed to the Committee of Detail to allow Congress to select the President.[96] The President needed to be able to wield discretion in order to be an effective executive and able to check the legislature. It is hard to fathom that two of the strongest supporters of executive power, Wilson and Gouverneur Morris, would have removed executive discretion from their drafts for the Committee of Detail and the Committee of Style.[97]

The Committee of Style made one important change to the Take Care Clause. The Committee of Detail's version read, "he shall take care that the laws of the United States be *duly* and faithfully executed. . . .".[98] The Committee of Style removed the word "duly" in its reported version that became the final text.[99] Unfortunately, there is no recorded account of why the Committee made the change.[100] *John-*

92 *See* Calabresi & Prakash, *supra* note 62, at 583 (arguing that the Take Care Clause is a duty to faithfully carry out the grant of power in the Vesting Clause).

93 Lessig & Sunstein, *supra* note 84, at 64. Richard Beeman's exhaustive historical study of the Constitutional Convention does not include any mention of the Take Care Clause. *See generally* BEEMAN, *supra* note 35 (failing to discuss the Take Care Clause).

94 Calabresi & Prakash, *supra* note 62, at 583–84; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989).

95 BEEMAN, *supra* note 35, at 231. *See also* Prakash, *supra* note 75, at 1001 (finding that Wilson did not believe faithful execution of the laws turned the President into a functionary of Congress).

96 *See* RAPHAEL, *supra* note 37, at 90 (suggesting that allowing Congress to select the President would have resulted in congressional insiders dominating the presidency).

97 Lessig and Sunstein suggest that the draft submitted to the Committee of Detail ("power to carry into execution the natl. laws") allowed for executive discretion, but the final draft of the Committee of Detail (the Take Care Clause) removed that discretion. Lessig and Sunstein, *supra* note 84, at 66; JAMES MADISON, *supra* note 80.

98 JAMES MADISON, *supra* note 80 (emphasis added).

99 *Id.*

100 Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 227 (2015).

son's Dictionary defines "duly" as "properly; fitly; in the due manner."[101] This suggests a mechanical obligation to carry out the law.[102] By removing "duly" and focusing on "faithfully" executing the laws, the Committee gave discretion to the President.[103] Eighteenth century usage of the word "faithfully" suggests an agency relationship with implied discretion rather than a requirement of strict adherence.[104] The evolution of the Take Care Clause at the Constitutional Convention shows that the Framers purposefully gave the President discretion in enforcing the law.

The Take Care Clause is a presidential duty to oversee and control the faithful execution of the laws.[105] The President cannot suspend a valid mandatory or ministerial duty imposed by Congress, but execution of the law implies discretion to choose the manner, time, and circumstances of that execution as understood by Blackstone and his contemporaries among the Framers.

D. Interpreting the Confusion Created by the Constitutional Convention

The document created by the Constitutional Convention was far from clear about presidential powers, something which caused much difficulty for the delegates throughout the Convention. While the delegates were able to reach agreement on matters such as how to select the President, the veto, and treaty-making, the delegates never explicitly defined executive power.[106] It would be left to others, such as Hamilton and the Supreme Court, to determine the extent of executive power.[107]

Hamilton was quick to defend executive power during the ratification debates and as Treasury Secretary to President Washington. In *Federalist No. 70*, Hamilton made the case for a single executive as opposed to vesting executive power in multiple people or vesting power in a single individual but subjecting him to a council.[108] Hamilton feared that vesting executive power into a plural executive would un-

101 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

102 Blackman, *supra* note 100, at 228.

103 *Id.* at 232.

104 Price, *supra* note 26, at 698 ("[T]he Constitution suggests that proper performance of the executive function may require adherence to notions of justice, equity, and the public interest, even at the expense of complete enforcement of each and every statutory mandate.").

105 Prakash, *Hail to the Chief Administrator*, *supra* note 86, at 1001.

106 BEEMAN, *supra* note 35, at 349.

107 Washington's presidency played a key role in defining executive power, but his views of executive power will be explored in Part II.

108 THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

dermine accountability and lead to a lack of vigor in government, which was a hallmark of the Articles of Confederation.[109] In *Federalist No. 72*, Hamilton explicitly stated that the administration of government falls within the executive department.[110] The administration of government included tasks such as foreign affairs, finance, the application and disbursement of funds appropriated by Congress, and the direction of war operations.[111] Crucially, the persons "to whose immediate management these different matters are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence."[112] The Constitution vested executive power in a single individual who had the authority, with implied discretion, to oversee all other executive officers. A few years later, Hamilton even more strongly explained executive power in his defense of President Washington's Proclamation of Neutrality designed to keep the United States out of war between Britain and France.[113] Writing under the pseudonym Pacificus, Hamilton argued that the Vesting Clause in Article II was a general grant of power that belonged to the President.[114] Hamilton's writings provide some clarity to the Vesting Clause and executive power, but he never directly addressed the Take Care Clause.

The Take Care Clause has rarely been litigated, but two early Supreme Court decisions—*Marbury v. Madison* and *Kendall v. United States ex rel. Stokes*—provide the best post-ratification understanding of the clause. *Marbury* is best remembered for judicial review, but the case provided the first judicial interpretation of the Take Care Clause.[115] President Thomas Jefferson instructed Secretary of State Madison to withhold William Marbury's commission as Justice of the Peace.[116] Marbury challenged that Madison violated an act of Congress by failing to deliver the commission.[117] Chief Justice John Mar-

109 *Id.* at 406.

110 THE FEDERALIST NO. 72, at 412 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

111 *Id.*

112 *Id.* at 413.

113 FATOVIC, *supra* note 36, at 200–01.

114 *Id.* at 201–02. Madison wrote in opposition to Hamilton under the pseudonym, Helvidius, and argued for a reduced scope of executive power which was inconsistent with his views during the Convention that the executive must not be subservient to the legislature. *Id.* at 202–03.

115 TODD GARVEY, CONG. RESEARCH SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 5 (2014).

116 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155 (1803).

117 *Id.* at 155–56.

shall observed that "whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act."[118] There are two types of acts. The first type is a political action which remains in the discretion of the President alone, and there cannot be any power to control that discretion:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, *or rather to act in cases in which the executive possesses a constitutional or legal discretion*, nothing can be more perfectly clear than that their acts are only politically examinable.[119]

The second type of action is a specific duty assigned by law:

> [W]hen [the President] is directed peremptorily [by the legislature] to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amendable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.[120]

Marshall created a distinction between discretionary duties (either statutory or constitutional) affecting the nation, versus mandatory or ministerial duties affecting individuals.[121] Only the latter is enforceable in the courts.[122]

The Supreme Court revisited the Take Care Clause in *Kendall*.[123] The case was brought by a group of mail carrier contractors against the Postmaster General for failing to comply with a federal law that directed the Postmaster General to provide for back pay.[124] Supposedly, the President directed the Postmaster to refuse to pay the amount owed to the mail carriers.[125] Justice Thompson again observed the distinction between discretionary acts, which are left to the President, and ministerial acts, which are beyond the control of the President:

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think prop-

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118 *Id.* at 165. Since the Court found no jurisdiction, Chief Justice Marshall's discussion remains dicta. Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 257 (2003).

119 *Marbury*, 5 U.S. (1 Cranch) at 166 (emphasis added).

120 *Id.*

121 *Id.*

122 *Id.*

123 Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 610–13 (1838).

124 *Id.* at 608.

125 GARVEY, *supra* note 115, at 5.

> er . . . *this is emphatically the case, where the duty enjoined is of a mere ministerial character.*[126]

The Postmaster General was vested with no discretionary authority to ignore a ministerial duty required by law.[127] The Court further held that the Take Care Clause was not a dispensing power.[128] *Kendall* held that the Take Care Clause did not grant a broad suspension power akin to the former powers of the King of England, but it recognized broad executive discretion for non-ministerial acts.[129] *Marbury* and *Kendall* stand for the proposition that the Take Care Clause requires that the President cannot ignore ministerial duties imposed by Congress, while discretionary duties remain under the control of the President.

E. Summarizing the Historical Foundation

The Framers intended to create a strong executive after witnessing the repeated failures of the Articles of Confederation and the states to wield effective executive power. Wilson and Gouverneur Morris, the two principal drafters of Article II, were among the strongest supporters of a strong national government. They created a single president vested with a broad grant of executive power qualified by a duty to faithfully execute the law. As understood by the Framers and later interpreted by the Supreme Court, the Take Care Clause prohibited a President from ignoring acts of the legislature akin to the royal prerogatives held by the English monarchy.[130] However, the Framers also understood that executing the law implied discretion, otherwise there would have been no need to ensure the independence of the executive from the legislature. As long as a congressional act grants discretionary authority, rather than creating a ministerial duty or cabining the President's discretion through guidelines as will be explored in Part III, the President can execute the law as he sees fit.

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126 Kendall, 37 U.S. at 610 (emphasis added).

127 *Id.* at 613.

128 *See id.* ("To 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.").

129 *Id.* at 610–13.

130 *See* Delahunty & Yoo, *supra* note 2, at 807–08 (linking the Take Care Clause to the English Bill of Rights). In their opposition to prosecutorial discretion, Delahunty and Yoo assume that there is law to suspend and dispense; however, enforcement actions are unique because they are usually committed to agency discretion by law. Heckler v. Chaney, 470 U.S. 821, 831 (1985). *See* discussion *infra* Part III.B.

II. THE TAKE CARE CLAUSE AND PROSECUTORIAL DISCRETION

By virtue of the Vesting Clause in Article II, the President is granted the power to execute the law, which means law enforcement. *Johnson's Dictionary*, published contemporaneously with the Revolutionary period, defined "executive" as "having the power to put in act the laws."[131] Likewise, the Framers understood executive power to include law enforcement.[132] This may require the President to use his executive authority to initiate, stop, or restrain execution of a law.[133] The doctrine of prosecutorial discretion did not fully emerge until after advancements in communication and the expansion of the federal government following the Civil War, but presidents since the founding wielded prosecutorial discretion.

A. The Founding Generation's Approach to Prosecutorial Discretion

Presidents starting with George Washington believed that they have the discretion to enforce the law. Critics of prosecutorial discretion point out that executive oversight of law enforcement has origins that are more recent.[134] Harold Krent has argued that executive control over law enforcement did not exist at the founding, since Congress did not provide the Attorney General with any mechanism to oversee federal district attorneys in the Judiciary Act of 1789.[135] Executive branch officials repeatedly asked for oversight authority, but Congress denied authority until the Civil War.[136] This account ignores the fact that early presidents since Washington and Jefferson believed that they had a *constitutional* rather than a statutory authority to direct federal district attorneys.[137] President Washington occasionally issued instructions directly to the district attorneys with a citation to the Take Care Clause or the Vesting Clause.[138] During the Whiskey Rebellion, President Washington directed his Attorney General to

131 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

132 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010) (quoting Madison, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws"); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 1701, 1735 (2005) (noting that Wilson believed that the ability to execute the law and control its execution by officers was the defining trait of a chief executive).

133 Prakash, *supra* note 132, at 546.

134 Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989).

135 *Id.*

136 *Id.* at 287–89.

137 Prakash, *The Chief Prosecutor*, *supra* note 132, at 553.

138 *Id.*

supervise the indictment of individuals involved in the uprising.[139] However, he also instructed the district attorney to end prosecutions against two individuals who he believed were innocent.[140] President Washington ordered prosecutors to ignore noncitizen violators of the Neutrality Act of 1794 based on considerations of justice and equity.[141] All of these instances of prosecutorial discretion elicited no backlash from Congress or the judiciary, which Prakash cites as evidence that the other branches found nothing wrong with President Washington's exercise of enforcement discretion.[142]

Similarly, President Jefferson believed that he had enforcement discretion authority granted from the Constitution.[143] He strongly believed that the Alien and Sedition Acts were unconstitutional, and he directed the district attorneys to halt ongoing prosecutions.[144] President Jefferson justified his enforcement discretion:

> The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into legal train . . . . There appears to . . . be no weak part in any of these positions or inferences.[145]

President Jefferson understood that the President could readily intervene and direct enforcement actions to ensure faithful execution of the laws including the Constitution.[146] Both Presidents Washington and Jefferson did not believe that the absence of statutory authority

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139 CALABRESI & YOO, *supra* note 60, at 48.

140 Prakash, *The Chief Prosecutor*, *supra* note 132, at 554.

141 Price, *supra* note 26, at 728.

142 Prakash, *The Chief Prosecutor*, *supra* note 132, at 558.

143 President Jefferson usually premised his ability to use prosecutorial discretion on a theory of the presidential prerogative or duty to decline enforcement of laws that the President believes to be unconstitutional, rather than on a theory of general enforcement discretion. Delahunty & Yoo, *supra* note 2, at 813. However, President Jefferson expanded his use of prosecutorial discretion beyond constitutionalism concerns in the later years of his presidency, especially when enforcing the Embargo Act. CALABRESI & YOO, *supra* note 60, at 72–73.

144 Although the Sedition Act expired before Jefferson entered office, the expiration did not terminate any ongoing prosecutions. Prakash, *The Chief Prosecutor*, *supra* note 132, at 560–61.

145 Letter from Thomas Jefferson, Vice President of the U.S., to Edward Livingston, U.S. Attorney for the Dist. of N.Y. (Nov. 1, 1801), *available at* http://founders.archives.gov/documents/Jefferson/01-35-02-0451.

146 *See id.* (showing that President Jefferson believed the Executive could control prosecutions, but did not identify whether his enforcement discretion specifically came from the Vesting Clause or the Take Care Clause).

to direct or suspend law enforcement was problematic because they believed such authority was granted by the Constitution.[147]

B. The Modern Conception of Prosecutorial Discretion

The doctrine of prosecutorial discretion underwent a change during the nineteenth century as the federal government expanded. During the early nineteenth century, the federal district attorneys operated independently of Washington, D.C., except when the President or his Attorney General felt the need to intervene.[148] This framework made sense in an era when it was difficult to communicate detailed instructions in a timely manner.[149] Moreover, the Attorney General did not have an office in Washington, D.C. and only had one clerk until 1850, making oversight of all federal enforcement impractical.[150] The Attorney General was finally given supervisory authority over the federal district attorneys in 1861, and the Department of Justice ("DOJ") was established in 1870 incorporating the district attorneys (now called United States Attorneys).[151] Over the next century, federal prosecution was slowly centralized in DOJ headquarters.[152] Meanwhile, the federal criminal code rapidly expanded, resulting in a mismatch between the broad scope of federal law and the relatively small number of resources to enforce those laws.[153] In 1873, there were 183 separate offenses; that number exceeded 1000 offenses by 2009.[154] Since the DOJ can only prosecute a small fraction of the cases, prosecutorial discretion is frequently used to manage caseloads.[155]

Reflecting these changes, the federal courts cemented the executive branch's use of prosecutorial discretion and immunized it from judicial review. Courts have based prosecutorial discretion on a separation of powers argument recognizing that the Executive has wide

147 *See* Price, *supra* note 26, at 676 (suggesting that executive officials from the beginning recognized that discretionary authority to decline enforcement of federal statutes was derived from their executive role).

148 Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 392–93 (2009).

149 Prakash, *The Chief Prosecutor*, *supra* note 132, at 564.

150 Beale, *supra* note 148, at 394.

151 *Id.* at 395.

152 The period also saw the U.S. Attorneys lose their own prosecutorial discretion to DOJ executive officers in Washington, making it easier for the President and the Attorney General to control federal law enforcement. *Id.* at 398.

153 *Id.* at 400.

154 Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 7 (2009).

155 *See* Beale, *supra* note 148, at 400–01 (noting the use of discretion by prosecutors).

discretion, notwithstanding the duty of the Take Care Clause.[156] *United States v. Cox*, a Fifth Circuit case, is the most often cited case for this proposition.[157] The court held that a district court could not force a United States Attorney to sign an indictment.[158] In its discussion of prosecutorial discretion the court observed that "[t]he Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed."[159] Since the Attorney General is an officer of the executive department, he exercises discretion as to whether the case should be prosecuted.[160] Furthermore, "as an incident of the constitutional separation of powers . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[161] *Cox* establishes that prosecutorial discretion is an executive function derived from the Take Care Clause's faithful execution language, and courts cannot review a prosecutorial decision without violating separation of powers.

The Supreme Court took a similar approach, immunizing prosecutorial discretion from judicial review.[162] In *United States v. Nixon*, the Supreme Court bluntly stated that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[163] While the Court did not provide any more detail behind its statement, the Court elaborated later in *United States v. Armstrong*. The Attorney General has "broad discretion" to enforce federal criminal laws because he is designated by statute as the President's dele-

156 *See* Krauss, *supra* note 154, at 10–11 (noting that the Take Care Clause is the most widely cited constitutional text to support the doctrine that prosecutorial discretion is inherently an executive function immune from judicial review given the separation of powers doctrine).

157 *Id.*

158 United States v. Cox, 342 F.2d 167, 172 (5th Cir. 1965).

159 *Id.* at 171.

160 *Id.* Two years later, the Fifth Circuit held that prosecutorial discretion is always required, especially "when the interests of the nation require that a prosecution be foregone." Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967) (quoting *Cox*, 342 F.2d at 182 (Brown, J., concurring)).

161 *Cox*, 342 F.2d at 171.

162 A century before *Cox*, the Supreme Court recognized that the district attorney, as an executive officer, has absolute discretionary control over the prosecution and may dismiss the case without review by the court. The Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868).

163 United States v. Nixon, 418 U.S. 683, 693 (1974) (citing *Cox*, 342 F.2d at 171; *The Confiscation Cases*, 74 U.S. (7 Wall.) at 457).

gate to take care that the laws are faithfully executed.[164] The decision to prosecute is left to the Attorney General's discretion and not subject to judicial review because it is within the "special province" of the Executive.[165] By the 1980s and 1990s, prosecutorial discretion within the criminal law context was widely accepted by the courts as a valid exercise of executive power under the Take Care Clause.

C. Summarizing the Development of Prosecutorial Discretion

Prosecutorial discretion has its roots in the founding. Presidents Washington and Jefferson repeatedly intervened in prosecutions out of concern for equity or even policy preference. They believed that their authority to direct prosecutions came from the Constitution. This view was adopted by the courts developing the modern doctrine of prosecutorial discretion where the Executive has near complete discretion to determine when and how to prosecute violations of federal law. Just as the doctrine developed in response to the growth of federal criminal statutes after the Civil War, it was only a matter of time before prosecutorial discretion became a frequent tool of executive branch officials in reaction to the expansion of the administrative state after the New Deal.

III. THE TAKE CARE CLAUSE AND NONENFORCEMENT DISCRETION

While prosecutorial discretion in the criminal law context is long recognized, prosecutorial discretion or enforcement discretion in the civil context is a more recent, but still well established, development. Enforcement discretion was not particularly necessary in the civil context until the rapid growth of the federal government and administrative agencies during the twentieth century.[166] With the adoption of the Administrative Procedure Act ("APA") in 1946, enforcement

164 United States v. Armstrong, 517 U.S. 456, 464 (1996); *see also* Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that the government has broad discretion over whom to prosecute); United States v. Goodwin, 457 U.S., 368, 380, n.11 (1982) (noting that selective enforcement is not a constitutional violation as long as it is not based on race, religion, or some other arbitrary classification).

165 *Id.* (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)). However, the immunity is qualified subject to certain restraints such as due process and equal protection. *See* United States v. Batchelder, 442 U.S. 114, 123–24 (1979) (holding that the government has absolute discretion to prosecute "so long as it does not discriminate against any class of defendants"). Other constraints will be discussed in Part III.

166 There is some historical precedent for the use of prosecutorial discretion in the civil context. *See The Confiscation Cases*, 74 U.S. (7 Wall.) at 454 (involving the use of prosecutorial discretion regarding the condemnation of property used against the United States during the Civil War).

discretion was implicitly endorsed, as Section 701(a)(2) denied judicial review for agency actions "committed to agency discretion by law."[167] With more government programs than resources available, under-enforcement (including nonenforcement) became a tool in the arsenal of presidents set on deregulation.[168] *Heckler v. Chaney*, decided in 1985, is the seminal case linking executive enforcement discretion in the criminal context to the civil context and creating a presumption of no judicial review for agency nonenforcement decisions unless Congress has cabined the agency's discretion through statutory guidelines or mandatory language.[169]

A. The Run-Up to Chaney

The D.C. Circuit addressed the connection between prosecutorial discretion and civil enforcement in isolated cases such as *Adams v. Richardson*. That case involved a challenge against the Secretary of Health, Education, and Welfare ("HEW") for failing to take enforcement actions to end segregation in public schools receiving federal funds.[170] HEW attempted to liken its enforcement policy to the prosecutorial discretion of the Attorney General, but the court found the specific facts of the case distinguishable from prosecutorial discretion in the criminal law context.[171] The court found that Title VI of the Civil Rights Act of 1964 established "specific enforcement procedures," making Section 701(a)(2) of the APA inapplicable since there

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167 5 U.S.C. § 701(a)(2). The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* interpreted this to mean instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 212 (1945)).

168 President Ronald Reagan refused to enforce civil rights laws, President George H.W. Bush delayed implementation of environmental statutes, and President George W. Bush relaxed environmental rules. Cheh, *supra* note 118at 266.

169 *See* Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Action*, 50 U. RICH. L. REV. 665, 673 (2016) (noting that *Chaney* is the leading case on prosecutorial discretion within the administrative law context); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1239 (2010) (recognizing that *Chaney* linked prosecutorial discretion in criminal law to administrative law); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 485 (2008) (noting the volume of citations to *Heckler v. Chaney*); Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN L. REV. 131, 134 (1992) (arguing that *Chaney* represented a turning point in the recognition of prosecutorial discretion in the administrative law context).

170 Adams v. Richardson, 480 F.2d 1159, 1160-61 (D.C. Cir. 1973).

171 *Id.* at 1162.

was law to apply.[172] More importantly, the court found that the facts of the case did not make it a pure enforcement discretion case since HEW was affirmatively providing funds to civil rights violators (contrary to the statute) rather than merely declining to prosecute civil rights abusers.[173] *Adams* acknowledged the similarity between criminal prosecutorial discretion and civil enforcement discretion, but the court declined to find that HEW had enforcement discretion because the statute was clear in mandating the means of enforcement.[174]

B. The Heckler v. Chaney *Decision*

After *Adams*, *Chaney* significantly altered the scope of judicial review over nonenforcement decisions and expanded the underlying support for nonenforcement discretion in the civil context. Inmates on death row sued the Food and Drug Administration ("FDA") to take enforcement action to prevent certain legal injection drugs to be used in executions.[175] The petitioners argued that the drugs had not been tested and labeled for use in human executions contrary to provisions of the Food, Drug, and Cosmetic Act.[176] The FDA declined to act, arguing that it had discretion not to act unless there was "a serious danger to the public health or a blatant scheme to defraud."[177]

Writing for the majority, Justice Rehnquist found that there was no law to apply in enforcement decisions, making them presumably immune to judicial review under the APA.[178] Justice Rehnquist tied civil enforcement discretion to criminal prosecutorial discretion. He observed that it was well-established precedent that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[179] An agency deserves discretion and immunity from judicial review in part because decisions not to enforce often involve balancing factors that are within the agency's expertise.[180] The agency is best placed to determine enforcement priorities, the likelihood

172 *Id.; see also* 42 U.S.C. § 2000d-1 (setting enforcement procedures such as making findings on the record and providing for a hearing).

173 The language of the court suggests that this was dispositive of the case. *Id.*

174 *Id.* Thus, the case is consistent with *Overton Park*, 401 U.S. at 410 (discussing the "no law to apply" standard).

175 Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 661 (1985); *see also* Heckler v. Chaney, 470 U.S. 821, 823 (1985) (summarizing the facts).

176 Sunstein, *supra* note 175, at 661.

177 *Chaney*, 470 U.S. at 824–25.

178 *Id.* at 837–38; *see also* Sunstein, *supra* note 175, at 662 (discussing the holding).

179 *Chaney*, 470 U.S. at 831.

180 *Id.*

of enforcement success, how the enforcement action fits within the agency's policies, and whether the agency has the resources to enforce in the first place.[181] Justice Rehnquist recognized that an agency's refusal to enforce shares many of the characteristics of a prosecutor's decision not to indict.[182] Just as past courts premised prosecutorial discretion on the Take Care Clause, Justice Rehnquist linked civil enforcement discretion to the President's duty to faithfully execute the laws establishing a constitutional basis for nonenforcement.[183]

The Court in *Chaney* affirmed earlier cases that there was a distinction between discretionary acts and mandatory duties.[184] Like *Marbury* and *Kendall*, the *Chaney* Court found a dividing line between statutes which imposed a mandatory duty on the Executive and statutes that left discretion to the Executive.[185] Since there is no law to apply in the latter, only the former can be reviewed by the courts.[186] In the most recent nonenforcement case to reach a circuit court, the D.C. Circuit reaffirmed the discretionary-mandatory distinction established by the Supreme Court.[187] The court observed that the President can only use prosecutorial discretion in enforcement actions.[188] Prosecutorial discretion cannot be used to ignore a statutory obligation or mandate such as a requirement to issue rules, pay benefits, or administer statutory programs.[189] After *Chaney*, the courts have given the President significant deference over discretionary actions such as enforcement, so long as Congress does not establish any mandatory duties.[190]

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181 *Id.*

182 *Id.* at 832.

183 *Id.* Justice Rehnquist found constitutional support for enforcement discretion in the Take Care Clause, but the holding in *Chaney* was also premised on the APA's § 701 since enforcement decisions were actions committed to agency discretion unless otherwise indicated by Congress. *Id.* at 838.

184 *Id.* at 837.

185 *See supra* pp. 1524–26.

186 Heckler v. Chaney, 470 U.S. 821, 838 (1985).

187 *In re* Aiken Cnty., 725 F.3d 255, 266 (D.C. Cir. 2013). The case considered whether the Nuclear Regulatory Commission ("NRC") could refuse to comply with the Nuclear Waste Policy Act requiring the NRC to consider the Department of Energy's license to store nuclear waste at Yucca Mountain. *Id.* at 384.

188 *Id.* Judge Kavanaugh heavily relied upon the Pardon Power to defend prosecutorial discretion rather than a pure Take Care Clause analysis. *See id.* at 263–64 (discussing how the Pardon Power allows the President to moderate the law and under-enforce a statute to protect individual liberty).

189 *See id.* at 266 ("[P]rosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch.").

190 *See* Biber, *supra* note 169, at 485, n.89 (noting that *Chaney* has been cited hundreds of times by federal appellate courts).

C. *Limits to Nonenforcement Discretion*

Chaney established a broad basis for nonenforcement discretion so long as there is no law to apply; however, it also set certain limits that differentiate it from the near absolute discretion held by the Executive in the criminal context. The discretion held by the Executive in the civil context is rebuttable under two circumstances: (1) Congress has limited the Executive's discretion by setting substantive priorities or circumscribing how an agency can discriminate among issues or cases; or (2) the Executive has adopted a general policy that is so extreme as to "amount to an abdication of its statutory responsibilities."[191]

Congress can restrict executive nonenforcement discretion through statutory guidelines that the President must follow.[192] The President cannot freely "disregard legislative direction in the statutory scheme that the agency administers."[193] Statutory deadlines that compel the Executive to act by a certain date are the simplest examples of statutory guidelines.[194] Other guidelines include substantive priorities such as factors that the Executive must consider.[195] Statutory guidelines rebut the presumption that there is no law to apply, but *Chaney* recognized that it is difficult to determine exactly when Congress has left an issue to agency discretion.[196] Thus, nonenforcement discretion analysis becomes a task of statutory interpretation to determine if the statute is clear in mandating action or otherwise circumscribing how the Executive can employ its discretion.[197]

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191 *Chaney*, 470 U.S. at 833 & n.4. There appears to be overlap between the two circumstances since a case involving the Executive disregarding statutory guidelines would amount to an abdication.

192 Subject to limitations that will be discussed in Part IV.

193 *Chaney*, 470 U.S. at 833; *see* Sunstein, *supra* note 175, at 670 (finding that the Take Care Clause does not allow the President to decline enforcement of laws that he does not like).

194 Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 177 (2014). For example, "The Secretary shall enforce violations of the provisions in this statute beginning January 1, 2016."

195 *Chaney*, 470 at 833; *see also Adams*, 480 F.2d at 1162–63 (holding that the plain language of the statute clearly created an affirmative enforcement duty that could not be ignored by the agency). For example, "The Secretary shall consider X and Y in enforcing violations of the provisions in this statute."

196 *Chaney*, 470 U.S. at 833 ("How to determine when Congress has done so is the question left open by *Overton Park*.").

197 As will be explored in Part IV, even statutory guidance or other mandatory commands can be subject to discretion in certain circumstances. *See* Sunstein & Vermeule, *supra* note 194, at 177–78 (noting that resource scarcity may prevent an agency acting as Congress directed).

Under a second limitation imposed by *Chaney*, the Executive cannot adopt a general policy of nonenforcement that "is so extreme as to amount to an abdication of its statutory responsibilities."[198] The Court did not elaborate other than to cite *Adams v. Richardson* for the proposition that the Executive cannot ignore a statute that establishes a clear mandatory or ministerial duty.[199] Below this extreme position, the lower courts and scholars have struggled to determine the scope of an "abdication."[200] Zachary Price argues that only case-by-case determinations are permitted since categorical, policy-based nonenforcement decisions amount to an abdication.[201] Lower courts agree that *Chaney* shields single-shot or case-by-case enforcement decisions from review.[202] An enforcement action that falls between a policy of ignoring a statutory mandate and a one-shot action presents a much more difficult case yet remains constitutional despite the argument presented by Price.[203]

Categorical nonenforcement decisions will be upheld where the nonenforcement decision is for a limited duration or where the policy does not eliminate case-by-case discretion. The Eighth Circuit in *Kenney v. Glickman* interpreted *Chaney* to foreclose an agency from establishing a *permanent* enforcement standard or policy.[204] The D.C. Circuit in *Schering Corp. v. Heckler* found that a delay of enforcement activities "falls squarely within the confines of *Chaney*."[205] The FDA decided to delay enforcement against a pharmaceutical company for eighteen months pending review of whether the company's drug was subject to the Federal Food, Drug, and Cosmetic Act.[206] While *Schering Corp.* was a one-shot nonenforcement decision, Sunstein and

198 *Chaney*, 470 U.S. at 833 n.4.

199 The Court in *Chaney* declined to determine whether judicial review would be available even in a situation similar to *Adams*, except noting that a statutory mandate or other enforcement guidelines would suggest that the action was not committed to agency discretion. *Id.*

200 Sunstein & Vermeule, *supra* note 194, at 185.

201 *See* Price, *supra* note 26, at 675 (discussing categorical nonenforcement in the context of congressional primacy).

202 *See* Kenney v. Glickman, 96 F.2d 1118, 1123 (8th Cir. 1996) ("This language suggests that *Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards."); Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 676 (D.C. Cir. 1994) (finding no basis for judicial review of single-shot nonenforcement decisions).

203 Recently, in dicta, the D.C. Circuit found a broad basis for the President to exercise enforcement discretion including categorical or policy-based nonenforcement. *In re* Aiken Cnty., 725 F.3d 255, 266 (D.C. Cir. 2013).

204 *Kenney*, 96 F.3d at 1123.

205 779 F.2d 683, 685 (D.C. Cir. 1985).

206 *Id.*

Vermeule found that the case law suggests that a temporary moratorium from enforcing discretionary duties would not amount to an abdication.[207]

The D.C. Circuit has found that nonenforcement policies that did not restrain individual discretion would not constitute an abdication of a statutory responsibility. In *Safe Energy Coalition of Michigan v. United States Nuclear Regulatory Commission*, the court held that the Nuclear Regulatory Commission's opinion about nonenforcement of certain quality assurance regulations did not require mandatory compliance; therefore, it did not amount to an abdication.[208] The problem with general policies of nonenforcement is that they often look like legislative rulemaking in violation of the APA.[209] Courts, however, have found that non-binding agency general statements of policy do not amount to legislative rules.[210] Thus, the Executive can take a categorical approach to nonenforcement so long as it does not remove the possibility of case-by-case discretion. In defending the legality of the November 2014 immigration decisions, the Office of Legal Counsel argued that general policies of nonenforcement that "merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases" would not be an abdication of an agency's statutory responsibilities.[211] A policy of nonenforcement is consistent with *Chaney* so long as it does not create a binding duty on agency officers executing the law by removing their individual enforcement discretion.

D. Summarizing Nonenforcement Discretion after Chaney

Chaney firmly established that nonenforcement discretion of civil statutes is a valid exercise of executive power akin to prosecutorial

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207 Sunstein & Vermeule, *supra* note 194, at 193.

208 Safe Energy Coal. of Mich. v. U.S. Nuclear Regulatory Comm'n, 866 F.2d 1473, 1477 (D.C. Cir. 1989).

209 *See* Crowley Caribbean Transp. v. Pena, 37 F.3d 671, 676–77 (D.C. Cir. 1994) (finding that general statements are more likely to include interpretations of statutes rather than a factual assessment that is associated with one-shot enforcement actions); Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 171 (1996) (discussing the connection between non-enforcement policies and enforcement guidelines that the agency treats as "binding" in the context of rulemaking subject to § 553 of the APA).

210 *See* U.S. Tel. Ass'n. v. FCC, 28 F.2d 1232, 1235 (D.C. Cir. 1994) (finding that the action was not a general statement of policy because it created a binding framework of penalties); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 948 (D.C. Cir. 1987) (concluding that the FDA's policy had binding effect making it a legislative rule requiring § 553 notice-and-comment procedures).

211 The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 7 (2014).

discretion. The Court found authority for enforcement discretion partially in the Take Care Clause, insulating nonenforcement decisions from judicial review.[212] The President has broad nonenforcement discretion as long as there is no law to apply unless Congress has established clear statutory enforcement guidelines. However, the restrictions on the discretion identified by *Chaney* are weaker than they may seem on paper. As will be explored in the next part, a President can ignore mandatory duties created by Congress when the duty is unconstitutional or when Congress has failed to allocate resources. Finally, the "abdication of a statutory responsibility" standard has only been used to invalidate executive discretion when the Executive ignored clear, mandatory statutory language as in *Adams*.[213] Anything less, including temporary enforcement delays or non-binding general policies, is a valid exercise of nonenforcement discretion.

IV. EXCEPTIONS TO ENFORCING MANDATORY DUTIES: UNCONSTITUTIONAL STATUTES AND RESOURCE SCARCITY

Even mandatory statutory duties do not need to be enforced in every instance. As established in the previous part, Congress can essentially convert a discretionary duty into a mandatory duty by including enforcement guidelines. Mandatory duties must be met by the Executive, as held in *Marbury* and *Kendall*.[214] However, Presidents, courts, and scholars have long recognized that mandatory duties can be defeasible.[215] Most recently in *In re Aiken County*, the D.C. Circuit concluded that the President can decline to follow a statutory man-

212 The Court connected enforcement discretion to the Take Care Clause:

> [A]n agency's refusal to institute proceedings shares to some extent the characters of the decision of a prosecutor in the Executive Branch not to indict-a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

Heckler v. Chaney, 470 U.S. 821, 832 (1985) (citing U.S. CONST. art II, § 3). However, the Court grounded much of its reasoning in the APA. *Id.* at 837.

213 *See, e.g.*, Edison Elec. Inst. v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993) (finding that the EPA interpreted the law to change the substantive requirements of the law); Nat'l. Wildlife Fed. V. EPA, 980 F.2d 765, 773–74 (D.C. Cir. 1992) (concluding that there was law to apply precluding agency discretion).

214 *See supra* text accompanying notes 115 and 129.

215 *See* Delahunty & Yoo, *supra* note 2, at 835 (recognizing that the President can decline to enforce a law in a number of circumstances).

date if the statute is unconstitutional or Congress has failed to allocate funds.[216]

A. Unconstitutional Statutes

The President can decline to enforce a statute imposing a mandatory or ministerial duty that he believes to be unconstitutional.[217] The Take Care Clause creates a duty to enforce the laws, which includes the Constitution.[218] Since the President is charged with enforcing the law and the Constitution is superior to laws passed by Congress, the President must favor the Constitution over the statute.[219] Delahunty and Yoo argue that an unconstitutional act of Congress is void and cannot be law; thus, the President is under no obligation to enforce the act of Congress.[220] The authority to disregard unconstitutional statutes also derives from the presidential oath.[221] The oath prohibits the President from enforcing an unconstitutional statute since he would be a participant in violating the Constitution.[222] President Jefferson refused to enforce the Alien and Sedition Acts because he believed that the Acts were unconstitutional and infringed on individual rights.[223] Taking a more limited perspective, some scholars have pro-

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216 *In re* Aiken Cnty., 725 F.3d 255, 259 (D.C. Cir. 2013); *see also* Delahunty & Yoo, *supra* note 2, at 836, 845 (finding no executive nonenforcement power but conceding that the Executive can decline to enforce a statute if it is unconstitutional or Congress has failed to provide sufficient resources).

217 *See* YOO, *supra* note 31, at 45–46 (arguing that the refusal to enforce an unconstitutional statute derives from the President's control over law enforcement); Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, But Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 71 (2011) (finding that the President has a constitutional basis to decline enforcement of unconstitutional statutes); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1617 (2008) (arguing that the President has a duty to disregard unconstitutional statutes); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 411 (2014) (declining to enforce an unconstitutional law is an important feature of the Madisonian system of checks and balances).

218 Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, *supra* note 217, at 1627 ("Per the Faithful Execution Clause, which requires him to 'take Care that the Laws be faithfully executed,' the President has a duty to enforce federal law, including the Constitution."). *See also In re Aiken Cnty.*, 725 F.3d at 261 (noting that the Take Care Clause's reference to "Laws" includes the Constitution, which is superior to a statute).

219 *Id.*

220 Delahunty & Yoo, *supra* note 2, at 836.

221 *See* U.S. CONST. art. II, § 1, cl. 8 ("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.").

222 Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, *supra* note 217, at 1629.

223 President Jefferson even believed that a court decision finding a statute to be constitutional did not constrain his discretion in enforcing the statute if he believed the statute was unconstitutional. YOO, *supra* note 31, at 106–07. *But see In re Aiken Cnty.*, 725 F.3d at 259 (finding that the President can decline to enforce a mandatory duty on constitutional

posed a structural argument that the President has the authority to refuse enforcement of a statute that infringes on his own powers prescribed by the Constitution.[224] Calabresi and Prakash argue that requiring the President to enforce unconstitutional statutes would undermine the separation of powers envisioned by the Framers during the Constitutional Convention.[225] The President can (and scholars such as Prakash argue "must") decline enforcement of unconstitutional statutes even when they impose mandatory or ministerial duties in order to uphold the Constitution.[226]

B. Resource Scarcity

The President may insert discretion into a mandatory statutory scheme when Congress fails to allocate sufficient funds. The President cannot perform the impossible, and if Congress has failed to make the necessary appropriations then the President is excused from fully executing the letter of the law.[227] Without adequate funding, the law becomes at odds with itself, since the Executive cannot do what Congress directed.[228] In such cases, Sunstein and Vermeule argue, the courts "must recognize a degree of flexibility."[229] However, the Executive cannot completely ignore a statutory mandate only because Congress failed to appropriate the necessary funds.[230] In the absence of full funding, the Executive is still required to effectuate the statutory scheme within the funding constraints.[231] In *In re Aiken County*, the D.C. Circuit found that the NRC had to complete the licensing process for the Yucca Mountain project, a ministerial duty,

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grounds as long as a final order by the court has not rejected the claim of unconstitutionality).

224 *See* Calabresi & Prakash, *supra* note 62, at 621–22 (arguing that the President has the means to refuse enforcement of laws that usurp his constitutional powers).

225 *Id.* at 621–24; *see also supra* text accompanying note 95 (discussing how Wilson did not want the Executive to become a "mere creature" of the legislature).

226 Calabresi & Prakash, *supra* note 62, at 621; *see also* Delahunty & Yoo, *supra* note 2, at 836 (arguing that the President has a duty to enforce the Constitution, which is a more important duty than enforcing an (unconstitutional) statute).

227 Delahunty & Yoo, *supra* note 2, at 845.

228 Sunstein & Vermeule, *supra* note 194, at 177–79.

229 *Id.* at 178.

230 *In re* Aiken Cnty., 725 F.3d 255, 260 (D.C. Cir. 2013).

231 City of Los Angeles v. Adams, 556 F.2d 40, 51 (D.C. Cir. 1977); *see also* Sunstein & Vermeule, *supra* note 194, at 180 (noting that given a conflict between resource constraints and a statutory deadline, the deadline has priority and the agency should try its best to effectuate the statute). *But see In re Aiken Cnty.*, 725 F.3d at 270 (Garland, C.J., dissenting) (finding that partial application of the statute, given the resource constraints, would lead to bad policy).

even in the absence of full funding from Congress.[232] The NRC could only stop the licensing process if there were no appropriated funds remaining.[233] In the mandatory statutory duty context, resource constraints is a limited exception to the general rule that the President must enforce the law. The President may exercise discretion, but he must apply the law to the full extent allowable by funding.

V. APPLYING THE EXECUTIVE NONENFORCEMENT DISCRETION FRAMEWORK TO THE OBAMA ADMINISTRATION DECISIONS

The President has broad nonenforcement discretion as long as Congress has not established any mandatory guidelines to restrict his discretion. Whether the President's use of nonenforcement discretion is constitutional is a two-step process. First, it must be determined whether the action in question is an enforcement action of the type protected by *Chaney* and akin to prosecutorial discretion. Ministerial or other mandatory duties imposed by Congress are not insulated from judicial review by *Chaney*. Second, the inquiry must determine whether the statute includes any mandatory language or statutory guidelines that would restrict or remove the President's discretion. If the action is a discretionary enforcement action without any law to apply, then the Executive is free to not enforce the law. Under this analysis, the delay in enforcing the ACA employer mandate and the policy announced about immigration enforcement are both valid exercises of executive nonenforcement discretion.

A. The ACA and the Employer Mandate

The delay of the ACA's employer mandate is a valid exercise of executive nonenforcement discretion and presents an easy case. The employer mandate is a penalty placed on certain employers for failing to provide health insurance to their employees.[234] Enforcing a penalty is an enforcement action. The statute contains no mandatory language other than to define large employers as businesses that employ over fifty workers and provide how the penalty should be calculated.[235] Congress did not direct or constrain how the Executive could enforce the penalty. The statute contains an effective date provision, but the provision merely says that employers would be subject

232 *In re Aiken Cnty.*, 725 F.3d at 267.
233 *Id.*
234 26 U.S.C. § 4980H(a) (2015).
235 *Id.*

to the penalty starting after December 31, 2013; it is not a mandatory command to the Treasury Secretary to begin enforcement on that date.[236] As in *Kenney v. Glickman*, this is only a temporary delay rather than a permanent decision not to enforce the law. The decision was a delay in order to develop better enforcement procedures rather than a permanent decision not to enforce the law.[237] The delay of the employer mandate is entirely within the President's discretion, making it a valid exercise of executive nonenforcement discretion.

B. The Immigration Decisions

The immigration decisions present a more difficult case due to the scope of the decisions and the complex nature of the underlying immigration statutes. The President's orders are enforcement actions since they involve decisions of enforcing the immigration statutes. Removal proceedings share more in common with a prosecutor's decision to indict than the decision to delay the ACA employer mandate.[238] The Supreme Court in *Arizona v. United States* recognized that executive officials have broad discretion over immigration enforcement.[239] Federal officials have the discretion even to decide whether to pursue removal and to determine the relief that would allow undocumented aliens to remain in the country.[240] President Obama's immigration decisions comprise two distinct actions: (1) prioritizing the removal of certain aliens over others; and (2) extending deferred action to certain aliens who are parents of legally present children.

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236 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1513(d), 124 St. 119, 256 (codified as amended in scattered sections of 26 U.S.C.).

237 *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8,545 (implementing the delay); *see also* Press Release, Department of the Treasury, Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015 (announcing the delay); Kenney v. Glickman, 96 F.2d 1118, 1123 (8th Cir. 1996) (stating that *permanent* enforcement policies would amount to abdications of statutory responsibilities under *Chaney*).

238 *See* 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. at 3 (2014) (detailing removal procedures and the role of the Secretary of DHS in deciding whether to order removal).

239 132 S. Ct. 2492, 2499 (2012).

240 *Id.*; *see also* 6 U.S.C. § 202 ("The Secretary . . . shall be responsible for . . . establishing national immigration enforcement *policies and priorities*.") (emphasis added); 8 U.S.C. § 1103(a)(3) ("[The Secretary of DHS] shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.").

1. *Removal Prioritization*

As part of the immigration nonenforcement actions, DHS announced that it would focus its enforcement actions on high priority individuals.[241] The enforcement plan has three priorities. The highest priority are aliens who are threats to national security and criminals who committed felonies, followed by aliens who committed misdemeanors or entered the United States after January 1, 2014, and finally, aliens who were issued a final order of removal after December 31, 2013.[242] This prioritization is valid so long as it is not contrary to any direction from Congress.

Unlike the ACA delay, Congress has established statutory guidelines and priorities that must be followed unless there is a constitutional issue or resource constraint.[243] DHS contends that Congress has only appropriated enough resources to remove fewer than 400,000 aliens each year out of a total population approximating 11.3 million undocumented aliens.[244] It can under-enforce the statutory guidelines and insert its discretion so long as it uses available resources to effectuate the statutory scheme as fully as possible. DHS's prioritization roughly matches the statutory guidelines set in 8 U.S.C. § 1182(a). Under the statute, inadmissible aliens include individuals who are convicted criminals,[245] who pose a threat to national security or public health,[246] who are likely to become public charges,[247] or who are illegally present.[248] Similarly, 8 U.S.C. § 1227 sets classes of deportable aliens who can be removed at the discretion of the Secretary of DHS.[249] DHS's prioritization, while not as encompassing as the statute, mirrors the congressional guidelines by focusing on criminals and individuals who pose threats to national security.[250] In *Texas v.*

241 Memorandum from Jeh Charles Johnson for Thomas S. Winkowski, R. Gil Kerlikowske, Leon Rodriguez, Alan D. Bersin, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants at 3–4.

242 *Id.*

243 *See generally* Margulies, *supra* note 169 (discussing immigration law and nonenforcement).

244 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. at 9 (2014).

245 8 U.S.C. § 1182(a)(2).

246 8 U.S.C. § 1182(a)(1); 8 U.S.C. § 1182(a)(3).

247 8 U.S.C. § 1182(a)(4).

248 8 U.S.C. § 1182(a)(6).

249 8 U.S.C. § 1227. The classes mirror the categories listed in 8 U.S.C. § 1182(a) (e.g., criminals, threats to national security, etc.).

250 Memorandum from Jeh Charles Johnson for Thomas S. Winkowski, R. Gil Kerlikowske, Leon Rodriguez, Alan D. Bersin, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants at 3.

United States, the district court agreed with DHS, finding that determinations of how to prioritize limited resources were entirely within the Executive's discretion.[251] The removal prioritization decision is a valid exercise of nonenforcement discretion given limited resources, and it is consistent with the statutory guidelines.

2. *Deferred Action*

Deferred action is the second component of President Obama's immigration decisions and is the primary subject of the legal challenge against DHS in *Texas v. United States*. Deferred action is a form of administrative relief that allows DHS to defer the removal of an illegal alien for a period of time.[252] Versions of deferred action have existed since at least the 1960s to ameliorate harsh and unjust outcomes.[253] The November 2014 deferred action program expanded coverage of the 2012 DACA program for DREAMers and applied deferred action to individuals who have children in the United States who are citizens or lawful permanent residents, subject to certain conditions.[254]

Deferred action is a proper exercise of executive nonenforcement discretion. First, the policy is consistent with the statutory guidelines since an individual is only eligible for deferred action if they have a child who is a citizen or permanent resident, have continuously resided in the United States since January 1, 2010, and are not an enforcement priority.[255] The conditions in the 2014 deferred action program mirror the statutory scheme set by Congress in 8 U.S.C. § 1229b(b)(1).[256]

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251 86 F. Supp. 3d 591, 645 (S.D. Tex. 2015).

252 Memorandum from Jeh Charles Johnson for Leon Rodriguez, Thomas S. Winkowski, R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents at 2.

253 Texas v. United States, 86 F. Supp. 3d at 612.

254 Memorandum from Jeh Charles Johnson for Leon Rodriguez, Thomas S. Winkowski, R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents at 4. The conditions require that the individual has continuously resided in the United States since January 1, 2010, was physically present in the United States when the memorandum was issued (November 20, 2014), and is not a removal priority. *Id.*

255 *Compare id.*, *with* 8 U.S.C. § 1229b(b)(1), *and* 8 U.S.C. § 1182(a).

256 8 U.S.C. § 1229b(b)(1). The Fifth Circuit held, perhaps correctly, that the policy's continuous presence requirement is in conflict with the statutory guidance in 8 U.S.C. § 1229b(b)(1)(A), which requires continuous presence for ten years; thus, DHS exceeded

Second, the deferred action program is not an abdication of statutory responsibilities. The nonenforcement policy outlined in a memorandum from Secretary Jeh Johnson requires deferred action to be used on a case-by-case basis; thus, it is not binding and an abdication.[257] As held in *Safe Energy Coalition of Michigan v. United States Nuclear Regulatory Commission*, a nonenforcement policy is valid so long as it does not require mandatory compliance or restrict case-by-case discretion.[258] In the immigration context, "real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty."[259] By requiring case-by-case determinations, the 2014 deferred action program is more akin to a general statement of policy rather than a legislative rule since it does not mandate a finding of eligibility in every instance;[260] therefore, it is not an abdication despite being a categorical nonenforcement policy.

The State plaintiffs challenging DHS argued, and the Fifth Circuit agreed, that the 2014 deferred action program was not an exercise of nonenforcement discretion but an affirmative agency action.[261] Affirming the district court, the Fifth Circuit found that deferred action would affirmatively confer "lawful presence" status and associated benefits such as the ability to obtain Social Security numbers, work authorization permits, unemployment insurance, and driver's licenses.[262] Reminiscent of *Adams v. Richardson*, the Fifth Circuit held that by conferring eligibility for benefits the agency exercised its power such that it "can be reviewed to determine whether the agency ex-

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the statutory guidance. Texas v. United States, 809 F.3d at 180, *cert. granted*, 2016 WL 207257 (U.S. Jan. 19, 2016) (No. 15-674).

257 Memorandum from Jeh Johnson for Leon Rodriguez, Thomas S. Winkowski, R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents at 3–4.

258 866 F.2d 1473, 1478 (D.C. Cir. 1989).

259 Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997); *see also* Heckler v. Chaney, 470 U.S. 821, 834 (1985) ("The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to policy this aspect of their performance.").

260 Memorandum from Jeh Charles Johnson for Leon Rodriguez, Thomas S. Winkowski, R. Gil Kerlikowske, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents at 2–4. Judge King agreed with the DHS that the DAPA Memorandum still requires "discretionary judgments as to the application of the respective criteria to the facts of a particular case." Texas v. United States, 809 F.3d at 204 (5th Cir. 2015) (King, J., dissenting).

261 Texas v. United States, 809 F.3d 134 at 169.

262 *Id.* at 166. In dissent, Judge King disagreed saying that "lawful presence" does not confer "legal status" and it is not a change in designation. *Id.* at 199 (King, J., dissenting).

ceeded its statutory powers."[263] In *Adams*, the federal government provided funds to civil rights violators despite a statute prohibiting such action.[264] The 2014 deferred action program is distinguishable from *Adams* because granting deferred action does not directly convey any benefits or flout any statutes. The Fifth Circuit erred by conflating two separate actions. In the first action, DHS determines whether an individual is eligible for deferred action. Once an individual is granted deferred action, DHS can make a second decision to grant employment benefits pursuant to 8 U.S.C. § 1324a(h)(3).[265] The benefits are incidental to deferred action and are authorized from specific provisions of the Immigration and Nationality Act. Judge King made this exact point in her dissent in *Texas v. United States*. The Immigration and Nationality Act and its associated regulations grant the benefits, not the DAPA Memorandum.[266] In effect, the majority's interpretation would make any use of nonenforcement discretion subject to review if it triggered incidental benefits, which would swallow the *Chaney* doctrine.[267] Deferred action does not grant any benefits—it just provides temporary relief from removal, making it the type of nonenforcement action encompassed by *Chaney*.[268]

CONCLUSION

Executive nonenforcement discretion is well-founded in case law, history, and text, but it remains controversial because it can encompass sweeping executive power through selectivity in enforcement ac-

263 *Id.* at 168.

264 Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973).

265 "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." 8 U.S.C. § 1324a(h)(3)(2015). Prior to the enactment of this section in 1986, Immigration and Naturalization Services (INS) promulgated regulations allowing the Attorney General (now DHS) to grant employment authorization to individuals granted deferred action. 8 C.F.R. § 274a.12(c)(14). By enacting § 1324a(h)(3) and the amendments to the Immigration and Nationality Act (INA) in 1986, Congress did not remove the Attorney General Authority. 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. at 21, n.11 (2014). Thus, there is a grant of authority to the Executive in the INA allowing for deferred action recipients to receive employment authorization.

266 Texas v. United States, 809 F.3d 134 at 198 (King, J., dissenting)

267 *Id.* at 201 (King, J., dissenting).

268 If the State plaintiffs want to challenge the grant of benefits to illegal aliens then they should challenge § 274A(h)(3) of the INA and 8 C.F.R. § 274a.12(c)(14) as impermissible grants of legislative authority rather than challenge the Executive's discretion to cancel removal under deferred action.

tions. Prior to President Obama, nonenforcement discretion did not receive front-page attention on *The New York Times* in part because past decisions often involved non-politicized issues such as food and drug safety or nuclear regulation. President George W. Bush's use of nonenforcement discretion over environmental laws raised concerns among environmentalists but did not necessarily garner prominent national attention.[269] President Obama's decisions have been particularly controversial because they addressed the most maligned accomplishment of his presidency (health care) and one of the biggest political issues in current American politics (immigration). Furthermore, even DHS and the Office of Legal Counsel recognized that the immigration decisions were likely the broadest use of executive nonenforcement discretion by a President.[270]

Contrary to the arguments put forth by Price, the size of the nonenforcement decision is not determinative. The key question is whether the President has discretionary authority to enforce the law rather than mandatory requirements imposed by Congress. This grants the President considerable discretion, but the text of the Constitution and the understanding of the Framers supports this interpretation. The Framers did not intend to create an executive unable to resist and act independently of the legislature. Furthermore, early practice by Presidents Washington and Jefferson supported robust presidential authority and influence over law enforcement.

Such considerable presidential discretion is potentially troubling especially since the courts are unwilling to review nonenforcement discretion after *Chaney*, recognizing that such authority is an executive prerogative. It is easy to see how a President could abuse his enforcement discretion to under-enforce important environmental or public health laws.[271] However, the President's actions are constitutional as long as he avoids contradicting a statutory mandate. If the President is acting within his discretion, the issue is a political dispute between the executive and legislative branches. The Court in *Chaney* explicitly left such disputes for Congress to resolve.[272] Madison envi-

269 Deacon, *supra* note 6, at 807–16 (reviewing examples of nonenforcement by President George W. Bush).

270 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. at 30 (2014).

271 *See* Deacon, *supra* note 8, at 796 (arguing that nonenforcement discretion has been used as a deregulation tool).

272 *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985) ("[W]e essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable.").

sioned a system of checks and balances. President Obama has resorted to nonenforcement discretion precisely because Congress has been unable to pass legislation and unwilling to check the concentration of power in the Executive.[273] Executive nonenforcement discretion is constitutional. If Congress is concerned about executive discretion, then it should follow the instruction of *Chaney* and enact legislation rather than continuing the practice of abdicating power to the executive branch.

273 *See* Deacon, *supra* note 8, at 805 (noting the political obstacles that make nonenforcement appealing). The 112th and 113th Congresses have been the least productive in terms of legislative productivity in history. Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RESEARCH CENTER (Dec. 29, 2014), http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/. The 113th Congress only enacted 296 laws compared to over 700 during the 1970s. *Bills by Final Status: Statistics and Historical Comparison*, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics (last visited Jan. 17, 2015).