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FAITHFUL EXECUTION AND ENFORCEMENT  
DISCRETION

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## INTRODUCTION

On November 20, 2014, President Obama signaled a significant turn in U.S. immigration policy. Acknowledging Congress's failure to adopt a comprehensive overhaul of the nation's "broken immigration system," the President announced measures to "help make our immigration system more fair and more just."<sup>1</sup> The centerpiece of the announcement was a program allowing certain illegal immigrants with children who are U.S. citizens or lawful permanent residents "to apply to stay in this country temporarily without fear of deportation."<sup>2</sup> Secretary of Homeland Security Jeh Johnson issued a memorandum directing the head of U.S. Citizenship and Immigration Services to develop a process for such immigrants to seek a discretionary form of relief from deportation known as "deferred action."<sup>3</sup> Under the program, the parent of a U.S. citizen or lawful permanent resident would be eligible for deferred action if the parent (1) has resided continuously in the United States since before January 2010; (2) is not an enforcement priority under simultaneously issued Department of Homeland Security (DHS) guidance; and (3) presents "no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."<sup>4</sup> Johnson ordered U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officials to consider anyone they encounter for program eligibility, including individuals in custody or with pending removal cases, so as to "prevent the further expenditure of enforcement resources" on potential beneficiaries of deferred action.<sup>5</sup> A recipient of deferred action would be

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<sup>1</sup> Remarks on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 877 (Nov. 20, 2014), [hereinafter President's Address on Immigration].

<sup>2</sup> *Id.*

<sup>3</sup> Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf) [<https://perma.cc/RE6J-8URB>] [hereinafter Johnson Memorandum].

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 5.

considered “lawfully present in the United States”<sup>6</sup> for a period of three years, and would be “eligible to apply for work authorization” for that period.<sup>7</sup>

In announcing the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), the President asserted that his actions were “the same kinds of actions taken by Democratic and Republican presidents before me.”<sup>8</sup> Previously, however, the President had acknowledged that broad relief from deportation would require congressional action.<sup>9</sup> The Administration thus anticipated significant controversy over the program’s legality. The Justice Department’s Office of Legal Counsel (OLC) had prepared a thirty-three page opinion addressing the legal basis of DAPA, including elements of an earlier proposal that it concluded were beyond the President’s authority.<sup>10</sup> The administration released that opinion when it announced the program. Secretary Johnson’s implementing memorandum, moreover, sought to place the policy within a safe harbor from judicial review. Administrative enforcement discretion is an entrenched feature of our federal system—a tool that Democratic and Republican Presidents alike have used to accomplish policy objectives and one with which courts have been reluctant to interfere. The Johnson memorandum thus characterized DAPA as involving the exercise of “*prosecutorial discretion* through the use of deferred action, on a *case-by-case basis*.”<sup>11</sup>

The battle over DAPA’s legality moved quickly to the courts. A federal district court in Texas enjoined the implementation of the program,<sup>12</sup> and the U.S. Court of Appeals for the Fifth Circuit affirmed.<sup>13</sup> Both courts, however, skirted a key

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<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> President’s Address on Immigration, *supra* note 1.

<sup>9</sup> See, e.g., Glenn Kessler, *Obama’s Royal Flip-Flop on Using Executive Action on Illegal Immigration*, WASH. POST: FACT-CHECKER (Nov. 18, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration/> [https://perma.cc/9QPB-QE5D] (quoting President Obama as stating that expanded use of deferred action would amount to “ignoring the law in a way that I think would be very difficult to defend legally . . . . What I have said is that there is a path to get this done and that is through Congress.”). Although the President was responding to a question about deferred action for parents of noncitizen children who had themselves been granted deferred action, the President stated a general concern about “broadening” deferred action, arising from his “job in the executive branch . . . to carry out the laws that are passed.” *Id.*

<sup>10</sup> 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. (2014), 2014 OLC Lexis 2 [hereinafter OLC Opinion].

<sup>11</sup> Johnson Memorandum, *supra* note 3, at 4 (emphases added).

<sup>12</sup> *Texas v. United States*, 86 F. Supp. 3d 591, 677-78 (S.D. Tex. 2015) [hereinafter *Texas I*]. *But see* *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015) (dismissing challenge to DAPA for lack of standing).

<sup>13</sup> *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015) [hereinafter *Texas II*].

question about the Executive's authority to adopt DAPA.<sup>14</sup> DAPA's critics had argued not only that DHS's proposed deferred action program violated procedural requirements constraining agency action and substantive restrictions in the Immigration and Nationality Act (INA),<sup>15</sup> but also that the program violated the Constitution's admonishment that the President "shall take Care that the Laws be faithfully executed."<sup>16</sup> The lower courts did not address that claim. In granting certiorari in *United States v. Texas* to review the lower courts' determinations that DAPA is unlawful, however, the Supreme Court directed the parties to brief and argue "[w]hether the [DHS guidance on deferred action] violates the Take Care Clause of the Constitution, Article II, § 3."<sup>17</sup>

With a one-sentence *per curiam* opinion in *United States v. Texas*, an equally divided Supreme Court affirmed the Fifth Circuit's decision.<sup>18</sup> Although the Court did not reach the question of DAPA's constitutionality, DAPA provides an interesting lens for exploring the President's obligation of faithful execution. The text of the Faithful Execution Clause<sup>19</sup> frames two aspects of the debate over the scope of administrative enforcement discretion. First, one can view the clause as discretion-granting: in conferring or recognizing the President's power to "execute[]" the law, the clause seemingly embeds some flexibility to decide when and how to exercise that power. Second, one can view the clause as discretion-limiting: the clause calls for the President not merely to ensure that the laws be executed, but that they be "*faithfully*" executed.

This Article uses DAPA to explore the tension between the discretion-granting and discretion-limiting features of the Faithful Execution Clause. Guidance from the courts on the scope of administrative enforcement discretion is sparse, and likely to remain so. The OLC opinion on DAPA's legality attempted to develop a framework for determining when an exercise of enforcement authority breaches the Executive's constitutional obligations

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14 The district court concluded that DAPA was a substantive rule issued without the notice-and-comment procedures prescribed in the Administrative Procedure Act. *Texas I*, 86 F. Supp. 3d at 671. The court of appeals agreed, and held as an alternative basis of affirmance that DAPA violated the Immigration and Nationality Act. *Texas II*, 809 F.3d at 178, 186.

15 *Texas II*, 809 F.3d at 149 (reviewing assertions by a number of states challenging DAPA that the law was both procedurally and substantively unlawful under the APA).

16 U.S. CONST. art. II, § 3; *Texas II*, 809 F.3d at 149 ("[T]he states urged that DAPA was an abrogation of the President's constitutional duty . . .").

17 *United States v. Texas*, 136 S. Ct. 906 (Jan. 19, 2016) (No. 15-674) (mem.).

18 *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*) As of this writing, the United States' petition for rehearing remains pending.

19 I rely in this Article on Peter Shane's apt descriptive label, in lieu of the more conventional "Take Care Clause" label. See Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11081, 11102 (2000); see also Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 706 n.10 (describing "Faithful Execution Clause" label as an "unconventional" but "superior description of the clause").

of faithful execution. That framework embeds certain immigration-specific elements, but its potential relevance transcends the immigration context. It is worth asking, then, both what the Faithful Execution Clause means and whether the OLC framework properly measures and constrains the scope of administrative enforcement discretion.

The Faithful Execution Clause, I argue, has not and likely will not prove decisive in disputes in court over the scope of administrative enforcement discretion. That is not, however, because the Faithful Execution Clause does not constrain executive conduct. The clause demands that the President ensure that his subordinates act in good faith in enforcing the law. Whether the clause itself imposes a duty of good faith on the President's subordinates is a complicated question. Even if it does not impose such a duty, the clause necessarily requires that the President have the tools to do so.

This understanding of the Faithful Execution Clause calls into question certain aspects of OLC's framework for evaluating DAPA. First, OLC's framework for assessing administrative enforcement discretion collapses the line between constitutional law and ordinary law, and neglects the latter. While the framework does seek to test the substantive fit between DAPA and the INA, that analysis is necessary not (or not only) as part of an inquiry into whether DAPA is consistent with an obligation of faithful execution, but because the law otherwise requires the alignment of DAPA with the INA. Collapsing the constitutional and statutory layers of the analysis permits OLC to countenance significant departures from Congress's statutory scheme.

Second, although OLC's framework in some respects properly seeks to evaluate whether exercises of enforcement discretion are undertaken in good faith, the framework effectively creates a presumption of good faith even with respect to categorical exercises of enforcement discretion—i.e., those exercises of enforcement discretion that are most likely to conflict with a good-faith interpretation of the underlying statute. Third, even to the extent that the framework demands executive officials' good-faith interpretation of the underlying statute, the challenges of interpreting the statute at issue here—the INA—produce few constraints on executive action.

This Article proceeds as follows. Part I briefly describes the tool of deferred action in immigration law, its implementation in an earlier executive program, Deferred Action for Childhood Arrivals (DACA), and the proposed extension of deferred action that ultimately culminated in DAPA. Part I also outlines the statutory and regulatory backdrop governing benefits and work authorization for individuals who lack legal immigration status but whom immigration officials forbear from removing. Part II explores the analytic framework and key conclusions of the OLC opinion as to the latitude of the executive branch's enforcement discretion. Part III then examines the modest

textual, structural, and historical clues to the meaning of the Faithful Execution Clause. The Supreme Court has invoked the clause in a variety of contexts, and this Part considers the scope and significance of these cases for our understanding of the clause. Part III considers what constitutes faithful execution and by what mechanisms the duty the clause imposes carries to the President's subordinates. Part IV revisits the OLC framework in light of the understanding of the Faithful Execution Clause that Part III develops.

It is important to note that my analysis and conclusions address questions of presidential power and administrative enforcement discretion, not the merits of DAPA as a matter of policy. DAPA concerns a complex problem with compelling humanitarian dimensions. This Article does not seek to tackle that problem or to discount those dimensions. Rather, it seeks to address the questions of executive authority that surround, and will no doubt survive, DAPA.

## I. THE EXECUTIVE'S PATH TO DAPA

To understand the controversy surrounding the legality of DAPA, we must understand some basic features of federal immigration law. Federal law extensively regulates the status of immigrants in the United States, including by delineating who is entitled to remain in the United States and who is entitled to obtain work authorization or certain federal benefits. Below I separately explore the regulatory frameworks that bear upon two key elements of the DAPA guidance: DAPA's direction to immigration officials to forbear from removing unauthorized immigrants who meet certain criteria; and the manner in which DAPA links a decision not to remove an alien with eligibility for certain benefits and eligibility to seek work authorization.

### A. *Forbearance from Removal*

Section 212(a) of the Immigration and Nationality Act, as amended, identifies numerous grounds of "inadmissibility" to the United States, including immigration law violations.<sup>20</sup> In general, "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."<sup>21</sup> In other words, an alien who does not lawfully gain entry to the United States is inadmissible. A separate section of the INA, section 237, provides that inadmissible aliens—as well as lawfully admitted aliens who fail to maintain legal status—are subject to being deported from the United States.<sup>22</sup>

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<sup>20</sup> Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (2012) [hereinafter INA].

<sup>21</sup> *Id.* § 212(a)(6), 8 U.S.C. § 1182(a)(6).

<sup>22</sup> *Id.* § 237(a)(1), 8 U.S.C. § 1227(a)(1).

These seemingly straightforward concepts of inadmissibility and deportability do not tell the full story of the INA's applicability to unlawful immigrants. DHS estimates that the population of unauthorized immigrants in the United States exceeds 11 million.<sup>23</sup> By one estimate, removing the entire population of unlawful immigrants would cost the federal government \$94 billion.<sup>24</sup> DHS's budget permits removal of fewer than 400,000 unauthorized immigrants each year.<sup>25</sup> This gap between the INA's putative scope and its enforceable scope necessarily confers significant discretion on DHS officials to determine how to allocate resources toward removal.<sup>26</sup>

When DHS issued the DAPA guidance, it also issued a separate memorandum outlining its removal priorities.<sup>27</sup> That separate memorandum has gone unchallenged,<sup>28</sup> and there is little question that DHS has the power to establish enforcement priorities. If so, one must ask why DAPA's forbearance from removal is not simply a deprioritization of removal of a category of unlawful aliens—those who are parents of U.S. citizens or lawful permanent residents. The challenge to DAPA's legality depends in part on arguments about (1) how DAPA aligns with the statutory and extra-statutory mechanisms for suspending or delaying removal of unauthorized immigrants; and (2) whether DAPA collides with specific provisions of the INA that provide more restrictive avenues for parents of citizens and lawful permanent residents to achieve lawful status.

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<sup>23</sup> OLC Opinion, *supra* note 10, at 9.

<sup>24</sup> See Nomination of Hon. Julie L. Myers to Be Assistant Secretary, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security: Hearing Before the Comm. on Homeland Sec. & Gov't Affairs, 110th Cong. 11 (2008) (statement of Julie L. Myers) (responding to Senator Collins's inquiry on the cost of deportations).

<sup>25</sup> See OLC Opinion, *supra* note 10, at 9 (explaining that Congress appropriated resources to Immigration and Customs Enforcement for removal of fewer than 400,000 aliens).

<sup>26</sup> See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 131 (2015) [hereinafter Cox & Rodríguez II] (discussing "a profound mismatch between the law on the books and reality on the ground" in the immigration context); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 512-13 (2009) [hereinafter Cox & Rodríguez I] (noting that, although provisions on deportability "lay out clear rules that do not confer any de jure discretion on the Executive to determine who has lawful status and may therefore remain in the United States, in practice they delegate tremendous authority to the executive branch"); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 745 (2014) ("[T]he breadth and depth of substantive law . . . presumes a regime in which executive officials exercise discretion to moderate the rigors of statutory prohibitions, thereby creating a law on the ground that more closely approximates popular preferences than the law on the books.").

<sup>27</sup> Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, et al. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/9AE4-STKJ>].

<sup>28</sup> *Texas II*, 809 F.3d 134, 166 (5th Cir. 2015) ("[T]he states have not challenged the priority levels [Secretary Johnson] has established . . .").

### 1. Discretion to Delay or Suspend Removal

The INA incorporates a variety of mechanisms permitting executive officials to temporarily delay or suspend removal of unauthorized immigrants. Officials can “parole” an alien into the United States, without formally admitting the individual, “for urgent humanitarian reasons or significant public benefit.”<sup>29</sup> Likewise, the INA permits officials to grant “temporary protected status” to avoid returning individuals to a country in armed conflict or based on other extraordinary conditions.<sup>30</sup> Officials have used other discretionary mechanisms whose statutory pedigree is less clear, including deferred enforced departure<sup>31</sup> and extended voluntary departure.<sup>32</sup> The former involves deferred removal in cases in which a noncitizen’s return to his or her home country would have foreign policy implications.<sup>33</sup> Through the latter—a form of discretionary relief that is apparently no longer used—the Attorney General would declare a noncitizen removable and secure his or her agreement to depart the United States voluntarily, but would not impose a time limit for departure.<sup>34</sup> For example, through the Family Fairness program adopted in 1987<sup>35</sup> and expanded in 1990,<sup>36</sup> the Immigration and Naturalization Service (INS) granted voluntary departure to certain spouses and children of aliens who had received legal status under the Immigration Reform and Control Act of 1986.<sup>37</sup>

The particular form of discretionary relief at issue in DAPA is known as “deferred action.” This form of relief dates back to at least the early 1970s and was first used to delay departure in individual cases involving compelling humanitarian considerations.<sup>38</sup> More recently, immigration officials have used

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<sup>29</sup> INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (2012).

<sup>30</sup> *Id.* § 244(b)(1), 8 U.S.C. § 1254a(b)(1).

<sup>31</sup> *See, e.g.*, Memorandum from President Barack Obama to the Sec’y of Homeland Sec. (Sept. 26, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/26/presidential-memorandum-deferred-enforced-departure-liberians> [<https://perma.cc/HWB4-PPFB>] (invoking the President’s “constitutional authority to conduct the foreign relations of the United States” and extending deferred enforced departure for Liberians not eligible for temporary protected status under the INA).

<sup>32</sup> *See Cox & Rodríguez II, supra* note 26, at 122 (“The origins of, justifications for, and evolution of [extended voluntary departure] are somewhat obscure and poorly understood.”).

<sup>33</sup> *See* OLC Opinion, *supra* note 10, at 12 n.5 (explaining that deferred enforced departure may be granted to nationals of foreign states affected by extraordinary conditions); *Cox & Rodríguez II, supra* note 26, at 116 n.22 (“[P]residents since at least George H.W. Bush have halted the removal of nationals to their countries of origins where doing so would have foreign policy implications.”).

<sup>34</sup> *See* OLC Opinion, *supra* note 10, at 12 n.5.

<sup>35</sup> Alan Nelson, Comm’r, Immigration and Naturalization Service (INS), *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), *reprinted in* 64 INTERPRETER RELEASES, app. I at 1201.

<sup>36</sup> Gene McNary, Comm’r, INS, *Memorandum, Family Fairness: Guidelines for Voluntary Departure under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990), *reprinted in* 67 INTERPRETER RELEASES, app. I at 165.

<sup>37</sup> Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394.

<sup>38</sup> *See, e.g.*, Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819, 823 (2004)



shared characteristics as a threshold to provide access to deferred action. For example, the Violence Against Women Act (VAWA)<sup>39</sup> amended the INA to permit certain aliens victimized by spousal or parental abuse at the hands of a U.S. citizen or lawful permanent resident to petition for lawful status, without having to rely on documentation from the abusive family member.<sup>40</sup> Immigration officials have used deferred action to prevent removal of such victims during the time period before a visa becomes available.<sup>41</sup> Immigration officials have similarly made deferred action available to immigrants with a variety of other shared characteristics, including victims of human trafficking and other forms of violence covered in certain visa programs;<sup>42</sup> foreign students whose lawful status expired as a consequence of Hurricane Katrina's interruption of their full-time studies;<sup>43</sup> and widows or widowers of U.S. citizens whose visa petitions had not been adjudicated at the time of the spouse's death.<sup>44</sup> In June 2012, the President announced the adoption of the DACA program, through which officials could defer removal of individuals who entered the United States as children.<sup>45</sup> Under the program, individuals who arrived in the United States under the age of sixteen before January 2007, and who were under thirty-one years of age at the time of the announcement, could apply for deferred action and work authorization for a two-year

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(discussing the origins of deferred action and describing deferred action as placement of an alien in low-priority status for deportation for a "temporary period and reviewed biennially as a means to prevent a recognizable or unconscionable hardship to either aliens or their families").

<sup>39</sup> Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953 (1994) (codified at 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv) (2012)); *see also* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 816, 119 Stat. 2960, 3060 (codified at 8 U.S.C. § 1154(a)(1)(A)(vii) (2012)).

<sup>40</sup> *See* 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv), (vii).

<sup>41</sup> *See, e.g., Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 106th Cong. 43 (2000) (statement of Barbara Strack, Acting Executive Associate Comm'r for Policy and Planning, Immigration and Naturalization Service).

<sup>42</sup> *See* 8 U.S.C. § 1101(a)(15)(T)-(U) (2012) (creating visa classifications for victims of human trafficking and certain other crimes and their family members).

<sup>43</sup> U.S. Citizenship and Immigration Serv., Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ) 1 (Nov. 25, 2005), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf> [<https://perma.cc/97CU-T5NB>] (referring to temporary suspension of certain requirements for qualified students affected by Hurricane Katrina).

<sup>44</sup> U.S. Citizenship and Immigration Serv., USCIS Provides Interim Deferred Action Relief for Surviving Spouses: Relief for Spouses of Deceased U.S. Citizens Married Less Than Two Years (Aug. 31, 2009), [https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving\\_spouses\\_faq\\_0831.pdf](https://www.uscis.gov/sites/default/files/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/surviving_spouses_faq_0831.pdf) [<https://perma.cc/W9R6-MYXW>] (referring to temporary suspension for adjudication of widow(er)s' visa petitions and adjustment applications "where the sole reason for an adverse decision . . . would be the death of a U.S. citizen spouse prior to the second anniversary of their marriage").

<sup>45</sup> *See* Press Release, The White House, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/QH7V-NK8X>] ("Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people.").

period.<sup>46</sup> Between 2012 and 2015, the program benefited more than a half-million unlawful immigrants.<sup>47</sup> When Secretary Johnson announced the details of DAPA, he also announced an expansion of DACA, removing the age cap of thirty-one years, permitting applications from individuals who entered before January 2010, and extending the deferred action period from two years to three years.<sup>48</sup>

DAPA likewise seeks to benefit a group with a shared characteristic: those who have a son or daughter who is a U.S. citizen or lawful permanent resident. Some five million individuals could benefit from DAPA should the program take effect.

## 2. Statutory Alternatives: Cancellation of Removal and Immediate-Relative Visas

Whether or not DAPA fits comfortably with past exercises of deferred action or other discretionary relief, including large-scale, category-based forbearance from removal, there are additional questions about how DAPA aligns with specific provisions of the INA. DAPA serves the humanitarian goal of maintaining family unity for families with longstanding community ties and children who are citizens or lawful permanent residents. In the INA, however, Congress has provided narrower grounds for parents of U.S. citizens and, in some cases, parents of lawful permanent residents, to achieve permanent residence. For unauthorized aliens in the United States, the INA provides for cancellation of removal if, among other things, removal would result in “exceptional and unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”<sup>49</sup> The INA permits cancellation of removal for no more than 4000 aliens per year under this provision.<sup>50</sup> The INA also authorizes the issuance of “immediate-relative” visas, which permit the parent of a citizen to enter and remain in the United States.<sup>51</sup> The citizen, however, must be at least twenty-one years of age.<sup>52</sup> Moreover, the parent’s

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46 Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, Customs and Border Prot., et al., (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/VDU9-LBYD>] (establishing eligibility criteria for the DACA program).

47 U.S. Citizenship and Immigration Servs., Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Cases Status: 2012-2015 (Mar. 31, 2015), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/I821d\\_performancedata\\_fy2015\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/I821d_performancedata_fy2015_qtr2.pdf) [<https://perma.cc/HVK5-5XMM>].

48 Johnson Memorandum, *supra* note 3, at 3-4.

49 INA § 240A(a), 8 U.S.C. § 1229b(b)(1) (2012).

50 *Id.* § 240A(e)(1), 8 U.S.C. § 1229b(e)(1).

51 *Id.* § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

52 *Id.*

prior unlawful presence in the United States generally will trigger at least a three-year or ten-year bar on admissibility.<sup>53</sup>

As discussed below, DAPA authorizes immigration officials to tolerate a DAPA beneficiary's continued presence in the United States, and a DAPA beneficiary's presence is "lawful" presence for purposes of certain federal and state benefits.<sup>54</sup> DAPA, however, stops short of granting the lawful immigration status available through the INA's cancellation of removal and immediate-relative visa provisions.<sup>55</sup> The challenge is to determine whether DAPA's forbearance from removal—its recognition of legal presence without a full grant of or definite path to lawful immigration status—can coexist with these narrower but more permanent statutory avenues for entering and remaining within the United States.<sup>56</sup>

### B. Collateral Consequences of Deferred Action

In announcing that DHS officials would not remove individuals meeting the criteria for DAPA, Secretary Johnson emphasized that DAPA "confers no substantive right, immigration status or pathway to citizenship."<sup>57</sup> At the same time, Secretary Johnson acknowledged two consequences that would flow from deferred action. First, an individual receiving deferred action is "permitted to be lawfully present in the United States."<sup>58</sup> Second, a deferred action recipient is permitted to apply for work authorization.<sup>59</sup>

To understand the significance of these two features of the DAPA program, we must again examine the INA.

#### 1. Lawful Presence

Secretary Johnson's memorandum makes clear that DAPA recipients do not receive citizenship or a pathway to citizenship. Their presence in the United States, however, is "lawful" in at least two senses. First, under the INA, an unauthorized alien will accrue "unlawful presence" that could later

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<sup>53</sup> See *id.* § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (deeming an alien inadmissible for three-year period, if the alien was unlawfully present for a period of more than 180 days but less than one year); *id.* § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (deeming an alien inadmissible for ten-year period, if the alien was unlawfully present for a year or more); *id.* § 212(a)(9)(C)(i)(I), 8 U.S.C. § 1182(a)(9)(C)(i)(I) (deeming an alien inadmissible for attempting to reenter the United States without being admitted, if the alien was ordered removed or was unlawfully present for an aggregate period of a year or more).

<sup>54</sup> See *infra* notes 60–64 and accompanying text.

<sup>55</sup> Johnson Memorandum, *supra* note 3, at 5.

<sup>56</sup> See *infra* notes 85–89 and accompanying text.

<sup>57</sup> Johnson Memorandum, *supra* note 3, at 5.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 4–5.

bar the individual from reentering the United States.<sup>60</sup> Under DHS guidelines, deferred action recipients cease accruing unlawful presence.<sup>61</sup> Second, other federal statutes and regulations tie participation in certain earned-benefit programs, including Social Security retirement and disability and Medicare, to lawful presence.<sup>62</sup> Deferred action recipients are lawfully present for purposes of these programs.<sup>63</sup> Lawful presence may also trigger state-law entitlements.<sup>64</sup>

## 2. Work Authorization

Immigration officials have long coupled forbearance from removal, including deferred action, with work authorization. To understand why the grant of work authorization to DAPA beneficiaries is controversial, we must consider the INA's restrictions on the employment of unauthorized aliens. Until 1986, there existed no general federal prohibition on the employment of unauthorized aliens.<sup>65</sup> In the Immigrant Reform and Control Act of 1986 (IRCA), Congress made it unlawful to hire an unauthorized alien, and defined that term in section 274A(h)(3) of the INA as an alien who is not, at the time of employment, "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General."<sup>66</sup>

With respect to the debate over DAPA, there are two possible interpretations of the 1986 statute's acknowledgment of a category of aliens for whom the Attorney General could authorize employment. On one view, section 274A(h)(3),

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<sup>60</sup> See *supra* note 53 and accompanying text.

<sup>61</sup> Memorandum from Johnny Williams, Exec. Comm'r, Office of Field Operations, to Reg'l Dir. (June 12, 2002), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/unlawful\\_presence\\_memo\\_06\\_12\\_2002.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/unlawful_presence_memo_06_12_2002.pdf) [<https://perma.cc/22F7-PHJA>].

<sup>62</sup> See, e.g., 8 U.S.C. § 1611(b)(2)–(4) (2012) (exempting aliens "lawfully present in the United States as determined by the Attorney General" from bar on receipt of Social Security benefits); 8 C.F.R. 1.3(a)(4)(vi) (2016) (defining "alien lawfully present in the United States" to include an alien in deferred action status); 42 C.F.R. 417.422(h) (2015) (restricting Medicare eligibility to United States citizens and those "lawfully present in the United States as determined in 8 C.F.R. 1.3").

<sup>63</sup> 8 C.F.R. 1.3(a)(4)(vi) (2016).

<sup>64</sup> That, indeed, was the crux of Texas's claim in its suit to enjoin DAPA: that treating a DAPA beneficiary's presence as "lawful" triggered Texas's obligation to issue subsidized driver's licenses and triggered an entitlement to unemployment compensation and unemployment insurance. *Texas II*, 809 F.3d 134, 149 (5th Cir. 2015).

<sup>65</sup> Prior to 1986, federal statutes did prohibit farm labor contractors from knowingly employing unauthorized aliens. See Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 11(a)(3), 88 Stat. 1652, 1655 (prohibiting the knowing employment of any "alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment"); Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 106(a), 96 Stat. 2583, 2589-90 (1983) ("No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.").

<sup>66</sup> Pub. L. No. 99-603, § 101(a), 100 Stat. 3359, 3368 (codified at 8 U.S.C. § 1324a(h)(3) (2012)).

by exempting an alien “authorized to be so employed by . . . the Attorney General” from the employment prohibition, recognized or codified broad executive discretion to grant work authorization to aliens, including unauthorized aliens whom immigration officials forbear from removing. On another view, section 247A(h)(3)’s reference to the Attorney General’s authority simply acknowledges other statutory provisions that define circumstances under which the Attorney General can grant work authorization—circumstances that do not include all instances in which DHS grants deferred action.

DAPA’s recognition that deferred action beneficiaries can seek work authorization depends on the former interpretation;<sup>67</sup> the challenge to DAPA’s legality rests on the latter interpretation.<sup>68</sup>

## II. UNDERSTANDING THE OLC FRAMEWORK

Against this complex statutory and regulatory backdrop, OLC attempted to develop a framework for determining whether the executive branch had the power to adopt DAPA. In asking OLC to consider the legality of deferred action for parents of children present in the United States, DHS proposed not only to extend deferred action to parents of U.S. citizens and lawful permanent residents, but also to extend deferred action to parents of DACA beneficiaries.<sup>69</sup> OLC framed the issue as a question about the scope of the Executive’s enforcement discretion. OLC’s analysis relied both on general separation-of-powers considerations and on immigration-specific considerations.

OLC opined that as a general matter, “when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action.”<sup>70</sup> That discretion, OLC wrote, is rooted in the President’s duty to “take

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<sup>67</sup> See Johnson Memorandum, *supra* note 3, at 4-5 (referencing “my authority to grant [work] authorization reflected in section 274A(h)(3) of the [INA]”); OLC Opinion, *supra* note 9, at 21 (citing INA § 274A(h)(3), 8 U.S.C. § 1324(a)(h)(3), as “independent and more specific statutory authority rooted in the text of the INA,” which “has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens”); Brief for the Petitioners at 50-57, *United States v. Texas*, No. 15-674 (June 23, 2016) (describing practice of linking work authorization with discretionary decisions not to pursue removal, and the effect of IRCA on that practice).

<sup>68</sup> See, e.g., Brief of 186 Members of the U.S. House of Representatives and 39 Members of the U.S. Senate As Amici Curiae In Support of Petitioners at 25-28, *United States v. Texas*, No. 15-674 (June 23, 2016) (arguing that INA § 274A and subsequent statutory enactments foreclose the argument that DHS has unfettered discretion to grant work authorization).

<sup>69</sup> DHS also asked OLC whether it could implement a policy prioritizing the removal of certain categories of aliens over others. See *supra* notes 27-28 and accompanying text. OLC applied the same framework to the prioritization proposal as it did to the deferred action proposal. See generally OLC Opinion, *supra* note 10, at 2-11. I discuss only the latter here.

<sup>70</sup> OLC Opinion, *supra* note 10, at 4.

Care that the Laws be faithfully executed.”<sup>71</sup> Under the Supreme Court’s decision in *Heckler v. Chaney*,<sup>72</sup> the leading case on administrative enforcement discretion, faithful execution of the law does not require “act[ing] against each technical violation of the statute [an agency] is charged with enforcing.”<sup>73</sup>

OLC thus emphasized the discretion-granting side of the Faithful Execution Clause. It paired that emphasis with two immigration-specific observations. First, Congress’s delegation of power to the executive branch to enforce the immigration laws is extremely broad, including with respect to removal of unauthorized aliens, in part to enable executive officials to respond to humanitarian and foreign policy considerations.<sup>74</sup> Second, according to OLC, the history of immigration law illustrates that the scope of an agency’s enforcement discretion in immigration generally is subject to political rather than judicial control: Congress has acted to limit executive discretion when the executive branch has extended immigration relief beyond the bounds Congress anticipated.<sup>75</sup>

Despite emphasizing the discretion-granting aspect of the Faithful Execution Clause and recognizing broad enforcement discretion in the immigration context, OLC opined that “[l]imits on enforcement discretion are both implicit in, and fundamental to, the Constitution’s allocation of governmental powers between the two political branches.”<sup>76</sup> The constitutional duty of faithful execution, OLC wrote, points to “at least four general (and closely related) principles governing the permissible scope of enforcement discretion that . . . are particularly relevant here:”<sup>77</sup>

First, enforcement decisions should reflect factors which are peculiarly within [the agency’s] expertise . . . .

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.

Third, the Executive ordinarily cannot . . . adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities . . . .

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<sup>71</sup> *Id.* (citing U.S. CONST. art. II, § 3).

<sup>72</sup> 470 U.S. 821 (1985).

<sup>73</sup> *Id.* at 831.

<sup>74</sup> See OLC Opinion, *supra* note 10, at 4 (noting that *Chaney*’s principles apply “with particular force in the context of immigration” and discussing the breadth of delegation to Immigration and Naturalization Service and the Department of Homeland Security); *id.* at 5 (discussing the range of considerations implicated in removal decisions, including “immediate human concerns” and “ensur[ing] that enforcement policies are consistent with this Nation’s foreign policy” (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012))).

<sup>75</sup> See *id.* at 6 (explaining that “political branches have addressed the proper allocation of enforcement authority through the political process”).

<sup>76</sup> *Id.* at 5.

<sup>77</sup> *Id.* at 6.

Finally, . . . a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses special risks that the agency has exceeded . . . its enforcement discretion.<sup>78</sup>

Before applying this four-part framework to the proposed deferred action programs, OLC explored the history of executive officials' use of deferred action—including the transition from the use of deferred action for individual cases to the use of deferred action for groups with shared characteristics—and Congress's response. OLC concluded that "Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice."<sup>79</sup>

OLC acknowledged that deferred action differs in important ways from other forms of enforcement discretion: it represents a decision to tolerate future unlawful conduct, not merely a decision not to prosecute past unlawful conduct; it carries benefits beyond forbearance from enforcement, namely the ability to apply for work authorization; and it represents not case-specific relief for an individual identified for removal, but rather an invitation for individuals meeting specified criteria to apply for relief.<sup>80</sup> After concluding that the differences between this potential exercise of deferred action and other exercises of enforcement discretion "are less significant than they might initially appear,"<sup>81</sup> the opinion noted that Congress, aware of the features that distinguish deferred action from other forms of immigration relief, "has repeatedly enacted legislation appearing to endorse such programs."<sup>82</sup>

OLC then returned to the four principles and applied them to both proposed deferred action programs—first, to provide relief for the parents of U.S. citizens and lawful permanent residents, and second, to provide relief for the parents of DACA beneficiaries. As for whether the proposed program reflected concerns within DHS's expertise, OLC focused principally on the "humanitarian interest" involved: the asserted interest in promoting family unity by enabling "parents of U.S. citizens and [lawful permanent residents] who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States."<sup>83</sup> The task of determining how to address such humanitarian concerns, OLC reasoned, falls peculiarly within DHS's expertise.<sup>84</sup>

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<sup>78</sup> *Id.* at 6-7 (internal quotation marks and citations omitted).

<sup>79</sup> *Id.* at 18.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *Id.* at 26.

<sup>84</sup> *Id.*

Turning to the program's fidelity to the statutory scheme—whether the agency, in effect, had rewritten the laws to match its policy preferences—OLC found the humanitarian justification to be consonant with the INA. The program, OLC reasoned, “tracks a congressional concern” with uniting the immediate families of citizens and lawful permanent residents.<sup>85</sup> Once a citizen turns twenty-one years of age, he or she has the ability to petition for a visa for a parent.<sup>86</sup> Although the INA does not contain a similar provision for lawful permanent residents, a lawful permanent resident can become a citizen and then petition for a visa for a parent. According to OLC, granting deferred action to parents of citizens and lawful permanent residents maintains family unity for a category of immigrants with a “prospective entitlement” to lawful status.<sup>87</sup> OLC acknowledged that the INA incorporates other forms of discretionary relief from removal for immediate family members of citizens and lawful permanent residents, and that the criteria for those forms of relief are far more restrictive than DAPA.<sup>88</sup> OLC opined that executive-based discretionary relief through deferred action would not conflict with statutory provisions authorizing discretionary relief from removal or with statutory avenues for parents of citizens to obtain lawful immigration status, because deferred action is a more limited form of relief that provides no lawful immigration status or path to citizenship.<sup>89</sup>

Turning to the third principle, OLC rejected the notion that DAPA amounts to an “abdication” of agency responsibility. If DHS's resource constraints are such that the agency cannot remove the vast majority of removable aliens in the United States, OLC reasoned, the deferred removal of a subset of these aliens “does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities.”<sup>90</sup>

Finally, OLC opined that in light of the case-by-case nature of DHS officials' inquiry into whether to grant deferred action, the proposed program did not amount to a “legislative rule overriding the commands of a statute.”<sup>91</sup>

Although OLC deemed lawful the elements of DAPA concerning parents of U.S. citizens and lawful permanent residents, it rejected the extension of that program to the parents of DACA beneficiaries. The

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<sup>85</sup> *Id.* at 27.

<sup>86</sup> INA § 201, 8 U.S.C. § 1151(b)(2)(A)(i) (2012); *see supra* notes 51-53 and accompanying text.

<sup>87</sup> *See* OLC Opinion, *supra* note 10, at 32 (contrasting parents of citizens and lawful permanent residents with parents of DACA beneficiaries).

<sup>88</sup> *Id.* at 26-27; *see also* 8 U.S.C. § 1229b(b)(1)(D) (authorizing cancellation of removal for unlawful immigrants who are immediate relatives of a U.S. citizen or lawful permanent resident, where exceptional hardship would otherwise result to the U.S. citizen or lawful permanent resident).

<sup>89</sup> OLC Opinion, *supra* note 10, at 27 (characterizing DAPA as conferring “temporary relief . . . sharply limited in comparison to the benefits Congress has made available through statute”).

<sup>90</sup> *Id.* at 28.

<sup>91</sup> *Id.*



parents of DACA beneficiaries, OLC reasoned, lack a prospective entitlement to lawful status.<sup>92</sup> That fact distinguishes any concern for maintaining family unity from the concern motivating deferred action for parents of U.S. citizens and lawful permanent residents: “[I]n the absence of any family member with lawful status in the United States, it would not explain why [the] concern [for family unity] should be satisfied by permitting family members to remain in the United States.”<sup>93</sup>

In sum, OLC’s DAPA opinion developed a detailed framework for evaluating executive exercises of enforcement discretion. Although the framework embeds certain immigration-specific elements, OLC relied more broadly on separation-of-powers considerations, including the President’s obligation of faithful execution. In the next Part, I consider the President’s obligation of faithful execution in more depth, before returning to an evaluation of DAPA and the OLC framework in Part IV.

### III. MODELS OF FAITHFUL EXECUTION IN ENFORCEMENT DISCRETION

At the heart of the debate over DAPA’s legality, and at the heart of other recent controversies over executive pronouncements concerning the enforcement of federal statutes, is the President’s obligation under Article II, Section 3 to “take Care that the Laws be faithfully executed.”<sup>94</sup> OLC, as noted, distilled from the constitutional duty of faithful execution four principles limiting the scope of administrative enforcement discretion.<sup>95</sup> In its grant of certiorari in *United States v. Texas*, the Supreme Court directed the parties to brief whether DHS’s deferred action guidance violates that duty.<sup>96</sup> This Part focuses on the substance of the faithful execution duty. Before proceeding, however, I briefly consider two institutional questions.

The first question is *who* is subject to a duty of faithful execution. The clause refers only to the President. It does not, for example, direct all officers of the United States to faithfully execute the laws; it directs the President to ensure the laws’ faithful execution. Even if the Faithful Execution Clause does not itself constrain other executive officials, it is difficult to see how the President could ensure faithful execution of the laws without the ability to demand faithful execution by his subordinates, such as (in the case of DAPA) the Secretary of Homeland Security. For purposes of this discussion, then, I focus not only on the direct importance of the Faithful Execution Clause for

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<sup>92</sup> *Id.* at 32.

<sup>93</sup> *Id.* at 33.

<sup>94</sup> U.S. CONST. art. II, § 3.

<sup>95</sup> See *supra* note 78 and accompanying text.

<sup>96</sup> *United States v. Texas*, 136 S. Ct. 906 (2016) (mem.).

the President's conduct, but also on the implications of the clause for the conduct of the President's subordinates.

The second institutional question is who decides what constitutes faithful execution. As will become clear, although courts have invoked the requirement that the President "take Care that the Laws be faithfully executed" in a number of contexts, courts have done little to flesh out that concept. There are at least two different ways to think about the limited role of courts. One is that in a range of cases that might raise questions about faithful execution, those questions coincide or overlap with questions about proper interpretation of an agency's organic statute or of the Administrative Procedure Act (APA).<sup>97</sup> A finding that agency conduct is not inconsistent with an organic statute or the APA might eliminate most claims that the agency has breached an obligation of faithful execution. Conversely (and as in the lower courts in the DAPA case), a conclusion that executive conduct is inconsistent with an organic statute or the APA would obviate the need to consider a constitutional claim.<sup>98</sup> In other words, when a case is or can be resolved on statutory grounds, limited discussion of the Faithful Execution Clause is unsurprising.

The second way to think about the limited role of the courts is that, if it is the President's duty to take care that the laws be faithfully executed, it is the President who determines what constitutes faithful execution. On this view, the Faithful Execution Clause is nonjusticiable.<sup>99</sup>

This question and other questions of justiciability are critical to the resolution of individual cases challenging executive conduct on constitutional grounds. Because the executive branch must evaluate the legality of its own conduct, however, the substance of the Faithful Execution Clause is important independent of the justiciability of a challenge under that clause to executive conduct. I turn now to that substance. I examine the constitutional text, structure, and history of the Faithful Execution Clause before turning back to DAPA in Part IV.

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<sup>97</sup> 5 U.S.C. § 551 *et seq.* (2012).

<sup>98</sup> See, e.g., *Ashwander v. Tenn. Valley Auth'y*, 297 U.S. 288, 346 (1936) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885))).

<sup>99</sup> Cf. *Nixon v. United States*, 506 U.S. 224, 237 (1993) (holding that the Senate has the final authority to give content to the word "try" in the Impeachment Trial Clause); Brief for the Petitioners at 73, *United States v. Texas*, No. 15-674 (June 23, 2016) (rejecting "judicial superintendence over the exercise of the Executive power that the [Faithful Execution] Clause commits to the President").

### A. The Constitutional Background

Article II, Section 1, Clause 1 provides, “The executive Power shall be vested” in the President.<sup>100</sup> There exists a robust scholarly debate over whether the “executive Power” so vested consists merely of all of the powers subsequently recognized in Article II, or whether the “executive Power” connotes a distinct set of powers that a Chief Executive typically enjoys.<sup>101</sup> Although that debate is beyond the scope of this Article, one’s understanding of the Vesting Clause may color one’s view of the role the Faithful Execution Clause plays in our constitutional scheme.

On a broad view of the Vesting Clause, the “executive Power” encompasses—indeed, has at its very core—the power to execute the law.<sup>102</sup> If so, without introducing redundancy, we cannot read the Constitution’s instruction to the President to “take Care that the Laws be faithfully executed” simply to confer the power to execute the law. The provision must do more. We can ascribe two other plausible meanings to the Faithful Execution Clause. The clause may clarify that the President’s law execution power does not demand that the President execute the law himself, but rather obligates the President to “take Care” that others do so. If so, the clause implies whatever powers are necessary for the President to carry out that duty—for example, granting the President the power to direct and control government officials’ execution of the law.<sup>103</sup> Another plausible meaning of the Faithful

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<sup>100</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>101</sup> Compare, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3-4 (2008) (arguing that the Vesting Clause of Article II “is a grant to the president of all the executive power,” and that the President’s powers go “beyond those specifically enumerated in Article II” to include “the power to remove and direct all lower-level executive officials”), and Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1391 (1994) (arguing that any governmental action not involving legislation or adjudication “must be an executive action which the President can control”), and Prakash, *supra* note 19, at 714 (“The Executive Power Clause grants authority beyond those powers listed elsewhere in Article II.”), with, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 585 (2004) (advancing textual and historical arguments to demonstrate the nature of the Vesting Clause as “specific and functional rather than categorical and essentialist”), and A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1364 (1994) (“The chief problem with reading the Vesting Clause[] as [a] grant[] of ‘executive’ . . . power is that we have no clear idea what those words mean in the context of the Constitution other than from the text of the articles that follow.”).

<sup>102</sup> See Prakash, *supra* note 19, at 716 (“If the Executive Power Clause vests anything beyond the authorities listed in Article II, it surely vests the power to execute the laws.”).

<sup>103</sup> See, e.g., Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1384 (2012) (arguing the Faithful Execution Clause grants the President the powers necessary to fulfill this obligation to ensure that the laws be faithfully executed); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2036 (2011) (“Since well-settled rules of implication suggest that the imposition of a duty implicitly connotes a grant of power minimally sufficient to see that duty fulfilled, the Take Care Clause seems straightforwardly to call

Execution Clause is that it tightens the law execution role that the Vesting Clause already confers by emphasizing that such execution must be “faithful[.]” The Faithful Execution Clause thus constrains executive discretion by reining in any authority that the “executive Power” might otherwise be thought to confer to execute the law in a manner that is not “faithful[.]” (or to decline to execute the law altogether).<sup>104</sup>

On the narrower view of the Vesting Clause, the “executive Power” refers to those powers recognized elsewhere in Article II.<sup>105</sup> Under this view, if the President has a power to execute the law or to direct others to do so, that power must derive from the Faithful Execution Clause. If so, the clause is self-limiting, in the sense that it constrains the President to ensure that executive officials carry out the law “faithfully.”

Whether one views the Clause as tightening or conferring a law execution role, one must still confront what “faithful[.] execut[ion]” of the law entails. In Founding-era dictionaries, definitions of the word “faithfully” support varied constructions of the text. For example, faithful execution might imply strict adherence to the law,<sup>106</sup> or it might imply a sincere and honest effort carry the law into effect.<sup>107</sup> Other constitutional provisions do not shed significant light on the clause. The concept of faithful execution appears in only one other constitutional clause: the Presidential Oath Clause. That clause requires the President to swear or affirm that he or she “will faithfully execute the Office of President of the United States, and will to the best of [his or her] Ability, preserve, protect and defend the Constitution of the United States.”<sup>108</sup> If the Presidential Oath Clause simply restates the concept of faithful execution, it provides limited insight into the phrase’s meaning in the Faithful Execution Clause. At most, one could argue that the addition of

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for the recognition of sufficient ‘executive Power’ to allow the President to remove subordinates who, in his or her view, are not faithfully implementing governing law.”).

<sup>104</sup> 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, 799 (2013) (“The Take Care Clause is . . . an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, ‘without failure’ and ‘exactly.’”); Prakash, *supra* note 19, at 722 (“The Faithful Execution Clause imposes a duty of faithful law execution on the only officer who enjoys the executive power.”).

<sup>105</sup> See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47 (1994) (“As we conceive it, the framers intended the Vesting Clause to vest constitutionally little more than the enumerated executive powers.”).

<sup>106</sup> See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining “faithfully” as “[w]ith strict adherence to duty and allegiance” and “[w]ithout failure of performance; honestly; exactly”); see also Delahunty & Yoo, *supra* note 104, at 799 (arguing that it is unnatural to read the Take Care Clause as allowing deviation from “strict enforcement” of the law).

<sup>107</sup> See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755), *supra* note 106 (defining “faithfully” as “[s]incerely; with strong promises” and “[h]onestly; without fraud, trick, or ambiguity”).

<sup>108</sup> U.S. CONST. art. II, § 1, cl. 8.

the phrase “to the best of my Ability” in connection with the President’s duty to preserve, protect, and defend the Constitution, but not in connection with the President’s duty of faithful execution, suggests that the duty of faithful execution is the stronger of the two, and requires more than that the President act to the best of his or her ability.<sup>109</sup> Alternatively, one could view the concept of faithful execution as synonymous with “to the best of [the President’s] ability,” such that the phrasing of the Presidential Oath Clause indicates that the two duties are commensurate.<sup>110</sup>

While the phrase “faithful[] execut[ion]” might support more than one interpretation, the Constitution supplies other contextual clues. The Constitution calibrates the congressional and presidential roles in lawmaking. Article I grants Congress the legislative power, while the President’s role in the process is to “recommend” consideration of “such Measures as he shall judge necessary and expedient,”<sup>111</sup> and to sign or veto measures approved by a majority of both houses of Congress.<sup>112</sup> Although these structural mechanisms do not tell us what constitutes “faithful[] execut[ion],” they do sketch some outer limits. For example, an executive decision to disregard a law—absent a concern that the law is itself unconstitutional—collides with these core structural principles, for it would grant the President a second veto that the Constitution does not contemplate.<sup>113</sup> More generally, an executive decision that displaces or undermines a law could exceed the President’s powers, either because it constitutes “lawmak[ing]”<sup>114</sup> or because the President cannot overcome Congress’s contrary will without an independent source of power.<sup>115</sup>

The historical background of the Faithful Execution Clause likewise suggests an outer limit to presidential discretion. Here, two aspects of the Constitution’s drafting history warrant discussion. Early proposals would

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<sup>109</sup> Cf. N.Y. CONST. of 1777, art. XIX (requiring that the governor “take care that the laws are faithfully executed to the best of his ability”); see also THE FEDERALIST NO. 69, at 464 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting similarity of the President’s powers to those of the New York governor).

<sup>110</sup> Cf. Prakash, *supra* note 19, at 723 (suggesting that the deletion of the “best of his ability” language from the Faithful Execution Clause eliminated redundancy).

<sup>111</sup> U.S. CONST. art. II, § 3.

<sup>112</sup> *Id.* art. I, § 7, cl. 2.

<sup>113</sup> See Price, *supra* note 26, at 690 (“Allowing the President to disregard duly enacted laws with which he disagrees would . . . giv[e] the President a form of second veto over laws . . . that he does not wish to see enforced during his presidency.”).

<sup>114</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

<sup>115</sup> See *id.* at 602 (Frankfurter, J., concurring) (“[N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice.”); *id.* at 639 (Jackson, J., concurring) (rejecting claim of presidential authority where “Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure”).

have provided that the President had authority to execute the laws.<sup>116</sup> James Madison's notes indicate that the delegates approved a proposal vesting the president with the power "to carry into execution the nation[al] laws."<sup>117</sup> The Committee of Detail considered different formulations,<sup>118</sup> ultimately reporting out a provision stating that the President "shall take care that the laws of the United States be duly and faithfully executed."<sup>119</sup> The Committee of Style deleted the phrase "duly and."<sup>120</sup>

Some have argued that the shift from recognizing the President's authority to execute the laws to imposing a duty to ensure that the laws are executed was intended to emphasize the primacy of Congress in lawmaking.<sup>121</sup> Others suggest that the clause "merely modified the president's executive power," so as to "ensure faithful execution."<sup>122</sup> On either view, the President cannot decline to execute a law, at least absent a good faith belief that the law is unconstitutional. Declining to execute a law would either undercut the primacy of Congress in lawmaking or disregard the manner in which the Faithful Execution Clause narrows the executive power.

The second aspect of the drafting history that warrants discussion is the possibility that the Founders sought to codify the rejection of the claims of English monarchs to the powers to suspend (temporarily or permanently) the operation of certain statutes and to dispense with the application of statutes to particular individuals. Following the Glorious Revolution, the English Bill of Rights of 1689 repudiated these powers.<sup>123</sup> Numerous states incorporated

<sup>116</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23 (Max Farrand ed., 1966) (presenting Madison's notes outlining the Virginia plan) [hereinafter CONVENTION RECORDS I].

<sup>117</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 32 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS II]; see also *id.* at 132 (reflecting referral to the Committee of Detail); CONVENTION RECORDS I, *supra* note 116, at 63, 67, 230, 236 (reflecting proposed changes to the Virginia plan).

<sup>118</sup> CONVENTION RECORDS II, *supra* note 117, at 171. Versions include formulations attributed to James Wilson ("He shall take Care to the best of his Ability, that the Laws of the United States be faithfully executed.") and John Rutledge ("It shall be his duty to provide for the due & faithful exec—of the Laws of the United States to the best of his ability."). For the attributions to Wilson and Rutledge, see *id.* at 163 n.17. The "take care" formulation was common to certain state constitutions, including those of New York, Pennsylvania (of which James Wilson was a delegate), and Vermont. See, e.g., N.Y. CONST. of 1777, art. XIX (requiring the governor "to take care that the laws are faithfully executed to the best of his ability"); PA. CONST. of 1776, art. II, sec. 20 (providing that members of the executive council "are also to take care that the laws be faithfully executed"); VT. CONST. of 1786, ch. II, § XI (same).

<sup>119</sup> CONVENTION RECORDS II, *supra* note 117, at 185.

<sup>120</sup> *Id.* at 600.

<sup>121</sup> See, e.g., Price, *supra* note 26, at 693 ("The evolution of the Take Care Clause from a power-granting to a duty-imposing provision underscores that the Framers intended Congress to have policymaking supremacy.")

<sup>122</sup> Prakash, *supra* note 19, at 724.

<sup>123</sup> See An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2 (Eng.) (condemning James II for "assuming and

prohibitions on suspension into their constitutions.<sup>124</sup> The delegates to the Philadelphia Convention, in debating whether the Executive should have a power to veto legislation, considered both whether any presidential veto power should be absolute<sup>125</sup> and whether the President should have the power to suspend legislation for a defined period.<sup>126</sup> The delegates unanimously rejected both proposals.<sup>127</sup> Although no evidence directly links the Faithful Execution Clause to the repudiation of the suspension power,<sup>128</sup> many scholars argue that the clause serves that purpose.<sup>129</sup> Whatever the concept of faithful execution might encompass, the drafting history suggests that it does not encompass the power to suspend or disregard duly enacted laws. Courts reaffirmed that understanding early in our nation's history.<sup>130</sup>

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exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament"); *id.* (providing "[t]hat the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal" and "[t]hat the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late is illegal").

<sup>124</sup> See Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534 (2012) (noting that six state constitutions confined suspension and dispensation to the legislatures only); see, e.g., DEL. DECLARATION OF RIGHTS OF 1776, § 7 ("That no Power of suspending Laws, or the Execution of Laws, ought to be exercised unless by the Legislature."); MD. CONST. of 1776, Declaration of Rights, art. VII ("That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed."); VT. CONST. of 1786, ch. 1, art. XVII ("The power of suspending laws, or the execution of laws, ought never to be exercised, but by the Legislature, or by authority derived from it, to be exercised in such particular cases only as the Legislature shall expressly provide for."); VA. CONST. of 1776, Bill of Rights, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.").

<sup>125</sup> See CONVENTION RECORDS I, *supra* note 116, at 98-103 (noting the various discussions of an executive veto at the Constitutional Convention).

<sup>126</sup> See *id.* at 103-04 (discussing the possibility of term periods for executive suspension of legislation).

<sup>127</sup> See *id.* at 103-104 (recording that an absolute veto and a suspension period were voted down by all delegates).

<sup>128</sup> Prakash, *supra* note 19, at 726 n.113.

<sup>129</sup> See, e.g., CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 16 (1998) (describing the clause as a "succinct and all-inclusive command through which the Founders sought to prevent the executive from resorting to any of the panoply of devices employed by English kings to evade the will of Parliament"); Delahunty & Yoo, *supra* note 104, at 803-04 (joining scholars ascribing such a purpose to the clause, and observing that "it is scarcely conceivable that a federal Executive modeled on the Governor of New York should have been vested with a power that had long since been denied to the English King").

<sup>130</sup> See, e.g., *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."). The author of this opinion, Justice William Paterson, had served as a delegate to the Philadelphia Convention and was the primary proponent of the New Jersey Plan. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 557, 611 (Max Farrand ed., 1911) (listing Paterson as a delegate and reproducing the New Jersey Plan also called the Paterson Resolutions).

In sum, the text, structure, and history of the Constitution demonstrate that a President who countenances disregard for or suspension of the law does not “take Care” that the law is “faithfully executed.” The more difficult question is what actions, short of explicit suspension, breach the duty of faithful execution.

### B. *The Evolution of Enforcement Discretion*

Some scholars argue that the Constitution’s Faithful Execution Clause imposes a duty of “strict” enforcement on the Executive—that the President must enforce the laws “without failure” or “exactly.”<sup>131</sup> As discussed above, it is questionable whether the constitutional text and drafting history bear the weight of that position.<sup>132</sup> More broadly, one must ask whether such a narrow understanding of faithful execution does violence to the concept of “execution”—the discretion-granting side of Article II.

Whether one links the Executive’s power to carry the law into execution to the Vesting Clause or to the Faithful Execution Clause, that power embeds some discretion to decide how to carry the law into execution. Our constitutional system separates legislative and executive powers in part to guard against tyranny.<sup>133</sup> If the Constitution required enforcement without discretion, then the separation of the executive and legislative powers would have little liberty-protective value. On the criminal side, for example, the Constitution presumes that before the government exercises criminal power over an individual, “Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary . . . must agree to convict.”<sup>134</sup> The Constitution appears to presume not only that executive officials apply general laws to specific factual scenarios, but also that they can moderate the effects of the law in particular circumstances. Executive officials have done so from the time of the Founding in cases in which they believed that individuals subject to criminal prosecution were innocent.<sup>135</sup> More generally, there is strong evidence from the nation’s early history indicating that Presidents and executive officials exercised discretion not only in cases of innocence, but also

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<sup>131</sup> Delahunty & Yoo, *supra* note 104, at 799.

<sup>132</sup> See *supra* notes 107-120 and accompanying text.

<sup>133</sup> See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516 (1991) (describing efforts to preserve the separation of powers “as a concern for protecting individual rights against encroachment by a tyrannical majority”).

<sup>134</sup> Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006) (footnotes omitted).

<sup>135</sup> See, e.g., Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 554 (2005) (discussing President Washington’s direction to enter a *nolle prosequi* on certain indictments).



where officials considered particular offenders “undeserving of punishment for reasons of justice or equity.”<sup>136</sup>

The modern practice of executive discretion, of course, goes well beyond these foundational concepts of declining enforcement in specific cases for a narrow set of reasons. That practice reflects a complex mix of factors that have been well catalogued elsewhere,<sup>137</sup> including the dramatic expansion of the reach of federal law with little expectation on Congress’s part that the executive branch can or should enforce those laws to their fullest extent.<sup>138</sup> Modern Supreme Court cases reflect and entrench broad conceptions of the scope of prosecutorial discretion<sup>139</sup> and, as discussed below, the Court has carried those conceptions to the context of administrative nonenforcement.<sup>140</sup> The next Section explores the range of cases in which the Court has applied the Faithful Execution Clause for clues about the scope of the obligation that clause imposes.

### C. *Judicial Understandings of Faithful Execution*

The Supreme Court has invoked the Faithful Execution Clause in a range of contexts, including in cases addressing prosecutorial or administrative enforcement discretion, standing, and removal, among others.<sup>141</sup> In exploring the Court’s treatment of the clause, I focus here on cases addressing executive discretion and cases addressing the removal power. The former category bears most directly on the topic at hand. The latter category is mainly of interest because, unlike in other contexts, the Faithful Execution Clause appears to be critical to certain holdings. The clause’s primacy in the removal power

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<sup>136</sup> Price, *supra* note 26, at 730; *see also* Prakash, *supra* note 135, at 552-63 (describing presidential control over prosecutions in the early Republic, including instances in which Presidents directed termination of prosecutions).

<sup>137</sup> *See* Price, *supra* note 26, at 754-63 (describing factors influencing federal nonenforcement policies in the areas of marijuana possession, immigration, and environmental standards).

<sup>138</sup> *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 884-87 (describing the expansion of the criminal law and the increasing power of prosecutors to decide which cases to take to trial); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) (“Because criminal law is broad, prosecutors cannot possibly enforce the law as written: there are too many violators. Broad criminal law thus means that the law as enforced will differ from the law on the books.”).

<sup>139</sup> *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”); *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing prosecution as “a ‘special province’ of the Executive” (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985))).

<sup>140</sup> *See Chaney*, 470 U.S. at 832 (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics 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.’”).

<sup>141</sup> *See generally* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016) (describing the Court’s simultaneous reliance on the clause as a source of vast presidential power in some contexts and a sharp limitation in others).

cases thus presents us with an opportunity to understand what the Court perceives the obligation of faithful execution to entail.

### 1. Presumptions and Executive Discretion

As noted earlier, the Supreme Court has recognized that the decision not to prosecute criminal wrongdoing “has long been regarded as the special province of the Executive Branch.”<sup>142</sup> In *United States v. Armstrong*, the Court emphasized the “broad discretion” of United States Attorneys to decide how to enforce federal criminal laws: “They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>143</sup> In examining the showing that a defendant must make before being entitled to discovery on a claim of selective prosecution, the *Armstrong* Court held that a “presumption of regularity” supports prosecutorial decisions.<sup>144</sup> A defendant pursuing a selective prosecution claim must present “clear evidence” that an official has violated the Equal Protection Clause.<sup>145</sup> Although one could argue that the Court’s ultimate holding derives from the Equal Protection Clause rather than the Faithful Execution Clause,<sup>146</sup> the Court’s understanding of the discretion that the Faithful Execution Clause entails informed the Court’s emphasis on the need for “clear” evidence to trigger discovery requirements.

*Heckler v. Chaney* took a similar approach in the context of agency enforcement discretion. In *Chaney*, state prison inmates sentenced to die by lethal injection sued the Food and Drug Administration (FDA), claiming that the states’ use of certain drugs for lethal injection violated the Food, Drug, and Cosmetic Act (FDCA), and that the law required the FDA to take investigatory and enforcement actions to curb these violations.<sup>147</sup> The Court considered whether the Administrative Procedure Act (APA) permitted judicial review of the FDA’s decision not to act.<sup>148</sup> Under the APA, judicial review is unavailable if, among other things, “agency action is committed to

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<sup>142</sup> *Chaney*, 470 U.S. at 832; see also *Armstrong*, 517 U.S. at 464 (citing cases that held prosecutors have “broad discretion to enforce the [n]ation’s criminal laws”); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file . . . are decisions that generally rest in the prosecutor’s discretion.”); *Nixon*, 418 U.S. at 693 (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . .”).

<sup>143</sup> 517 U.S. at 464.

<sup>144</sup> *Id.* (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

<sup>145</sup> *Id.* (quoting *Chem. Found.*, 272 U.S. at 14-15).

<sup>146</sup> See *id.* at 465 (“The requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards.’” (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985))).

<sup>147</sup> See *Chaney*, 470 U.S. at 823-24 (describing the allegations).

<sup>148</sup> *Id.* at 823.

agency discretion by law.”<sup>149</sup> The Court construed this provision to preclude judicial review “even where Congress has not affirmatively precluded review” in the substantive statute.<sup>150</sup> If the statute is drawn “so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion,” judicial review is unavailable.<sup>151</sup> A plaintiff claiming that an agency has improperly refused to undertake enforcement action must overcome a presumption of unreviewability.<sup>152</sup> Although *Chaney* involved construction of the APA, the Faithful Execution Clause contributed to the Court’s application of that statute to nonenforcement decisions:

[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special providence 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.”<sup>153</sup>

In sum, both *Armstrong* and *Chaney* relied in part on the Faithful Execution Clause to endow executive nonenforcement decisions with presumptions of regularity. Both cases also made clear that the presumptions of regularity can be overcome—in *Armstrong*, by sufficient evidence of an equal protection violation, and in *Chaney*, by evidence that an agency has “consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>154</sup> Although we could understand the cases to suggest that constitutional violations and statutory abdication are inconsistent with the obligation of faithful execution, the cases do not flesh out that concept in any greater detail.

## 2. Removal Cases

The Supreme Court’s removal cases present a second context for exploring the contours of the Faithful Execution Clause. As noted above, the Court has invoked the Faithful Execution Clause in multiple contexts. In most of those contexts, however, the Court’s discussion of the clause simply adds weight to a holding adequately supported by another rationale.<sup>155</sup> What distinguishes the removal cases, and particularly the Court’s most recent case, *Free Enterprise*

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<sup>149</sup> 5 U.S.C. § 701(a)(2) (2012).

<sup>150</sup> *Chaney*, 470 U.S. at 830.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 832-33.

<sup>153</sup> *Id.* at 832.

<sup>154</sup> *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

<sup>155</sup> See, e.g., *Lujan v. Def. of Wildlife*, 504 U.S. 555, 577 (1992) (relying on the Faithful Execution Clause to buttress holding that plaintiff lacked standing); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (same).

*Fund v. Public Company Accounting Oversight Board (PCAOB)*,<sup>156</sup> is that the Court's holding cannot be explained without relying on the Faithful Execution Clause. The removal cases thus may provide more insight into the scope of the Faithful Execution Clause than cases that consider the clause in other contexts. Below, I first survey the landscape of removal cases to show that certain aspects of the Court's removal cases can only be explained with reference to the Faithful Execution Clause. I then build upon this understanding of the removal cases to suggest some tentative conclusions about the obligation of faithful execution.

To help understand the role that Article II—and particularly the Faithful Execution Clause—plays in the removal cases, we can identify three possible connections between Article II and the removal power. First, Article II vests the “executive Power” in the President.<sup>157</sup> As discussed earlier, scholars have long debated the significance and scope of that grant.<sup>158</sup> For present purposes, the question is whether the “executive Power” itself encompasses a power to remove executive officials—that is, whether a removal power is part and parcel of the “executive Power” that the Constitution grants to the President. Second, Article II imposes on the President the obligation to “take care that the Laws be faithfully executed.”<sup>159</sup> Although the clause imposes an obligation on the President rather than granting a power to him, it is a well-settled rule of construction that an obligation carries with it whatever powers are necessary to fulfill the obligation.<sup>160</sup> Thus, the obligation to ensure faithful execution of the laws may imply a power to remove executive officials when their removal is required to fulfill the obligation. Third, one might argue that even if the Faithful Execution Clause did not exist, the vesting of the “executive Power” in the President would itself oblige the President to ensure faithful execution of the laws. That is, the “executive Power” demands faithful execution of the laws, and implies whatever power of removal is necessary to ensure faithful execution. Because the second and third theories of removal—under which an obligation of faithful execution (whether textually drawn or implied) gives rise to a removal power—are likely to produce removal powers of similar scope, I discuss the third theory only where the Court's reference to the “executive Power” appears to rest specifically on that theory.

The Court's most forceful statements about an Article II-based removal authority appear in *Myers v. United States*,<sup>161</sup> a case involving a statute

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<sup>156</sup> 561 U.S. 477 (2010).

<sup>157</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>158</sup> See *supra* Section III.A.

<sup>159</sup> U.S. CONST. art. II, § 3.

<sup>160</sup> See Manning, *supra* note 103, at 2036 (describing “well-settled rules of implication” suggesting that “the imposition of a duty implicitly connotes a grant of power minimally sufficient to see that duty fulfilled”).

<sup>161</sup> 272 U.S. 52 (1926).

requiring senatorial advice and consent for the removal of a postmaster during a four-year term in office.<sup>162</sup> The President had removed Myers without senatorial consent from his position as first-class postmaster.<sup>163</sup> Myers sued for the salary allegedly owed to him from the time of his removal to the expiration of his four-year term.<sup>164</sup>

In rejecting Myers's claim, and affirming the President's power to remove Myers at will, the Supreme Court focused on the first two aspects of Article II discussed above. That is, the Court explored both whether the executive power that Article II confers on the President encompasses an authority to remove executive officials<sup>165</sup> and whether the obligation of faithful execution entails such authority.<sup>166</sup> The Court's discussion drew heavily upon Founding-era evidence of the scope of Article II, including the extensive debates preceding the First Congress's creation of key executive departments in 1789.<sup>167</sup> The *Myers* Court focused in part on James Madison's argument that the executive power includes a power of removal. According to the Court, Madison "insisted" that Article II's vesting of "the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article."<sup>168</sup> The Court also linked the removal power to the obligation of faithful execution:

As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.<sup>169</sup>

Drawing upon the debates in the First Congress, the Court stated,

Mr. Madison and his associates pointed out with great force the unreasonable character of the view that the Convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the

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<sup>162</sup> See Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 ("Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law . . .").

<sup>163</sup> *Myers*, 272 U.S. at 106.

<sup>164</sup> *Id.*

<sup>165</sup> See Bellia, *supra* note 103, at 1395-96 (summarizing the *Myers* Court's use of historical evidence to determine the scope of the President's removal power).

<sup>166</sup> See *id.* at 1396-97 (describing *Myers*' conclusions about the President's responsibilities to faithfully execute the law).

<sup>167</sup> *Myers*, 272 U.S. at 115-17. I have examined elsewhere the controversy over whether the actions of the First Congress indeed signal a "Decision of 1789" on the scope of presidential removal authority. See Bellia, *supra* note 102, at 1377-89.

<sup>168</sup> *Myers*, 272 U.S. at 115.

<sup>169</sup> *Id.* at 117.

means of thwarting the Executive . . . by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.<sup>170</sup>

The Faithful Execution clause thus “confirmed” the Court’s conclusion that the President must have the power to remove those who assist him in execution of the laws.<sup>171</sup> To hold that the President lacked such a power would “make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.”<sup>172</sup> The Court acknowledged that officers will sometimes be acting in furtherance of the President’s discretionary duties and sometimes will be pursuing statutorily assigned duties.<sup>173</sup> Even in the latter case, however, the President must be able to “properly supervise” officers’ “construction of the statutes under which they act in order to secure . . . unitary and uniform execution of the laws.”<sup>174</sup> Thus, not only disloyalty or inefficiency, but also refusal to follow presidential direction on matters of statutory interpretation, would give rise to grounds for removal.

Although it is not possible to isolate the strands of the *Myers* case involving the Faithful Execution Clause from those involving the Vesting Clause, one could argue that the connection *Myers* draws between the removal power and faithful execution provides some insight into what faithful execution means. That is, if faithful execution demands that the President have the power to remove an official who refuses to follow presidential direction or who exhibits inefficiency or disloyalty, then faithful service entails acceptance of presidential direction, competence, and loyalty.

In subsequent cases, however, the Court narrowed the *Myers* decision, without fully exploring the continued validity of either of the potential theories underpinning that decision. First, in *Humphrey’s Executor v. United States*,<sup>175</sup> the Court upheld a provision of the Federal Trade Commission (FTC) Act limiting the President’s removal of FTC Commissioners to cases of “inefficiency, neglect of duty, or malfeasance in office.”<sup>176</sup> At the time of the decision, the FTC exercised considerable enforcement powers—powers

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<sup>170</sup> *Id.* at 131.

<sup>171</sup> *See id.* at 163-64 (“Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . .”).

<sup>172</sup> *Id.* at 164.

<sup>173</sup> *Id.* at 134-35.

<sup>174</sup> *Id.* at 135.

<sup>175</sup> 295 U.S. 602 (1935).

<sup>176</sup> *Id.* at 622.

that today would be considered executive.<sup>177</sup> The FTC also performed adjudicative (what the Court termed “quasi-judicial”) functions.<sup>178</sup> Because the FTC Commissioners performed at least some executive functions, and the Court sustained a for-cause removal provision, *Humphrey’s Executor* is inconsistent with a theory that the “executive Power” includes unfettered removal authority of all officers exercising any executive authority. Although the Court in *Humphrey’s Executor* did not specifically discuss the Faithful Execution Clause, the decision suggests that, in a case involving an officer with adjudicative functions, any removal power that the duty of faithful execution implies is not inconsistent with a good cause restriction on removal. That is, *Humphrey’s Executor* implies that where adjudicative functions are involved, unfettered presidential removal authority is not necessary for faithful execution of the laws. To the extent that *Myers* interprets the Faithful Execution Clause to encompass a presidential power to remove officials at will, *Humphrey’s Executor* clarifies that any such power extends only to officials who engage in purely executive functions.<sup>179</sup>

Similarly, in *Wiener v. United States*,<sup>180</sup> the Court confirmed that *Humphrey’s Executor* drew “a sharp line of cleavage” between purely executive officials, removable by virtue of the President’s constitutional powers, and “those whose tasks require absolute freedom from Executive interference.”<sup>181</sup> The Court characterized the War Claims Commission—a body responsible for adjudicating claims by individuals who suffered injury or property damage at the hands of the enemy in connection with World War II—as requiring that freedom from interference.<sup>182</sup> Indeed, in *Wiener* the Court inferred a good-cause limitation on presidential removal of members of the War Claims Commission even though the underlying statute was silent on the question of removal.<sup>183</sup> One could read *Wiener* to create a default presumption that, in the case of an adjudicative body like the War Claims Commission, the President cannot remove an official without cause unless Congress so specifies. *Wiener*,

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177 See *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) (“[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey’s Executor* would at the present time be considered ‘executive,’ at least to some degree.”).

178 *Humphrey’s Ex’r*, 295 U.S. at 629.

179 See *id.* at 627-28 (“[T]he necessary reach of [*Myers*] goes far enough to include all purely executive officers. It goes no farther . . .”).

180 357 U.S. 349 (1958).

181 *Id.* at 353.

182 *Id.*

183 See *id.* at 356 (“[N]o such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.”).

like *Humphrey's Executor*, thus implies that a for-cause removal power satisfies the President's obligation of faithful execution.<sup>184</sup>

Although the holdings of *Humphrey's Executor* and *Wiener* went only so far as to suggest that a presidential power to remove officers at will did not extend to officers with adjudicative functions (or those who did not engage in purely executive functions), the next significant removal case, *Morrison v. Olson*, jettisoned that limitation. In *Morrison*, the Court sustained Congress's creation of the Office of Independent Counsel.<sup>185</sup> The statute provided that an independent counsel could be removed, "other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."<sup>186</sup> As the Court acknowledged, the Independent Counsel's functions were purely executive.<sup>187</sup> While recognizing that *Humphrey's Executor* and *Wiener* had upheld removal restrictions on the ground that the functions of the officers in question were not purely executive, the Court stated that its "present considered view" was that "the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"<sup>188</sup>

The Court then invoked the Faithful Execution Clause. The constitutionality of the for-cause restriction on removal of the independent counsel, the Court reasoned, turned on whether the restriction would "impede the President's ability to perform his constitutional duty"<sup>189</sup>—that is, his "exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."<sup>190</sup> The Court concluded that a for-cause limitation on the Attorney General's ability to remove the Independent Counsel did not "sufficiently deprive[] the President

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<sup>184</sup> Although the *Wiener* Court discussed a sphere in which "a power of removal exists only if Congress may fairly be said to have conferred it," *id.* at 353, the Court appears to have been referring to a power to remove officials *at will*. That is, in the case of adjudicative bodies, the Court created a presumption against removal at will, but it did not suggest that a for-cause removal power exists only if Congress confers it.

<sup>185</sup> *Morrison v. Olson*, 487 U.S. 654, 682-83 (1988).

<sup>186</sup> 28 U.S.C. § 596(a)(1) (1982).

<sup>187</sup> See *Morrison*, 487 U.S. at 691 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

<sup>188</sup> *Id.* at 689.

<sup>189</sup> *Id.* at 691.

<sup>190</sup> *Id.* at 690.



of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”<sup>191</sup>

Although the *Morrison* Court invoked both the President’s executive power and the President’s duty of faithful execution, its discussion did little to clarify the relationship between the two. The Court did not treat the removal power as a constituent element of the executive power, and the Court’s holding is inconsistent with the view that the executive power itself entails the power to remove all officials who exercise purely executive powers. The Court appeared instead to treat the executive power as generating a duty parallel to that of the Faithful Execution Clause. In the case of the independent counsel, as with the adjudicative officers at issue in *Humphrey’s Executor* and *Wiener*, the Court determined that a for-cause limitation on removal would not interfere with the duty of faithful execution. Indeed, the Court went so far as to imply that the President can ensure faithful execution of the laws so long as a statute does not “completely strip[]” the President’s power to remove an official performing executive functions.<sup>192</sup> The Court found the duty of faithful execution satisfied where the for-cause removal provision preserved for the President “ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions” of the Ethics in Government Act, the statute at issue in that case.<sup>193</sup>

Finally, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>194</sup> the Supreme Court invalidated a statutory provision protecting the tenure of members of the Public Company Accounting Oversight Board (PCAOB), a board created to oversee the auditing of public companies subject to securities regulation.<sup>195</sup> PCAOB members could be removed only if the SEC, after notice and an opportunity for a hearing, found “good cause” as defined in the underlying statute, the Sarbanes-Oxley Act of 2002.<sup>196</sup> Because members of the SEC are themselves removable only for cause,<sup>197</sup> the Court had to consider whether the Constitution permits Congress to insulate officials from removal with two layers of for-cause protection. The Court held that the two levels of tenure protection for PCAOB members rendered the PCAOB’s structure unconstitutional.<sup>198</sup>

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<sup>191</sup> *Id.* at 693.

<sup>192</sup> *Id.* at 692.

<sup>193</sup> *Id.*

<sup>194</sup> 561 U.S. 477 (2010).

<sup>195</sup> *Id.* at 491.

<sup>196</sup> 15 U.S.C. § 7211(e)(6) (2012).

<sup>197</sup> Or so the Court assumed, based on the stipulations of the parties. See *Bellia*, *supra* note 103, at 1372 n.4 (noting the parties agreed that members of the SEC can only be removed for cause, “despite statutory silence on this point”).

<sup>198</sup> *Free Enter.*, 561 U.S. at 491.

*Free Enterprise* is important to our understanding of the Faithful Execution Clause for two reasons. First, the Court explicitly relied on the Faithful Execution Clause to reject the PCAOB's structure. Second, although the Court also purported to rest its decision in part on the "executive Power" the Constitution vests in the President, the Vesting Clause cannot account for the Court's ultimate holding—making the Court's reliance on the Faithful Execution Clause all the more important.

To understand why the Vesting Clause cannot account for the Court's decision, we must measure the Court's holding in relation to the Court's broad statements about the executive power. The *Free Enterprise* Court bookended its discussion of the removal issue with references to the Vesting Clause. Relying on the statements of James Madison during the debates in the First Congress over creation of the executive departments, the Court repeatedly observed that the removal power is an element of the executive power.<sup>199</sup> As I have argued elsewhere, however, the Court's reliance on the executive power in *Free Enterprise* was more rhetorical than substantive.<sup>200</sup> In rejecting the dual for-cause removal structure of the PCAOB, the Court read the Constitution to demand that the SEC have unlimited authority to remove members of the PCAOB. The Court did not explain why the executive power might demand unlimited removal authority for tenure-protected individuals, but not for the President. If the Vesting Clause truly encompassed an unlimited authority to remove executive officials, that rule would necessarily run upward and demand that the President have the power to remove SEC Commissioners at will. Because the Court severed the provisions restricting the SEC's authority to remove PCAOB members and then sustained the constitutionality of the statutory scheme,<sup>201</sup> the Court necessarily (though implicitly) validated the for-cause removal restriction on members of the SEC. In short, despite the fact that the Court repeatedly relied on the Vesting Clause as the source of a presidential power to supervise or remove executive officials, the Court's limited holding is not consistent with that clause.

The Faithful Execution Clause thus takes on greater significance in *Free Enterprise*, as the only case in which the Court invalidated a removal restriction and could not have done so solely on the basis of the Vesting Clause. The Court noted that the duty of faithful execution implies a power

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<sup>199</sup> See, e.g., *id.* at 492 (quoting an account of James Madison's statement that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws"); *id.* (attributing to the First Congress a prevailing view that "the executive power included a power to oversee executive officers through removal"); *id.* (describing removal as a "traditional executive power"); *id.* at 513-14 (stating that the executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties").

<sup>200</sup> Bellia, *supra* note 103, at 1406.

<sup>201</sup> *Free Enter.*, 561 U.S. at 508-10.

of oversight of executive officials: “The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”<sup>202</sup> Because it is “*his* responsibility to take care that the laws be faithfully executed,” the President “must have some ‘power of removing those for whom he can not continue to be responsible.’”<sup>203</sup> Turning specifically to the PCAOB’s dual for-cause removal requirement, the Court observed that the President’s inability to act upon a determination that “Board members are abusing their offices or neglecting their duties” means that the President “can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”<sup>204</sup>

The Faithful Execution Clause provides a much more promising basis for the *Free Enterprise* holding than does the Vesting Clause.<sup>205</sup> Although the Court did not state precisely what removal power the President must possess to fulfill his duty of faithful execution, the fact that the Court upheld one layer of for-cause removal for the SEC suggests a presumption that for-cause removal restrictions in the case of an agency with functions and authorities similar to the SEC or the PCAOB (or, for that matter, the agencies and officials at issue in *Humphrey’s Executive*, *Wiener*, and *Morrison*) suffices. The for-cause removal provisions vary by agency, but some of the common elements include inefficiency, neglect of duty, misconduct, malfeasance, abuse of authority, and failure to observe the law.<sup>206</sup> Thus, the removal cases suggest that to ensure faithful execution, the President must demand fidelity to law, competence, and abstention from improper conduct. At the same time, it is well understood that with respect to agencies whose officers typically enjoy for-cause tenure protection, a reasonable disagreement about the law does not provide the basis for removal.

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<sup>202</sup> *Id.* at 484.

<sup>203</sup> *Id.* at 493 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)).

<sup>204</sup> *Id.* at 496.

<sup>205</sup> The Court also relied on two structural separation of powers principles, untethered to specific constitutional text: concerns about presidential accountability and fears of congressional aggrandizement at the expense of executive power. For discussion, see Bellia, *supra* note 103, at 1409-10.

<sup>206</sup> *See, e.g.*, 15 U.S.C. § 41 (2012) (Federal Trade Commission) (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”); *id.* § 2053(a) (Consumer Product Safety Commission) (“Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.”); 42 U.S.C. § 7171(b)(1) (2012) (Federal Energy Regulatory Commission) (“Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”); 46 U.S.C. § 301(b)(5) (2012) (Federal Maritime Commission) (“The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.”); *see also* 15 U.S.C. § 7217(d)(3) (setting forth the provision invalidated in *Free Enterprise*, which limited removal of PCAOB members to abuse of authority, violation of law, or failure to enforce compliance).

#### D. *Summary*

As the discussion above suggests, the courts have done little to moderate the discretion-granting and discretion-limiting aspects of the Faithful Execution Clause. The constitutional background suggests that the Founders rejected a suspension power, whether or not the Faithful Execution Clause itself embodied that rejection. If so, faithful execution cannot encompass a power to disregard entirely a duly enacted law, other than on constitutional grounds. The early constitutional history also suggests that faithful execution encompasses a power not to pursue particular offenders, based on innocence or considerations of justice and equity in particular cases. The challenge is to identify a constitutional tipping point somewhere between these two poles—at one end, a concept of enforcement that requires action except in individual cases dictated by considerations of justices and equity; at the other end, a concept of enforcement that permits executive discretion up to the point of suspension.

The removal cases shed some light on this tipping point. They imply that to fulfill his duty of faithful execution, the President must demand executive officials' fidelity to the law. Yet those cases also suggest that with respect to officials whose tenure the Constitution permits Congress to protect with a for-cause removal provision, the President cannot treat a reasonable disagreement about the law as a trigger for removal. If so, then ensuring faithful execution requires the President to ensure a good-faith, reasonable interpretation of the law. Beyond that, any number of actions undertaken in bad faith would satisfy the sort of for-cause requirements that the Court has concluded are sufficient to preserve the President's faithful execution duty.

With this backdrop in mind, we can flesh out what the President's duty to take care that the laws be faithfully executed requires. The President must act in good faith in executing the law. He also must ensure that other executive officials do so, by demanding their fidelity to law, competence, and abstention from improper conduct. Returning to the first institutional question addressed at the beginning of this Part, the Faithful Execution Clause does not itself preclude (and is not, without more, violated by) a bad-faith act by a subordinate executive official. Rather, the Faithful Execution Clause protects the President's ability to respond to acts of bad faith, and indeed requires the President to do so, or to ensure that there exists an executive branch structure to respond effectively to acts of bad faith.

Depending on the context for executive action, good faith will have different elements. Suspending or dispensing with a statute is outside the bounds of good faith. As for enforcement discretion, the constitutional structure clearly permits such discretion for reasons of justice and equity in individual cases. Beyond that, if an exercise of discretion is to constitute faithful execution of the law, it must be tethered to a good-faith interpretation

of the underlying statute. The next Part fleshes out these issues through an evaluation of OLC's DAPA opinion.

#### IV. BEYOND THE OLC FRAMEWORK

As summarized in Part II, OLC evaluated a proposal to extend deferred action to the parents of citizens and lawful permanent residents and a proposal to extend deferred action to the parents of DACA beneficiaries. Applying the four principles it developed to evaluate exercises of enforcement discretion, OLC declared the former proposal lawful and the latter proposal unlawful. Although the debate over DAPA's legality moved to the courts, the OLC framework may prove important in future evaluations of executive conduct. Justiciability limitations inevitably constrain judicial superintendence of faithful execution of the law. If executive self-policing and legislative oversight are the primary mechanisms for gauging executive enforcement of the law, then it becomes critical to evaluate the mechanisms by which the executive judges its own conduct. For our purposes, that evaluation encompasses two (sometimes overlapping) questions: how well suited is OLC's framework to reining exercises of enforcement discretion, and how well does OLC apply that framework to DAPA?

##### A. *Unreasonable Versus Unconstitutional Exercises of Enforcement Discretion*

Before evaluating the elements of OLC's framework, we must first clarify whether OLC's analysis of DAPA was about faithful execution at all. Recall that the OLC framework embedded four principles: that enforcement decisions should reflect factors peculiarly within the agency's expertise; that an agency cannot rewrite laws to match its policy preferences; that an agency cannot adopt a nonenforcement policy so extreme as to amount to statutory abdication; and that an agency generally cannot foreclose case-by-case discretion.<sup>207</sup>

OLC's second and third principles call for measuring the degree of substantive fit between an enforcement policy and the underlying statute. In seeking to identify whether DHS was rewriting the laws to match its policy preference and whether DAPA reflected an extreme nonenforcement policy, OLC tested whether DAPA conformed to congressional priorities and limitations reflected in the INA. OLC's approach was somewhat analogous to the analysis an agency or a court might conduct in determining if a particular interpretation of a statute is correct. An agency's analysis might differ from that of a court evaluating an agency's interpretation: whereas an

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<sup>207</sup> See *supra* note 78 and accompanying text.

agency's task is to seek the best meaning of the statute, the court's task—depending on the scope of Congress's delegation to the agency and the form of the agency's interpretation—may be to accept a reasonable interpretation of the statute.<sup>208</sup> In either case, however, the agency or court looks to the statute to assess its meaning, and a policy that is inconsistent with the statute or that is unreasonable is unlawful.

Despite some similarities between OLC's analysis and the typical analysis of a question of statutory interpretation, I read the OLC opinion as driven by a concern about unconstitutionality as well as, or rather than, a concern about statutory interpretation or unreasonableness. OLC focused on the concept of "faithful[] execut[ion]" in critical segments of the framework it laid out and in its application of that framework to DAPA. As will become clear, moreover, OLC's assessment of the substantive fit between the enforcement program and the statutory scheme gave the executive branch extremely wide berth—an approach that is more consistent with a constitutional focus.<sup>209</sup>

The observation that OLC's framework seems to operate within the realm of constitutional law rather than ordinary law highlights a difficulty with OLC's approach to evaluating DAPA—that OLC's analysis neglected the ordinary law layer. OLC's characterization of DAPA as an exercise of enforcement discretion set OLC on a path of evaluating the consistency of that policy with the President's faithful execution duty, rather than more directly evaluating the policy's consistency with the INA. The inquiries overlap, but not entirely. The President's duty of faithful execution demands that he ensure executive officials' fidelity to law. In some contexts he must countenance a good-faith disagreement about the meaning of the law, and in other contexts he cannot do so. But even under the most demanding construction of the Faithful Execution Clause, the clause tolerates some degree of mismatch between congressional priorities and an executive enforcement policy. The executive agency's task, as noted earlier, is to arrive at the best construction of a statute. Although an unreasonable interpretation of a statute is an unlawful one, we would not, without more, characterize an unreasonable interpretation as a violation of the President's duty of faithful execution. If every failed instance of statutory interpretation by the executive branch does not trigger a constitutional claim, it follows that we must address

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<sup>208</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that where Congress has explicitly or implicitly left a statutory gap for an agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); see also *United States v. Mead*, 533 U.S. 218, 229 (2001) (holding that *Chevron* deference applies only where there are indicia that Congress "would expect the agency to be able to speak with the force of law").

<sup>209</sup> See *infra* Section IV.C.

questions of a policy's fidelity to an underlying statute even when a mismatch between the policy and the statute would not implicate the Faithful Execution Clause. Any other approach threatens to constitutionalize a range of questions that we currently treat as being within the realm of "ordinary" law.

The concept of enforcement discretion provides space for the Executive to make reasonable enforcement choices within a range reflected in the operative statute. The Constitution also provides space for the Executive to make good-faith, but perhaps mistaken or unreasonable, choices. *Heckler v. Chaney* suggests a limited role for courts in evaluating the latter space.<sup>210</sup> The executive branch, however, *must* evaluate enforcement discretion in this space: it must assess whether its enforcement priorities align with the statutory scheme, and not simply whether any deviation is so extreme as to amount to a constitutional violation. The OLC framework appears to collapse these two inquiries. Although OLC dedicated significant time to assessing the fit between DAPA and the INA, its orientation toward constitutional limits may introduce too much elasticity into the analysis. Section C addresses this issue in greater depth. For now, it is sufficient to note that OLC seems to miss the ordinary law layer.

A second difficulty with OLC's framework is that the Faithful Execution Clause does not pose the only relevant constitutional limitation on executive authority. The President's adoption of a policy that is not grounded in his constitutional or statutory authority is inconsistent with separation-of-powers principles, even if the policy was not adopted in bad faith.<sup>211</sup> Whether or not the Faithful Execution Clause captures this concept of congressional policymaking supremacy, it is not clear that the OLC framework does so. As discussed in Section IV.B, the OLC framework does demand a substantive fit between DAPA and congressional policies reflected in the INA. OLC's focus on general congressional priorities, however, as distinct from the specific statutory provisions that embody those principles, has the potential to mask significant deviations from the statutory scheme.

### B. *Evaluating the OLC Framework*

I now turn to the elements that OLC's enforcement discretion framework does include, and ask whether the framework sufficiently captures the requirements of the Faithful Execution Clause. There are at least two different ways to understand how the OLC framework refines the concept of faithful execution.

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<sup>210</sup> 470 U.S. 821, 833 (1985) (recognizing a presumption of unreviewability with respect to an agency's nonenforcement decisions).

<sup>211</sup> See *supra* notes 114-115 and accompanying text (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

On one view, OLC's framework interpreted the Faithful Execution Clause as demanding a *substantive fit* between congressional priorities and an executive official's exercise of enforcement discretion. As noted above, in various ways the principles OLC articulated and applied to DAPA do reflect an effort to test DAPA's substantive fit with the policies embedded in the INA. The second principle, for example, observes that an agency cannot, in effect, rewrite laws to match its policy preferences.<sup>212</sup> OLC's third principle seeks to ensure that an enforcement policy is not so extreme as to amount to an abdication of statutory responsibilities. Both principles thus should foreclose significant deviations from the underlying statutory scheme.

In applying these principles to DAPA's grant of forbearance from removal, OLC sustained DAPA based in large part on its view that granting deferred action to the parents of citizens and lawful permanent residents would be consonant with the priorities OLC imputed to Congress: a concern for family unity and a recognition that deferred action could appropriately serve as a bridge to a lawful status to which DAPA beneficiaries are prospectively entitled.<sup>213</sup> Conversely, OLC rejected the extension of deferred action to the parents of DACA beneficiaries because, in its view, Congress's concern for family unity did not apply when no family member had immediate or prospective lawful status in the United States.<sup>214</sup>

Section C more closely examines OLC's analysis of the relationship between DAPA and the congressional priorities reflected in the INA. Whatever the strengths and weaknesses of OLC's evaluation of congressional priorities might be, the point for now is that at least in some respects the OLC opinion links faithful execution to fidelity to the statutory scheme. That is, the opinion suggests that an enforcement policy untethered to or inconsistent with congressional policy would be beyond the executive's power of faithful execution.

On another view, OLC's framework interprets the Faithful Execution Clause as demanding that an agency pursue congressional policies in good faith. Under this approach, the degree of substantive fit between the enforcement policy and the governing statute provides clues about whether an agency is acting in good faith, but is not decisive. Here, we might view OLC's four principles as a proxy for good faith. For example, evidence of an agency basing enforcement decisions on factors outside its expertise may constitute evidence that the agency is not attempting to be faithful to Congress's statutory scheme. Likewise, evidence of a lack of substantive fit between the law Congress adopts and the Executive's enforcement policy or a policy so "extreme" as to amount to an abdication of statutory

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<sup>212</sup> OLC Opinion, *supra* note 10, at 6.

<sup>213</sup> *Id.* at 26-28; see *supra* note 87 and accompanying text.

<sup>214</sup> See *supra* notes 92-93 and accompanying text.



responsibilities could serve as evidence of bad faith. A general policy of nonenforcement—foreclosing case-by-case discretion—similarly serves as evidence that the Executive is not seeking in good faith to enforce an existing congressional scheme, but rather is using enforcement discretion as a subterfuge to substitute its own judgment for that of Congress.

OLC did not clearly choose between these two models of faithful execution. The fourth principle that OLC articulated—reflecting skepticism of exercises of enforcement discretion incorporating categorical rules rather than case-by-case discretion—perhaps fits better with a good-faith approach, because it seeks to smoke out substantive policy differences masked as enforcement priorities.

Part III argued that the President’s duty to ensure that the laws be faithfully executed requires both that the President act in good faith and that he demand good faith, including fidelity to law, competence, and avoidance of improper conduct on the part of his subordinates. To the extent that the OLC framework embeds principles that can help ensure good-faith conduct on the part of executive officials, it aligns well with what Part III’s assessment of the Faithful Execution Clause requires.

One could argue, however, that a critical element of enforcement discretion is underdeveloped in OLC’s framework. To evaluate the executive branch’s exercise of enforcement discretion, we must ask whether the discretion-granting side of the Faithful Execution Clause constrains the grounds on which executive officials can decline to enforce the law. Structural principles provide one affirmative basis for executive discretion: enforcement discretion is available in individual cases for reasons of justice or equity.<sup>215</sup> Beyond that, can executive officials decline to enforce the law for *any* reason whatsoever, and if not, what constrains and guides enforcement discretion?

It should be obvious that a power to decline to enforce the law for any reason quickly collapses into a suspension power. That is, if exercised across a class of cases, the power to decline to enforce the law reflects a narrowing of the operative statute. OLC did address this point by suggesting that categorical exercises of enforcement discretion pose “special risks” of exceeding enforcement discretion.<sup>216</sup> OLC did not, however, offer a clear basis for delineating categorical exercises of enforcement discretion from those that are not.<sup>217</sup> Nor did OLC demand that categorical exercises of discretion be grounded in, as opposed to merely not inconsistent with, the underlying statute.

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<sup>215</sup> See *supra* notes 133-136 and accompanying text.

<sup>216</sup> OLC Opinion, *supra* note 10, at 7.

<sup>217</sup> OLC placed DAPA on the non-categorical side of the line, claiming that the program “provides for the exercise of case-by-case discretion.” *Id.* at 31. *But see Texas II*, 809 F.3d 134, 176 (5th Cir. 2015) (“Reviewing for clear error, we conclude that the states have established a substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion.”).

The intuition that categorical or class-based exercises of enforcement discretion are more problematic than individual exercises of enforcement discretion reflects a key distinction between the two: individual exercises of enforcement discretion fit comfortably with structural principles regarding the separation of legislative and executive functions, whereas categorical or class-based exercises of enforcement discretion require a justification in the underlying statute. In many cases, it will indeed be possible to link a categorical exercise of enforcement discretion to an underlying statute. With respect to deferred action, for example, one could argue that removing certain aliens with an immediate or near-immediate entitlement to lawful status would frustrate the purpose of the provisions granting that lawful status. Deferred action for VAWA self-petitioners or for victims of human trafficking and other violent crimes could be justified on that basis.<sup>218</sup> In other words, certain categorical exercises of enforcement discretion will effectuate rather than undermine the underlying statute. In the examples above, the threshold criteria for categorical exercises of deferred action are linked to the statute: deferred action is not available unless the applicant makes a preliminary showing that he or she satisfies the criteria for the visa to which he or she claims a prospective entitlement.

It is, of course, exceedingly difficult to extract from a statute as complex as the INA a clear and consistent set of priorities. In the next Section, I discuss these difficulties with respect to the particular congressional priority that is claimed to justify DAPA—maintaining family unity. One could approach these difficulties in two ways: with a default presumption that categorical exercises of enforcement discretion are impermissible absent a need to effectuate the purpose underlying particular statutory provisions, or with a default presumption that categorical exercises of enforcement discretion are permissible absent a clear statutory provision precluding them. The choice between these two default presumptions is a complicated one, but in practice OLC appeared to choose the latter approach without significant discussion.<sup>219</sup>

In other words, DAPA's extension of deferred action across a category of unauthorized aliens is justified not as a tool to serve particular provisions of the INA, but as a measure not inconsistent with one of the congressional priorities generally reflected in the INA. In effect, OLC's analytic framework implies that categorical exercises of enforcement discretion need not derive from specific statutory provisions. Despite the importance of that principle to OLC's

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<sup>218</sup> See *infra* notes 234-235 and accompanying text.

<sup>219</sup> OLC did state that "a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." OLC Opinion, *supra* note 10, at 7. OLC denied, however, that DAPA creates "a categorical, rule-like entitlement to immigration relief for[] the particular class of aliens eligible for the program." *Id.* at 29.

ultimate conclusion about DAPA's legality, OLC never fully explored that principle on the merits.

### C. *The OLC Framework in Application*

Sections A and B of this Part focused on potential limitations of OLC's framework for evaluating nonenforcement decisions. Even if the framework adequately tests whether an enforcement policy constitutes faithful execution of the law, the application of the framework becomes critical. The failure to closely scrutinize the relationship between DAPA and the INA, for example, could lead to validation of a policy that rewrites the INA or amounts to statutory abdication.

In this Section, I consider two aspects of OLC's application of its framework. The first concerns OLC's treatment of multiple elements of DAPA as exercises of enforcement discretion. Some of these elements, I argue, deserve a separate legal analysis. The second concerns how OLC examined and evaluated congressional priorities under the INA.

#### 1. Enforcement Discretion and Collateral Consequences

OLC generally characterized DAPA as an exercise of enforcement discretion. Even if we assume that OLC's four principles provide the appropriate framework for evaluating exercises of enforcement discretion, a critical threshold question is whether different elements of DAPA truly reflect an exercise of enforcement discretion.

There are multiple elements to DAPA: the establishment of criteria for illegal aliens to seek deferred action;<sup>220</sup> the decision to permit deferred action recipients to seek work authorization;<sup>221</sup> and the decision to treat a deferred action beneficiary's presence as "lawful."<sup>222</sup> In addition, a grant of deferred action represents a decision not merely to decline to enforce the law against past conduct, but also to tolerate a continued violation of the law.

Although these elements are closely tied to one another, each deserves separate treatment. The decision to permit deferred action recipients to seek work authorization, for example, is not a nonenforcement decision at all. The decision to allow an illegal alien to seek work authorization may be a logical consequence of a nonenforcement decision, but the framework for evaluating enforcement discretion has no application to it. OLC implicitly acknowledged as much, by defending the grant of permission to seek work authorization as being "grounded in" section 274A(h)(3) of the INA, rather than in "background

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<sup>220</sup> See *supra* Section I.A.

<sup>221</sup> See *supra* Section I.B.2.

<sup>222</sup> See *supra* Section I.B.1.

principles of agency discretion” or the Faithful Execution Clause.<sup>223</sup> Determining whether section 274A(h)(3) in fact confers on DHS the authority to grant work authorization to all deferred action recipients requires interpretation of that provision. Issues include whether the provision authorizes the grant of work authorization or merely acknowledges powers to grant work authorization that exist elsewhere in the INA; how to interpret a past history of granting work authorization to deferred action recipients (albeit in much smaller numbers); and whether recognizing DHS’s authority to grant work authorization to DAPA beneficiaries undercuts any purpose Congress may have had to deter illegal immigration by restricting employment of unauthorized aliens.<sup>224</sup>

Similarly, the fact that deferred action leads executive officials to tolerate a continued violation of the law raises complex questions that go beyond enforcement discretion. One could view the decision not to apply the INA’s removal provision as an exercise of enforcement discretion. But is tolerating a continued violation of the law simply a logical consequence of the nonenforcement decision? Or is tolerating a continued violation of the law an act ancillary to the Executive’s enforcement of *separate* provisions that contemplate a future lawful status?

Notice how dramatically the analysis changes depending on how we frame the question. If we view tolerating a continued violation of the law as part of the decision to forbear removal, then the history of executive officials’ use of deferred action (or other nonstatutory forms of discretionary relief), and Congress’s acknowledgment of executive practice, support the legality of executive conduct. The question becomes much closer if tolerating a continued violation of the law is ancillary to the executive branch’s enforcement of *other* provisions of the INA granting lawful status. The government has defended past instances of deferred action as a bridge to lawful status.<sup>225</sup> One could argue that the more remote the transition to lawful status is, the harder it is to characterize executive officials’ tolerance of continued violation of the law as an authority ancillary to enforcement of provisions under which an alien may adjust to lawful status, as opposed to a new path to lawful status.

## 2. Measuring DAPA Against the INA

Second, to the extent that OLC applied its enforcement discretion framework to test the substantive fit between DAPA and the INA, that

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<sup>223</sup> OLC Opinion, *supra* note 10, at 21; *see supra* notes 67-68 and accompanying text.

<sup>224</sup> *See supra* notes 65-68 and accompanying text.

<sup>225</sup> *See infra* notes 233-235 and accompanying text.

application demonstrates the malleability of the framework. Here, two aspects of OLC's analysis are worth evaluating.

a. *The Role of Congressional Inaction and Implied Approval*

The first aspect concerns how past instances of deferred action influenced OLC's understanding of congressional priorities. OLC's assessment of whether DAPA is consonant with congressional policy turned heavily on past congressional approval of deferred action. OLC characterized deferred action as "a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court."<sup>226</sup> After reviewing five class-based exercises of deferred action,<sup>227</sup> OLC opined that "Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice."<sup>228</sup> In fact, OLC found, Congress has enacted legislation that assumes deferred action will be available to certain aliens, and has directed that deferred action be made available to others.<sup>229</sup> OLC extrapolated from this congressional awareness of deferred action to find implicit congressional approval of an extension of deferred action through DAPA. In particular, OLC found that the extension of deferred action to the parents of U.S. citizens and lawful permanent residents would "use[] deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status."<sup>230</sup>

The difficulties with OLC's approach are both conceptual and context-specific. On a conceptual level, OLC conflated evidence of congressional acknowledgment of past deferred action programs with congressional failure to disapprove such programs, and treated both as a form of implied approval. I have discussed elsewhere the malleability of the concept of implied congressional approval, including how it both extends presidential power and circumscribes the opportunity to explore—and limit—the contours of the President's constitutional powers.<sup>231</sup> Aside from the problems that flow from relying on Congress's failure to act as a sign of congressional approval in any context, the approach presents particular problems with a recurring issue such as deferred action. When congressional silence is construed as tacit approval of the Executive's approach, Congress's failure to act works a constant expansion of executive authority. The reliance on DACA as a precedent for

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<sup>226</sup> OLC Opinion, *supra* note 10, at 13.

<sup>227</sup> See *supra* notes 39-48 and accompanying text.

<sup>228</sup> OLC Opinion, *supra* note 10, at 18.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 29.

<sup>231</sup> Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 142-44 (2002).

DAPA is a case in point. OLC did not fully defend DACA,<sup>232</sup> and it likely could not have done so on the theory that it espoused with respect to DAPA (that of preventing removal of one with a prospective entitlement to lawful immigration status). Yet on OLC's view, Congress's failure to disapprove DACA, among other deferred action measures, provides evidence of congressional approval.

Turning to the specific case of implied congressional approval of deferred action, the evidence that Congress has approved certain narrow uses of deferred action—mostly by implication—is compelling. OLC, however, moved quickly from this evidence to the assumption that Congress would approve far broader uses of deferred action. The key to OLC's analysis was that Congress has impliedly approved exercises of deferred action to act as a bridge to prevent removal of an individual with a prospective entitlement to lawful immigration status. OLC did not, however, consider the varied nature of the prospective entitlement under DAPA and prior programs.

The pre-DACA programs that OLC cited involve immigrants currently entitled to lawful status, or immigrants with an entitlement to lawful status far more definite and immediate than that involved in DAPA. A DAPA beneficiary's path to lawful status in most cases would depend on the age and status of his or her children. As noted earlier, U.S. citizens over the age of twenty-one can petition for visas for their parents.<sup>233</sup> Lawful permanent residents cannot do so unless they themselves become citizens. In both cases, any "entitlement" to lawful status lacks immediacy and certainty. By contrast, VAWA self-petitioners can adjust to legal status as soon as a visa becomes available.<sup>234</sup> For victims of human trafficking and other forms of violence covered in certain visa programs, deferred action is available only once the applicant has, at a minimum, made a *prima facie* showing that he or she is eligible for lawful status.<sup>235</sup> In short, one cannot rely on implied congressional approval of programs involving immediate or near-immediate entitlement to lawful status to draw inferences about congressional approval of programs involving more distant or less definite entitlement to prospective lawful status.

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<sup>232</sup> See OLC Opinion, *supra* note 10, at 18 n.8 (noting that extending deferred action on "a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action," and explaining that it is critical to the program's legality that "immigration officials retain[] discretion to evaluate each application on an individualized basis").

<sup>233</sup> See *supra* note 86 and accompanying text.

<sup>234</sup> 8 U.S.C. § 1154(a) (2012).

<sup>235</sup> See 8 C.F.R. § 214.11(b) (setting forth evidence required for eligibility for visa program); *id.* § 214.14(d)(2) (authorizing the grant of deferred action to "eligible petitioners" for the "U" visa program, applicable to individuals who have suffered substantial physical or mental abuse as victims of certain crimes); *id.* § 214.11(k)(1) (setting forth the requirements of *prima facie* evidence, which entitles applicants to an automatic stay of removal); *id.* § 214.11(m)(2) (2015) (recognizing deferred action as one mechanism to prevent removal of an "eligible applicant" to the "T" visa program for victims of human trafficking).

b. *Identifying Congressional Priorities*

The second and perhaps broader problem arises from the level of generality at which OLC identified congressional priorities. OLC's account of DAPA's fidelity to a congressional policy of preserving family unity may be overstated. The INA unquestionably reflects a concern for achieving and maintaining family unity. As noted earlier, the statute permits citizens to petition for immediate-relative visas on behalf of qualifying family members, including parents.<sup>236</sup> What significance, however, should we attach to the limitations the INA imposes—that a citizen must be twenty-one or older before she can petition for a visa on behalf of a parent,<sup>237</sup> and that aliens who accrue unlawful presence are subject to a three-year, ten-year, or permanent bar on admission?<sup>238</sup> And to the extent that the INA explicitly provides for relief from removal based on a family relationship, it severely restricts the availability of such relief to 4,000 cancellations per year<sup>239</sup> in cases in which “removal would result in exceptional and extremely unusual hardship” to the child.<sup>240</sup> It is difficult to see how the absence of a hardship standard or numerical cap in the DAPA context can be squared with these provisions.

In short, depending on the level of generality at which we view the INA, we could find—to employ the framework of Justice Jackson's *Youngstown* concurrence—either implied approval or implied disapproval of DHS's action.<sup>241</sup> At a high level of generality, we can indeed detect a priority to maintain family unity. At the same time, DHS clearly could not grant parents of citizens or lawful permanent residents a lawful immigration status in the face of specific provisions restricting such relief. Even if Congress did not specifically disallow more limited relief, we might view the narrow provisions outlining a path for parents of citizens and lawful permanent residents as, in a sense, occupying the field and thus signaling Congress's implied disapproval of DHS's action.<sup>242</sup>

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<sup>236</sup> See *supra* notes 51-53 and accompanying text.

<sup>237</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

<sup>238</sup> See *supra* note 53 and accompanying text.

<sup>239</sup> 8 U.S.C. § 1229b(e)(1).

<sup>240</sup> *Id.* § 1229b(b)(1)(D).

<sup>241</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-39 (1952) (Jackson, J., concurring).

<sup>242</sup> One could argue that the concurring justices in the *Youngstown* case took precisely this approach, finding that President Truman was not authorized to seize the steel mills because, in view of statutory provisions not directly applicable to the situation President Truman faced, Congress had impliedly disapproved of the President's course of conduct. See, e.g., Bellia, *supra* note 231, at 100-02 (describing the concurring Justices' reliance on statutory alternatives); *id.* at 140 (“In effect, the concurring Justices found that Congress had occupied the field, thereby blocking the course of conduct President Truman chose to pursue.”).

## CONCLUSION

DAPA seeks to respond to an exceedingly difficult problem—one with compelling humanitarian dimensions. The questions of executive power that DAPA raises are also exceedingly difficult. Those questions will continue to recur outside of the immigration context and will endure long after the battle over DAPA's legality is resolved. With respect to enforcement discretion, as in many other contexts involving executive power, the Faithful Execution Clause is likely to remain in the background. It should supplement and not supplant the statutory and separation-of-powers questions with which it overlaps.

Nevertheless, it is critical for the executive branch to have an adequate account of the limits of executive enforcement discretion reflecting both statutory and constitutional constraints. As I have argued, OLC's account falls short. That account elevates questions of ordinary law to the level of constitutional law, and in doing so tolerates significant tension between the proposed enforcement program and the statutory scheme. In practice, OLC's framework for enforcement discretion also proceeds from a dubious presumption that categorical exercises of enforcement discretion that are not clearly foreclosed by a statute are permissible, rather than from a presumption that categorical exercises of enforcement discretion are not permissible unless they align with a discernable (and not overgeneralized) statutory purpose. OLC's application of its framework, moreover, reflects significant difficulties, including the failure to separate elements of DAPA that truly relate to enforcement discretion from those that do not; an undue reliance on congressional inaction as providing implied approval for DAPA; and a search for congressional policies at such a high level of generality that statutory constraints are overlooked.