
LIVE BY THE EXECUTIVE PEN, DIE BY THE EXECUTIVE PEN?

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ABSTRACT

President Barack Obama famously (or infamously) claimed that he had a pen and a phone that enabled him to advance his legislative policy goals by executive order when Congress failed to act. Not all executive orders stand (or fall) on the same legal footing, however. This Article explores the legality of President Obama's most significant executive orders and executive actions, from those issued that dealt with war powers, to the mixed arena of immigration, to those dealing with domestic policy, and concludes that in many (though not all) cases, President Obama exceeded his constitutional authority.

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I. INTRODUCTION

When President Barack Obama took office in January 2009, his party held fairly large majorities in both houses of Congress—a filibuster-proof 60–40 advantage in the Senate,¹ and a nearly 20-percentage-point, 79-seat

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1. Karen Tumulty, *A Filibuster-Proof Majority?*, TIME (Apr. 28, 2009), <http://www.swampland.time.com/2009/04/28/a-filibuster-proof-majority/>. For purposes of this Article, I am treating Independents who caucused with the Democrats as though they were Democrats. In 2009, that included Senator Bernie Sanders of Vermont and Senator Joseph Lieberman of Connecticut. The Democrats gained their 60-vote, filibuster-proof majority in April of that year, when Senator Arlen Specter of Pennsylvania switched party affiliation from Republican to Democrat. *Id.*

margin in the House.² Then the Tea Party revolution of 2010 hit, resulting in historic, landslide losses for the President's party in that year's midterm elections.³ Democrats lost their filibuster-proof advantage in the Senate and barely held on to the majority.⁴ And they lost control of the House of Representatives altogether, going from a 79-vote majority⁵ to a 49-vote minority⁶ position, a monumental swing of 128 votes to their detriment. Although Democrats regained a bit of that ground in the 2012 presidential election year,⁷ the 2014 midterm elections wreaked even more havoc on their congressional delegations. President Obama spent the last two years of his second term with the opposition party in control of both houses of Congress by wide margins: 54 to 46 in the Senate⁸ and 247 to 188 in the House.⁹ That is a 28-vote swing in the Senate from what the Democrats controlled in 2009, and a whopping 138-vote swing in the House.

It should probably come as no surprise, therefore, that when faced with

2. *Election Results 2008*, N.Y. TIMES (Dec. 9, 2008), <https://www.nytimes.com/elections/2008/results/house/votes.html?mcubz=1>.

3. Paul Harris & Ewen MacAskill, *US Midterm Election Results Herald New Political Era as Republicans Take House*, GUARDIAN (Nov. 3, 2010), <https://www.theguardian.com/world/2010/nov/03/us-midterm-election-results-tea-party>.

4. A total of 51 Democrats plus 2 Independents versus 47 Republicans. *Election 2010*, N.Y. TIMES, <https://www.nytimes.com/elections/2010/results/senate.html?mcubz=1> (last visited Aug. 21, 2017). The filibuster-proof majority had actually been lost a year earlier, when Massachusetts Republican State Senator Scott Brown defeated Massachusetts Attorney General Martha Coakley in a January 2010 special election to replace the late Senator Ted Kennedy. Ewen MacAskill, *Republicans Take Ted Kennedy's Seat in Dramatic Upset*, GUARDIAN (Jan. 20, 2010), <https://www.theguardian.com/world/2010/jan/20/republicans-massachusetts-scott-brown-obama-health>. That loss created immediate problems for adoption of the then-pending Patient Protection and Affordable Care Act and created the need for the Executive Branch's completion of the legislation by regulation and executive order. *Id.*

5. A total of 257 Democrats versus 178 Republicans. *Election Results 2008*, *supra* note 2.

6. A total of 242 Republicans versus 193 Democrats. *Election 2010*, *supra* note 4.

7. A total of 55 Democrats (including the two Independents) versus 45 Republicans in the Senate; 233 Republicans versus 201 Democrats in the House, with one vacancy. *Election 2012: House Map*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/house.html> (last visited Aug. 27, 2017); *Election 2012: Senate Map*, N.Y. TIMES, <https://nytimes.com/elections/2012/results/senate.html> (last visited Aug. 21, 2017).

8. *Election 2014: Senate Election Results*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/elections/2014/results/senate>.

9. *Election 2014: House Election Results*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/elections/2014/results/house>.

such majority opposition in the halls of Congress, the President looked for other ways to advance his political agenda. “[W]e are not just going to be waiting for . . . legislation in order to make sure that we’re providing Americans the kind of help that they need,” the President famously stated in 2014.¹⁰ “I’ve got a pen and I’ve got a phone—and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward”¹¹ The question explored in this Article is whether the President’s use of his executive pen exceeded his constitutional authority, and if so, under what circumstances.

We should, right up front, dispense with one of the sillier arguments that has been offered up, either to defend or to attack the President’s use of executive orders.¹² The quantity of executive orders issued by any particular president has nothing to do with the legitimacy of the orders. So the fact that President Obama “issued fewer executive orders on average than any president since Cleveland,”¹³ or that he “signed more executive actions in his first 12 days than Donald Trump” did,¹⁴ is immaterial to the constitutional assessment of whether the President’s action in any particular instance was constitutionally valid. Neither should we dwell on the distinctions between executive orders, presidential proclamations, presidential memoranda, memoranda by cabinet secretaries or department heads, and agency regulations. The issue in this Article is whether the use of executive power during the Administration of President Obama, under whatever guise it was manifested, exceeded the powers given to the President under Article II of the Constitution, as supplemented by statutory authority conferred on the President by Congress.

10. *Remarks by the President Before Cabinet Meeting*, WHITE HOUSE (Jan. 14, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/14/remarks-president-cabinet-meeting>.

11. *Id.*

12. *See, e.g.*, Clyde Wayne Crews Jr., *Obama’s Legacy: An Abundance of Executive Actions*, FORBES (Jan. 10, 2016), <https://www.forbes.com/sites/waynecrews/2016/01/10/this-inventory-of-obamas-dozens-of-executive-actions-frames-his-final-state-of-the-union-address/#19c1f5275f5d>.

13. Kristen Bialik, *Obama Issued Fewer Executive Orders on Average than Any President Since Cleveland*, PEW RES. CTR. (Jan. 23, 2017), <http://www.pewresearch.org/fact-tank/2017/01/23/obama-executive-orders/>.

14. Keith Collins, *Barack Obama Signed More Executive Actions in His First 12 Days than Donald Trump*, QUARTZ (Feb. 1, 2017), <https://qz.com/899741/how-many-executive-orders-has-donald-trump-signed-compared-to-barack-obama/>.

II. WAR POWERS: THE LIBYAN INTERVENTION

Let us begin, then, in the arena where the President's power is arguably at its height: the conduct of war. Article II of the Constitution gives the President power to act as "Commander in Chief of the Army and Navy of the United States."¹⁵ Several of President Obama's early executive orders easily qualify as valid exercises of the commander-in-chief power. Executive Orders (EO) 13491, 13492, and 13493, for example, issued on his second day in office, all dealt with how our military forces would engage the enemy in the war against terrorism.¹⁶ EO 13491 defined the scope of authorized interrogation techniques,¹⁷ EO 13493 directed the review of our enemy-combatant detention policies,¹⁸ and EO 13492 directed the review and ultimate closure of the detention facility at Guantanamo Bay, Cuba.¹⁹ There was a lot of opposition to the latter, of course, but most of the opposition was based on policy disagreements, not on claims that the President lacked authority.²⁰ The legality of the order became more complicated once Congress prohibited use of federal funds to transfer detainees to the mainland United States, but President Obama ultimately backed away from his longstanding campaign pledge rather than challenge whether Congress's restriction on his powers as Commander in Chief was itself unconstitutional.²¹

That same question of the relative powers of Congress and the President in the conduct of war arose over the President's unilateral actions in Libya. Ever since the adoption of the War Powers Act in 1973, the law on the books has required presidents to notify Congress within 48 hours of committing U.S. troops into hostilities and, even more significantly, to withdraw those troops at the end of 60 days unless Congress has specifically

15. U.S. CONST. art. II, § 2, cl. 1.

16. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

17. Exec. Order No. 13491.

18. Exec. Order No. 13493.

19. Exec. Order No. 13492.

20. See, e.g., Karoun Demirjian, *Top Republicans Slam Obama's Plan to Close Guantanamo*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/top-republicans-slam-obamas-plan-to-close-guantanamo/?utm_term=.4a4605b978cc.

21. Stephen Dinan, *House Acts to Block Closing of Gitmo*, WASH. TIMES (Dec. 8, 2010), www.washingtontimes.com/news/2010/dec/8/congress-deals-death-blow-gitmo-closure/.

authorized continued military action.²² President Obama provided the requisite notice after ordering U.S. military strikes in Libya, but he continued the military operations long after the 60-day mark, despite the fact that Congress had not authorized the continued use of military forces, as the law required.²³ If the law was constitutionally valid, then President Obama's continued deployment of U.S. military forces in the Libyan conflict was clearly illegal.

When faced with such disputes, the courts and legal scholars have long looked to Justice Robert Jackson's concurring opinion in *Youngstown Steel & Tube Co. v. Sawyer*,²⁴ one of the most influential concurring opinions in our nation's history. Famously, Justice Jackson provided a three-tiered framework within which to address conflicts between Congress and the President.²⁵ In tier one, when "the President acts pursuant to an express or implied authorization from Congress," joined with whatever powers he has directly from the Constitution, his power is at its maximum.²⁶ In tier two, when Congress has been silent, there is a zone of twilight in which the President can act—if authorized to do so directly under Article II of the Constitution.²⁷ Finally, in tier three, when Congress has by law specifically barred certain action by the President, the President's powers are at their lowest ebb—and the President can only act lawfully if the powers he has directly from the Constitution trump any legislative power Congress might have over the subject.²⁸ Significantly, the President is not prohibited from acting in matters that fall within tier three, but whether he can do so turns on a careful assessment of the Constitution's assignment of powers between Congress and the President²⁹—a point often misunderstood by courts and legal commentators alike, not to mention the general public.³⁰

22. 50 U.S.C. §§ 1541–48 (2012).

23. Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>; Eyder Peralta, *Congress Presses Obama on Libya, as 60-Day War Powers Deadline Arrives*, NPR (May 20, 2011), www.npr.org/sections/thetwo-way/2010/05/20/136505202/congress-presses-obama-on-libya-as-60-day-war-powers-deadline-arrives.

24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

25. *Id.* at 635–37.

26. *Id.* at 635–36.

27. *Id.* at 637.

28. *Id.*

29. *Id.*

30. John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 HARV.

For decades, presidents of both political parties have repeatedly expressed their position that the War Powers Act was an unconstitutional intrusion on the President's powers as Commander in Chief, even while complying with its terms as a matter of comity and respect for the legislative branch.³¹ On the other side, leading members of Congress have repeatedly insisted on the law's constitutional validity, pointing to Congress's not insignificant powers under Article I of the Constitution to declare war and to provide for the army and naval forces, as well as its general power over appropriations.³² Members of Congress have even challenged violations of the War Powers Act in court, only to be rebuffed for their lack of standing without the courts ever reaching the merits of the constitutional issues.³³

Alas, the defense that the War Powers Act is an unconstitutional intrusion upon the President's constitutional powers was not readily available to President Obama. Unlike every one of his predecessors in the oval office since the passage of the War Powers Act, President Obama was a staunch defender of the constitutionality of the Act while a U.S. Senator, and remained so both on the campaign trail and once in office.³⁴ So, too, were most of his top national security advisors.³⁵ Indeed, one of them—Harold Koh, the former Dean of Yale Law School—had long been one of the leading advocates for the position that the War Powers Act was perfectly constitutional and that a President who failed to comply with its terms would be acting unlawfully.³⁶

This posed a real dilemma for the Obama team with respect to the use of military force in Libya. Would President Obama rethink his position on the War Powers Act and adopt the position taken by his predecessors that the War Powers Act was an unconstitutional restraint on his commander-in-chief power, or would he withdraw troops at the 60-day mark, as the War Powers Act required? Or would he simply violate the Act while continuing to acknowledge its constitutionality? Not satisfied with any of these options,

J.L. & PUB. POL'Y 639, 651 (2017).

31. *Id.* at 650.

32. *See, e.g.*, Tim Cohen, *Debate Over War Powers Re-Emerges in Congress, Courts*, CNN POL. (June 17, 2011), <http://www.cnn.com/2011/POLITICS/06/17/war.powers.libya/index.html>.

33. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000).

34. Eastman, *supra* note 30, at 650.

35. *Id.* at 652.

36. *See, e.g.*, HAROLD JONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69–70 (1990).

President Obama and Harold Koh, by then serving in the Department of State as senior legal advisor to Secretary of State Hillary Clinton, cooked up another alternative after top legal advisors at the Departments of Justice and Defense had determined that the military intervention constituted “hostilities” that triggered the War Powers Act requirement for withdrawal after 60 days absent congressional authorization.³⁷ President Obama merely claimed—laughably—that the requirements of the War Powers Act were not triggered because U.S. military forces had not been introduced into “hostilities.”³⁸ Harold Koh ignominiously offered a rationale that amounted to “we were shooting at them, but they aren’t shooting back at us,”³⁹ a position so preposterous that even the very pro-Obama Administration editorial pages of the *New York Times* found it hard to stomach.⁴⁰ Opponents called the maneuver “legalistic ‘word play,’” a “contorted reading of a law” invented by “an imaginative executive-branch lawyer” that “stretched [Koh] out on a legal limb so long and so thin that one can almost hear it cracking.”⁴¹ Speaker of the House of Representatives, John Boehner, echoed the sentiment:

The White House says there are no hostilities taking place. Yet we’ve got drone attacks under way. We’re spending \$10 million a day. We’re part of an effort to drop bombs on Qaddafi’s compounds. It just doesn’t

37. Michael Isikoff, *On Libya, President Obama Evaded Rules on Legal Disputes, Scholars Say*, NBC NEWS (June 21, 2011), http://www.msnbc.msn.com/id/43474045/ns/politics-white_house/t/libya-president-obama-evaded-rules-legal-disputes-scholars-say/; Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?mcubz=0>.

38. Savage, *supra* note 37.

39. Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), <http://www.nytimes.com/2011/06/16/us/politics/16powers.html>. In a report submitted to Congress on June 13, 2011, the Obama Administration claimed that the 60-day withdrawal requirement of the War Powers Act was not triggered because “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.” UNITED STATES ACTIVITIES IN LIBYA 25 (2011) (emphasis added), <https://assets.documentcloud.org/documents/204680/united-states-activities-in-libya-6-15-11.pdf>.

40. See, e.g., Ackerman, *supra* note 23; Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html>.

41. Starobin, *supra* note 40.

pass the straight-face test, in my view, that we're not in the midst of hostilities.⁴²

And the Department of Defense itself was paying combat pay to those involved in the operation, according to one published account.⁴³

In other words, Obama's refusal to withdraw U.S. forces at the 60-day mark was an egregious act of lawlessness on Obama's own view of the law, but not in the view of those (now largely on the other side of the political aisle from Obama) who contend that the War Powers Act itself is unconstitutional.

Moreover, even if we accept the latter position (as I do), the commander-in-chief power is not a free-wheeling power to commit U.S. troops wherever and whenever the president wants. The U.S. military is not the president's private police force, after all. There has to be some threat to the United States or its interests before the President can unilaterally utilize the armed forces of the United States.⁴⁴ When there is such a threat, the need for a quick decision, even "secrecy . . . and dispatch," is the very reason the founders crafted the powers of the President in the way they did, a unitary executive that would have the energy to fulfill its constitutional duties, particularly the duty to "protec[t] . . . the community against foreign attacks," as Alexander Hamilton eloquently noted in Federalist Number 70.⁴⁵ President George W. Bush did not require an act of Congress, therefore, before scrambling U.S. fighter jets in the midst of the terrorist attacks on September 11, 2001,⁴⁶ and President Franklin D. Roosevelt did not require an act of Congress to take the nation to war after Japan attacked Pearl Harbor on the December 7, 1941 "day of infamy" (though Congress nevertheless quickly declared war itself).⁴⁷ Neither would President Obama

42. Savage, *supra* note 37.

43. Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176, 182 (2012) (citing David A. Fahrenthold, *Obama's Reasoning on Libya Criticized*, WASH. POST, June 21, 2011, at A8).

44. *Id.* at 180 (citing Charlie Savage, *Barack Obama's Q&A*, BOSTON (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>); see U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2.

45. THE FEDERALIST NO. 70, at 403–04 (Alexander Hamilton) (ABA 2009).

46. James Gerstenzang & Paul Richter, *Bush Gave Jets OK to Down Airlines*, L.A. TIMES (Sept. 17, 2001), <http://articles.latimes.com/2001/sep/17/news/mn-46649>.

47. Fisher, *supra* note 43, at 180; Melissa Chan, 'A Date Which Will Live in Infamy.' *Read President Roosevelt's Pearl Harbor Address*, TIME (Dec. 7, 2016), <http://time.com/4593483/pearl-harbor-franklin-roosevelt-infamy-speech-attack/>.

have required an act of Congress to attack Libyan forces had they been attacking U.S. shipping in the open seas of the Mediterranean, just as President Thomas Jefferson did not require an act of Congress before rebuffing attacks by Tripoli pirates against U.S. merchant ships in the same area two centuries earlier.⁴⁸

But Jefferson drew the line at defensive action. He did not believe he had the constitutional authority to launch offensive military operations, even against would-be attackers, without the advance approval of Congress.⁴⁹ Modern presidents, perhaps faced with the realities of modern warfare as well as the United States' position as a superpower, have not adhered to Jefferson's line, instead advancing a doctrine known as "preemptive defense."⁵⁰ Even with that significant expansion of the President's commander-in-chief power, though, President Obama's intervention in Libya was constitutionally problematic.⁵¹ Libya was not at the time attacking the United States or any of our allies (though it had done so previously).⁵² It was not even at the time a serious threat to the United States (or any of our allies) such that a preemptive defense attack by U.S. forces would be warranted.⁵³ Indeed, what was happening on the ground in Libya at the time was a civil war, a power clash between factions of Libyans for control of the Libyan government and territory that did not pose any obvious or immediate threat to the United States no matter its outcome.⁵⁴

One might argue that the civil war in Libya threatened to destabilize the region, which could in turn threaten U.S. interests and allies in the region, but such an argument would stretch the preemptive-defense doctrine well beyond that doctrine's much-criticized use during the Administration of President Bush, a criticism that President Obama himself, while in the U.S. Senate, had espoused.⁵⁵ Yet, even this argument was not strongly

48. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 973 (2008).

49. *Id.* at 975–76.

50. See, e.g., Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q., no. 2, 2002–2003, at 89, 96.

51. Eastman, *supra* note 30, at 650.

52. Fisher, *supra* note 43, at 177.

53. *Id.* at 177–78.

54. *Id.*

55. Jack Goldsmith, *Obama Has Officially Adopted Bush's Iraq Doctrine*, TIME (Apr. 6, 2016), <http://time.com/4283865/obama-adopted-bushs-iraq-doctrine/>.

advanced by President Obama in defense of his unilateral actions in Libya.⁵⁶ Rather, President Obama's primary focus of concern was that Qaddafi's actions against his own people would create a humanitarian crisis:

Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qaddafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.⁵⁷

President Obama reiterated that position in his report to Congress on March 21, 2011, within 48 hours of the initiation of hostilities, as required by the War Powers Act, noting that "U.S. military forces commenced operations . . . to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya."⁵⁸ Qaddafi's attacks against his own citizens, Obama contended, were "of grave concern to neighboring Arab nations" because he was forcing Libyan civilians to flee to neighboring countries, "thereby destabilizing the peace and security of the region."⁵⁹ The growing instability in Libya could therefore "ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States," Obama claimed, piling inference

56. *Id.* To the extent that President Obama did advance such an argument, however peripherally, the circumstances of his intervention in Libya were different in kind than the circumstances where President Bush authorized attacks based on the preemptive defense theory. Lawrence F. Kaplan, *New Republic: Stop Comparing—Libya Is Not Iraq*, NPR (Mar. 18, 2011), <http://www.npr.org/2011/03/18/134649115/new-republic-stop-comparing-libya-is-not-iraq>. President Bush had an advance congressional Authorization for the Use of Military Force (AUMF) that President Obama did not have. *Id.* President Bush's actions could therefore serve as precedent for President Obama's use of preemptive-defense drone strikes against those who posed a threat of terrorist acts against the United States, where the same AUMF applied, but not for the attacks in Libya. Goldsmith, *supra* note 55.

57. *Remarks by the President on the Situation in Libya*, WHITE HOUSE (Mar. 18, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya>.

58. *Letter from the President Regarding the Commencement of Operations in Libya*, WHITE HOUSE (Mar. 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

59. *Id.*

upon inference.⁶⁰ But he then closed with a reiteration of his main area of concern:

Qadhafi's defiance of the Arab League, as well as the broader international community . . . represents *a lawless challenge to the authority of the Security Council* and its efforts to preserve stability in the region. Qadhafi has forfeited his responsibility to protect his own citizens and created *a serious need for immediate humanitarian assistance and protection*, with any delay only putting more civilians at risk.⁶¹

This position was not entirely without precedent, of course. President William Jefferson Clinton's unilateral military intervention in Bosnia was likewise aimed at furthering humanitarian goals—the prevention of genocide—without any specific, direct U.S. interest at stake.⁶² But President Clinton's intervention was completed before the 60-day withdrawal mark mandated by the War Powers Resolution;⁶³ President Obama's was not.⁶⁴ Neither was Obama's action compelled by a U.N. Security Resolution. The U.N. Security Resolution simply “authorized” member states “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi.”⁶⁵ It did not mandate that member states take such action, even if it had the authority to do so.⁶⁶ It is important to recognize, therefore, just how broad the claim of presidential power had to be in order to support the Libyan intervention, and how potentially dangerous.

President Obama's actions in Syria were on more solid statutory ground. The bombing he authorized against ISIS strongholds there in 2014 was arguably within the authority Congress provided in the Authorization for the Use of Military Force (AUMF) after the 9/11 attacks.⁶⁷ And the

60. *Id.*

61. *Id.* (emphasis added).

62. Barron & Lederman, *supra* note 48, at 1088–89.

63. *Id.*

64. Ackerman, *supra* note 23.

65. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011); *see also* Security Council, *Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, U.N. (Mar. 17, 2011), <https://www.un.org/press/en/2011/sc10200.doc.htm>.

66. *See* S.C. Res. 1973, *supra* note 65, ¶ 4.

67. Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/>

President chose not to launch attacks against the Assad regime in 2013 after Assad crossed Obama's "red line" and used chemical weapons on his own people, because President Obama was unable to obtain authorization from Congress for the use of force against the Assad regime itself.⁶⁸

III. IMMIGRATION: THE DACA AND DAPA EXECUTIVE ORDERS⁶⁹

Let me turn next to a policy area that is a blend of foreign policy and domestic policy: immigration. Here, the President's executive actions were among the most controversial of his entire Administration.⁷⁰ I don't want to dwell on the merits or demerits of the policy itself, but rather on its legality. And I also want to acknowledge that, in light of President Trump's own executive orders on immigration,⁷¹ there is a real "shoe on the other foot"

americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html.

68. Patrice Taddonio, *"The President Blinked": Why Obama Changed Course on the "Red Line" in Syria*, PBS (May 25, 2015), <http://www.pbs.org/wgbh/frontline/article/the-president-blinked-why-obama-changed-course-on-the-red-line-in-syria/>. I should note that, just days before this paper was presented at the Drake University Constitutional Law Symposium, President Trump unilaterally launched a military strike against Syria as well, in retaliation for Syrian President Assad's use of chemical weapons on his own people. Michael R. Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <http://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>. President Trump claimed that his actions were in the national interest of the United States because it was important to prevent a breach of the international consensus against the use of chemical weapons, lest the Assad precedent lay the groundwork for use of such weapons against the United States in the future. *Id.* Like President Obama's rationale for the military intervention in Libya, that rationale pushes the preemptive-defense argument beyond the breaking point.

69. Portions of this Part are drawn verbatim from "*Prosecutorial Discretion*" *Does Not Allow the President to "Change the Law": Hearing on "Keeping Families Together: The President's Executive Action on Immigration and the Need to Pass Comprehensive Reform" Before the S. Comm. on the Judiciary* (2014) (statement of John C. Eastman) [hereinafter Eastman Testimony], <https://www.judiciary.senate.gov/imo/media/doc/12-10-14EastmanTestimony.pdf>.

70. Ben Feuer, *The Surprisingly Contentious History of Executive Orders*, HUFFPOST (Feb. 2, 2017), http://www.huffingtonpost.com/entry/the-surprisingly-contentious-history-of-executive-orders_us_58914580e4b04c35d583546e.

71. Matt Zapotosky, David Nakamura & Abigail Hauslohner, *Revised Executive Order Bans Travelers from Six Muslim-Majority Countries from Getting New Visas*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.f48b4d0a5f4c.

aspect of the whole discussion that serious scholarship needs to confront and overcome. It may be convenient to reduce the discussion to, “Well, Obama had his orders on immigration, and Trump has his. Either both Presidents had authority, or neither did.” But because the legal issues are distinctly different, that discussion is not as simple.⁷² We have to instead entertain the possibility that some of the orders are legally valid, while others are not.

Because this Article focuses on President Obama’s constitutional legacy, I’m going to largely confine my remarks to his set of executive actions on immigration.

Let us begin with the Constitution’s relevant text. There is no *explicit* grant of power to any of the branches of government over the regulation of immigration into the United States.⁷³ Section Nine of Article I implies such a power, however, by forbidding its exercise by Congress prior to 1808—one of the three compromises with slavery contained in the original Constitution.⁷⁴ “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight,” the Clause provides, indicating both by its placement in Article I (which otherwise mostly deals with Congress) and the textual reference to Congress that the Framers assumed that authority over immigration was vested in Congress.⁷⁵

Congress has several explicit grants of power from which a power to regulate, restrict, or even ban immigration into the United States might readily be inferred.⁷⁶ It has the power to “regulate Commerce with foreign Nations,”⁷⁷ for example, and in the *Passenger Cases*, the Supreme Court early on recognized that the foreign Commerce Clause vested Congress with exclusive power (as against the states, that is) to regulate noncitizen passengers seeking entry into the United States.⁷⁸ Congress also has the

72. See Eugene Kiely, *Fact Check: Trump’s Immigration Policy vs. Obama’s*, USA TODAY (Jan. 30, 2017), <https://www.usatoday.com/story/news/politics/2017/01/30/fact-check-trump-refugee-policy-comparison-obama/97247418/>.

73. See U.S. CONST. art. I–III.

74. *Id.* art. I, § 9, cl. 1.

75. *Id.*

76. See *id.* art I, § 8, cl. 3; *id.* art. I, § 8, cl. 4; *id.* art I, § 8, cl. 11.

77. *Id.* art. I, § 8, cl. 3.

78. *Smith v. Turner*, 48 U.S. 283, 464 (1849); see also, e.g., *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 272–74 (1875) (invalidating a New York law requiring payment of a bond for every noncitizen passenger seeking entry into the United States, on the ground

power to “establish an uniform Rule of Naturalization;”⁷⁹ the power to “declare War;”⁸⁰ and the power to “define and punish . . . Offenses against the Law of Nations.”⁸¹ Although the first, by its terms, directly covers only the power to define who shall be eligible for citizenship, the Supreme Court has long recognized that the Naturalization Clause, in conjunction with the foreign Commerce Clause,⁸² the various war powers clauses,⁸³ and the Sweeping Clause (the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”),⁸⁴ gives Congress the power “to forbid the entrance of foreigners within its dominions,”—or, in other words, to exercise the same power, inherent in sovereignty, that every sovereign nation has.⁸⁵ The cases in this line, from the *Passenger Cases* to the *Head Money Cases*, dealt with whether the *federal government*, broadly speaking, had exclusive power over immigration such that the states had no authority over immigration; however, they did not deal specifically with *which branch* of the federal government had that power.⁸⁶ In *Nishimura Ekiu v. United States*, the Court noted that the power over immigration, inherent in sovereignty, could be exercised either by Congress pursuant to the aforementioned constitutional provisions, or by the President and the Senate pursuant to the treaty power.⁸⁷ But then, in the *Chinese Exclusion* case, *Chae Chan Ping v. United States*, the Court held that Congress could, by a statute restricting immigration, override a treaty provision that allowed it.⁸⁸ The power of exclusion of foreigners is an incident of sovereignty delegated by the Constitution to “the government of the United States, *through the action of the legislative department*,” the Court held.⁸⁹

Ever since, this Court has consistently held that the Constitution assigns plenary power over immigration policy to Congress, not to the

that it was a regulation of commerce, the “whole subject” of which “has been confided to Congress by the Constitution”).

79. U.S. CONST. art. I, § 8, cl. 4.

80. *Id.* art. I, § 8, cl. 11.

81. *Id.* art. I, § 8, cl. 10.

82. *Id.* art. I, § 8, cl. 3.

83. *Id.* art. I, § 8, cl. 11.

84. *Id.* art. I, § 8, cl. 18.

85. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (citations omitted).

86. *Head Money Cases*, 112 U.S. 580, 591 (1884); *Smith v. Turner*, 48 U.S. 283, 464 (1849).

87. *Nishimura Ekiu*, 142 U.S. at 658.

88. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

89. *Id.* at 603 (emphasis added).

President.⁹⁰ Indeed, in the 1909 case of *Oceanic Steam Navigation Company v. Stranahan*, the Supreme Court declared that “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens [into the United States].”⁹¹ “[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly [e]mbedded in the legislative and judicial tissues of our body politic as any aspect of our government,” the Court declared in the 1954 case of *Galvan v. Press*.⁹² It subsequently described Congress’s power over the subject as “plenary.”⁹³ Even in the recent case of *Arizona v. United States*, in which the Supreme Court at times mischaracterized the “plenary power of Congress” language in the prior cases as a plenary power of the federal government en route to its decision upholding various actions by the President—the Court still rooted its decision in statutory language, evidencing (in its view) the legislative intent of Congress.⁹⁴ In other words, the plenary power to make immigration *policy* is vested in Congress.⁹⁵

Congress cannot implement its policy without enforcement actions by the Executive, of course. As the Supreme Court recognized in *Mahler v. Eby*, “Even if the executive may not exercise [the power to exclude aliens] without congressional authority, Congress cannot exercise [that power] effectively save through the executive.”⁹⁶ As a practical matter, therefore, there must be some discretion afforded to the President in how he carries out his enforcement duties. There has hardly ever been a law that could be enforced in every particular, against every person, every minute of the day.

90. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (recognizing the exceptionally broad power of Congress to set immigration policy).

91. *Id.* (emphasis added) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

92. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added).

93. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 201 (1993) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)) (“Congress . . . has plenary power over immigration matters.”); *INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question”); *Kleindienst*, 408 U.S. at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (“The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’”)).

94. *Arizona v. United States*, 567 U.S. 387, 394–95, 401–03 (2012); see *id.* at 435 (Scalia, J., concurring in part and dissenting in part) (discussing the President’s decision not to enforce provisions of the Immigration Act).

95. *Id.* at 395.

96. *Mahler v. Eby*, 264 U.S. 32, 40 (1924).

Moreover, the President has an independent authority over foreign affairs—derived directly from Article II of the Constitution—that can overlap somewhat with Congress’s plenary power over immigration.⁹⁷

With the stage thus set, let us turn to President Obama’s immigration orders (or, more precisely, the two guidance memos addressing enforcement of the nation’s immigration laws, issued by his Secretaries of the Department of Homeland Security): the Deferred Action for Childhood Arrivals (DACA) memorandum in 2012;⁹⁸ and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) memorandum in 2014.⁹⁹ Both memos purport to establish enforcement priorities for executing the nation’s immigration laws, under well-established principles of prosecutorial discretion.¹⁰⁰ If that were all the memos accomplished, there would be little merit to the constitutional challenges to them.¹⁰¹ But the memos did much more than that, and it was the broader import that undoubtedly led the Supreme Court, *sua sponte*, to add an additional question when it granted the United States’ petition for writ of certiorari in *United States v. Texas*: “Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.”¹⁰²

Although *United States v. Texas* addressed only the DAPA program,¹⁰³

97. U.S. CONST. art. II, § 2; *id.* art. I, § 8, cl. 3.

98. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enf’t 1 (June 15, 2012) [hereinafter Napolitano Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

99. Memorandum from Jeh Charles Johnson, Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, R. Gil, Kerlikowske, Comm’r, U.S. Customs & Border Prot. 1 (Nov. 20, 2014) [hereinafter Johnson Memo].

100. *Id.* at 1–2, 3–5; Napolitano Memo, *supra* note 98, at 1–3.

101. Because my purpose here is to address President Obama’s *constitutional* legacy, I do not address the statutory challenge under the Administrative Procedures Act that was actually the basis for the Fifth Circuit’s injunction against implementation of the DAPA memo. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015), *aff’d by equally divided court*, 136 S. Ct. 2271, 2272 (2016).

102. *United States v. Texas*, 136 S. Ct. 906, 906 (2016).

103. *Id.*

the Take Care constitutional challenge to it also would apply to the DACA program, so I will begin with a discussion of the DACA program.

On June 15, 2012, by way of a memorandum from then-Secretary of Homeland Security Janet Napolitano to the heads of the three immigration agencies (David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP); Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services (USCIS); and John Morton, Director, U.S. Immigration and Customs Enforcement (ICE)),¹⁰⁴ the Obama Administration announced, purportedly in the “exercise of prosecutorial discretion,” that it would not investigate or commence removal proceedings, would halt removal proceedings already under way, and would decline to deport those whose removal proceedings had already resulted in a final order of removal for a broad category of individuals who met certain criteria set out in the memorandum.¹⁰⁵ Specifically, the following individuals would, categorically, receive what the Napolitano memo characterized as “deferred action”: Those who (1) came to the United States under the age of sixteen; (2) have continuously resided in the United States for at least five years preceding the date of the memorandum and are currently residing in the United States; (3) are currently in school, have graduated from high school, have obtained a general education development certificate, or are an honorably discharged veteran of the U.S. Coast Guard or Armed Forces; (4) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or do not otherwise pose a threat to national security or public safety; and (5) are not above the age of 30.¹⁰⁶

Although the memo repeatedly asserts that these decisions are to be made “on a case by case basis,”¹⁰⁷ it is actually a directive to immigration officials to grant deferred action to anyone meeting the criteria.¹⁰⁸ “With respect to individuals who meet the above criteria” and are not yet in removal proceedings, the memo orders that “ICE and CBP *should* immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.”¹⁰⁹

104. Napolitano Memo, *supra* note 98, at 1.

105. *Id.* at 1–3.

106. *Id.* at 1.

107. *Id.* at 2.

108. Eastman Testimony, *supra* note 69.

109. Napolitano Memo, *supra* note 98, at 2 (emphasis added).

“[w]ith respect to individuals who are in removal proceedings but not yet subject to a final order of removal, and who meet the above criteria . . . ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.”¹¹⁰

USCIS and ICE are directed to “establish a clear and efficient process” for implementing the directive, and that process “*shall* also be available to individuals subject to a final order of removal regardless of their age.”¹¹¹

The notion that this memo allows for a true individualized determination rather than provides a categorical suspension of the law, as was argued by former Administration officials and other supporters of the DACA policy, is simply not credible. There is nothing in the memo to suggest that immigration officials can do anything other than grant deferred action to those meeting the defined eligibility criteria. Indeed, the overpowering tone of the memo is one of woe to line immigration officers who do not act as the memo tells them they “should,” a point that was admitted by Department of Homeland Security officials in testimony before the House of Representatives, in which the Department conceded that immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria.¹¹²

Nevertheless, by repeatedly regurgitating the phrase, “on a case by case basis,” Secretary Napolitano seemed to recognize the existing precedent that prosecutorial discretion cannot be exercised categorically without crossing the line into unconstitutional suspension of the law—without, that is, violating the President’s constitutional obligation to “take care that the laws be faithfully executed.”¹¹³

That precedent is longstanding. Way back in 1838, the Supreme Court recognized that “[t]o contend that the obligations imposed on the President

110. *Id.* (emphasis added).

111. *Id.* (emphasis added).

112. *President Obama’s Executive Overreach on Immigration: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 103 (2014) (statement of Bob Goodlatte, Chairman, Committee on the Judiciary) (“DHS has admitted to the Judiciary Committee that, if an alien applies and meets the DACA eligibility criteria, they will receive deferred action. In reality, immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria.”).

113. U.S. CONST. art. II, § 3; Eastman Testimony, *supra* note 69 (citing Heckler v. Cheney, 470 U.S. 821, 832–33 & n.4 (1985)).

to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is entirely inadmissible.”¹¹⁴ And it reiterated that view as recently as 1985, suggesting in *Heckler v. Cheney* that judicial review of exercises of enforcement discretion could potentially be obtained in cases where an agency has adopted a general policy that is an “abdication of its statutory responsibilities.”¹¹⁵

The opinion issued by the Office of Legal Counsel (OLC) at the Department of Justice at the time the 2014 DAPA program was announced likewise recognized the need for individualized determinations for exercises of prosecutorial discretion to be constitutional.¹¹⁶ “[T]he Executive Branch ordinarily cannot . . . “consciously and expressly adopt[] a general policy” that is so extreme as to amount to an abdication of its statutory responsibilities,” the memo notes.¹¹⁷ “[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.”¹¹⁸ President Obama’s Secretary of Homeland Security, Jeh Johnson, likewise admitted in testimony before the House of Representatives “that there are limits to the power of prosecutorial discretion and that ‘there comes a point when something amounts to a wholesale abandonment to enforce a duly enacted constitutional law that is beyond simple prosecutorial discretion’”¹¹⁹ but would instead amount to an unconstitutional suspension of the law—arguably, just what the Take Care Clause was designed to prevent.¹²⁰ Indeed, among the charges leveled against

114. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838).

115. *Heckler*, 470 U.S. at 832–33 & n.4.

116. Eastman Testimony, *supra* note 69; Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, on The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others to the Secretary of Homeland Security and the Counsel to the President 23 (Nov. 19, 2014) [hereinafter Thompson Memo].

117. Thompson Memo, *supra* note 116, at 7 (second alteration in original) (quoting *Heckler*, 470 U.S. at 833 n.4).

118. *Id.* (quoting *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994)).

119. *President Obama’s Executive Overreach on Immigration: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Bob Goodlatte, Chairman, Committee on the Judiciary).

120. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (“To contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is

King George III in the Declaration of Independence was that he had suspended the laws and had declared himself “invested with power to legislate for us in all cases whatsoever.”¹²¹ Moreover, the only federal court to have considered the issue in light of the DACA program held that the word “shall” in the relevant statutes mandated the initiation of removal for all unauthorized aliens, thus statutorily removing whatever prosecutorial discretion might otherwise exist.¹²² The Office of Legal Counsel concluded otherwise, but its application of the facts of the DACA and DAPA programs to the legal standards it correctly described was tortured at best and came off as a rather blatant and unpersuasive attempt to rationalize the DACA and DAPA programs as falling on the permissible side of the legal line.¹²³

Neither were the Obama Administration’s actions—either the adoption of the DACA program in June 2012 or the expansion of it contained in the November 2014 DAPA program—simply an exercise of the kind of prosecutorial discretion that has been exercised by previous administrations. Much was made of the Family Fairness Program implemented by President George H.W. Bush’s Administration in February 1990.¹²⁴ But that program, which dealt with delayed voluntary departure rather than the DACA and DAPA programs’ deferred action, was specifically authorized by statute.¹²⁵ Section 242(b) of the Immigration and Nationality Act at the time provided, in pertinent part:

In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a

entirely inadmissible.”).

121. THE DECLARATION OF INDEPENDENCE para. 24 (U.S. 1776).

122. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738 (N.D. Tex. 2013) (“[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding . . .” (alterations in original) (emphasis added) (citing 8 U.S.C. §1225(b)(2)(A) (2012))).

123. See Thompson Memo, *supra* note 116, at 32–33.

124. Memorandum from Gene McNary, Comm’r, on Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens to Reg’l Comm’rs 1–2 (Feb. 2, 1990); see, e.g., Marshall Fitz, *The Bush Family Fairness Plan Is the True Precursor to the President’s Executive Actions on Immigration*, HUFFPOST (Dec. 15, 2014), http://www.huffingtonpost.com/marshall-fitz/the-bush-family-fairness-_b_6319760.html; Dara Lind, *Did George H.W. Bush Really Pave the Way for Obama on Immigration?*, VOX (Nov. 20, 2014), <https://www.vox.com/2014/11/20/7254361/family-fairness-immigration>.

125. See Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (2012).

warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (2), (3), or (4) of section 1251(a) of this title.¹²⁶

That specific statutory authority was largely superseded by the Temporary Protected Status program established by the Immigration Act of 1990, which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions,¹²⁷ and was subsequently limited to 120 days by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹²⁸ In contrast, as even the OLC opinion acknowledged, “deferred action,” which was the asserted basis for President Obama’s actions, “developed without express statutory authorization.”¹²⁹ There are now specific statutes that authorize its use.¹³⁰ But none of these statutes authorize the broad use of

126. *Id.* (emphasis added); *see also* Perales v. Casillas, 903 F.2d 1043, 1048 (5th Cir. 1990) (citing § 1252(b) in discussing the permissive nature of prehearing voluntary departure for visa applicants).

127. 8 U.S.C. § 1254a(b) (2012).

128. 8 U.S.C. § 1229c(a)(2)(A) (2012).

129. Thompson Memo, *supra* note 116, at 13 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting that deferred action “developed without express statutory authorization,” apparently in the exercise of discretionary response to international humanitarian crises that trigger the President’s separate foreign affairs authority of the sort now covered by the Temporary Protected Status Program)).

130. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (Supp. I 2014) (providing that certain individuals are “eligible for deferred action”); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 1703(c)–(d), 117 Stat. 1392, 1694; USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 423(b)(1), 115 Stat. 272, 361 (codified as amended in scattered sections of 31 U.S.C.) (providing that certain immediate family members of lawful permanent residents who were killed on 9/11 should be made “eligible for deferred action”). Examples of other statutes that delegate to the Attorney General discretion to waive other provisions of the INA in specific circumstances are 8 U.S.C. § 1182(a)(6)(E)(iii), (d)(11) (Supp. I 2013) (authorizing discretionary waiver of smuggler ineligibility for admission rule for smugglers who only assisted their own spouses, parents, or children); *Id.* § 1182(d)(13), (14) (authorizing, in certain specified circumstances, discretionary waiver of inadmissibility rules for recipients of “T” and “U” visas, respectively); *cf.* 8 U.S.C. § 1229b (2012) (authorizing the Attorney General to “cancel removal” and “adjust status” for up to 4,000 aliens annually who are admitted for lawful permanent residence and who meet certain specific statutory criteria).

deferred action for domestic purposes asserted by the June 2012 DACA program or by the November 2014 DAPA program, and the fact that Congress deemed it necessary to include such statutory authorization for these specific domestic uses of deferred action is compelling evidence that the Executive does not have unfettered discretion to give out deferred action whenever it chooses, and certainly not to deem such individuals “to be lawfully present in the United States. . . . for a specified period of time” as Secretary Johnson claimed in his November 20, 2014 memo.¹³¹

To be sure, where to draw the line between valid, case-by-case prosecutorial discretion and invalid suspension of the law is no easy matter, and the issue might well have led to a Supreme Court determination that such a line is too uncertain a matter for judicial resolution, and hence a holding that the matter is a nonjusticiable political question. Justice Scalia’s untimely death in February 2016, and the resulting affirmance of the lower court’s narrower ruling on Administrative Procedure Act grounds in the multistate legal challenge to President Obama’s immigration orders, forestalled such a ruling for the time being.¹³²

But as serious as that issue is, it masks a much more fundamental constitutional question about executive power that needs to be addressed. As I have noted elsewhere,

President Obama’s Secretaries of Homeland Security did not just decline to prosecute (or deport) those who have violated our nation’s immigration laws. They gave to millions of illegal aliens a “lawful” permission to remain in the United States as well, and with that the ability to obtain work authorization, driver’s licenses, and countless other benefits that are specifically barred to illegal immigrants by U.S. law. In other words, President Obama’s administration took it upon itself to drastically re-write [U.S.] immigration policy, the terms of

131. Johnson Memo, *supra* note 99, at 2; *see infra* note 141 and accompanying text.

132. *See supra* note 101 and accompanying text. It should be noted here that this issue is not at play in the litigation challenging President Trump’s executive orders on immigration. That litigation does not involve the extent that prosecutorial discretion allows a president to decline to enforce the law, but rather the extent to which a president has authority under Article II, particularly as bolstered by explicit statutory authority, to deny admission to a class of aliens he determines to pose a threat to the security of the United States. *See* Adam Liptak, *The President Has Much Power Over Immigration, but How Much?*, N.Y. TIMES (Feb. 5, 2017), https://www.nytimes.com/2017/02/05/us/politics/trump-immigration-law.html?_r=0.

which, by constitutional design, are expressly set by the Congress.¹³³

As the USCIS explained on its website: “An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period of deferred action is in effect.”¹³⁴ And with that “lawful presence” came the ability to obtain authorization to work in the United States.¹³⁵

Secretary Napolitano noted in her DACA directive, “For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.”¹³⁶ The implication of the memo, borne out by how it was implemented in practice, was not just that USCIS would accept applications for work authorization, but would actually grant such work authorizations—whether or not the individuals met statutory prerequisites—on the ground that the individuals were now eligible because the Administration had deemed them “lawfully present” in the United States.¹³⁷ The statute actually enacted by Congress, in contrast, quite unambiguously prohibits the employment of aliens who are in the country illegally (whether in deferred action status or not), except for those who meet a couple of carefully circumscribed statutory exceptions that most of the individuals covered by the DACA memo did not meet.¹³⁸ Napolitano’s memorandum cited no legal authority whatsoever for the DHS’s extraordinary directive to immigration officers,¹³⁹ and the directive is directly contradicted by legal advice given by the INS’s general counsel during the Clinton Administration:

The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions. For example, a decision to charge, or not to charge, an alien with a ground of deportability is clearly a prosecutorial enforcement decision. By contrast, the grant of an

133. Eastman, *supra* note 30, at 655.

134. *Frequently Asked Questions*, USCIS, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last visited Sept. 3, 2017).

135. Eastman, *supra* note 30, at 655.

136. Napolitano Memo, *supra* note 98, at 3; *see also* Eastman, *supra* note 30, at 655–56.

137. *See* Napolitano Memo, *supra* note 98, at 2–3.

138. *See infra* note 141 and accompanying text.

139. *See* Napolitano Memo, *supra* note 98, at 1–3 (failing to cite any legal authority throughout the memorandum).

immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.¹⁴⁰

Secretary Johnson attempted to fill in the “source of authority” gap with his 2014 DAPA memo, citing as his statutory authority for continuing to grant work authorizations a few words in a definitional section of the Immigration and Naturalization Act.¹⁴¹ “Each person who applies for deferred action pursuant to the criteria [set out in the memo] shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act.”¹⁴²

Section 274A, codified at 8 U.S.C. § 1324a, deals with employment of illegal immigrants.¹⁴³ Subsection (a)(1) specifically makes it unlawful to hire “an unauthorized alien (as defined in subsection (h)(3) [of this section]).”¹⁴⁴ Subsection (h)(3), in turn, defines “unauthorized alien” as any alien who is not “lawfully admitted for permanent residence” (that would be pursuant to any of the carefully wrought exemptions to the general ban on admission for permanent residence found, *inter alia*, in 8 U.S.C. § 1101(a)(15), such as the “T” visa, so named because it appears in paragraph (T) of subsection (a)(15)) or an alien “authorized to be so employed by this chapter or by the Attorney General.”¹⁴⁵

That last phrase, “or by the Attorney General,” and by extension the Secretary of Homeland Security, is the only statutory hook relied upon by Secretary Johnson.¹⁴⁶ That is a slim reed for all of the heavy lifting necessary to accept the President’s assertion of complete discretion—not only to decline to prosecute or deport illegal immigrants, but to grant them a lawful

140. KATE M. MANUEL & TODD GARVEY, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 3 n.15 (2013) (quoting Memorandum from Bo Cooper, Gen. Counsel, on INS Exercise of Prosecutorial Discretion 4 (July 11, 2000)), <https://www.hsdl.org/?view&did=748392>.

141. See Johnson Memo, *supra* note 99, at 4–5.

142. *Id.* at 4. As with the Napolitano memo, by “eligible to apply,” Johnson was ordering that work authorizations be granted, not just that applications be processed. See *id.*; Napolitano Memo, *supra* note 98, at 2–3.

143. 8 U.S.C. § 1324a (2012).

144. *Id.* § 1324a(a)(1)(A).

145. *Id.* § 1324a(h)(3); see also 8 U.S.C. § 1101(a)(15)(T) (Supp. II 2015).

146. 8 U.S.C. § 1324a(h)(3); 8 U.S.C. § 1103(a)(1) (2012) (transferring authority over various immigration matters from the Attorney General to the Secretary of Homeland Security); see Johnson Memo, *supra* note 99, at 45.

residence status and work authorization, as well. Never mind that with such absolute discretion, none of the pages and pages of carefully circumscribed statutory entitlements to exemption, and none of the carefully circumscribed statutory grants of discretion to the Secretary of Homeland Security to issue exemptions in other circumstances, would be necessary. Taken out of context, the statute purported to give the President, through his Attorney General, absolute discretion to ignore significant provisions of the nation's immigration laws—"ignoring the elaborate web of requirements for eligibility for lawful status" and employment authorization "that had been carefully constructed by Congress over decades."¹⁴⁷ As Judge Jerry Smith rightly noted in his opinion for the Fifth Circuit Court of Appeals affirming the injunction against the DAPA program and dispensing with this argument, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."¹⁴⁸ Indeed, even had Congress intended to delegate such unfettered discretion to the Attorney General by that statutory language, such a delegation—without any limiting principle at all, much less an intelligible one—would violate the nondelegation doctrine even in its modern, largely moribund state.¹⁴⁹

In sum, the 2012 DACA program and its 2014 DAPA expansion were presidential usurpations of the lawmaking power that the Constitution vests in Congress. As merely an exercise of the "President's pen," it could easily be reversed, at least in theory, but as President Trump is learning as he confronts the various expectations that have arisen as a result of those orders, removing benefits that have already been granted, even if unlawfully granted, is not such an easy matter in practice.¹⁵⁰ When then-Secretary of Homeland Security John Kelly revoked the Obama Administration's

147. John C. Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?*, 15 *ENGAGE* 27, 29 (2014) [hereinafter Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion*].

148. *Texas v. United States*, 787 F.3d 733, 760 n.86 (5th Cir. 2015) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)) *aff'd by equally divided court*, 136 S. Ct. 2271, 2272 (2016).

149. *See also* Eastman, *Did Congress Really Give the Secretary of Homeland Security Unfettered Discretion*, *supra* note 147, at 29–30.

150. Tal Kopan, *A Storm Is Brewing for DACA This September*, CNN POL. (Aug. 7, 2017), www.cnn.com/2017/08/07/politics/daca-coming-storm/index.html (discussing the challenges the Trump Administration faces by both defenders and challengers of the DACA program).

DAPA memo on June 15, 2017, he expressly left the DACA memo in place,¹⁵¹ and the Department's spokeswoman, Jenny Burke, stated that "[t]he future of the DACA program continues to be under review with the administration."¹⁵² Living by the executive pen might not necessarily lead to one dying by the executive pen, therefore.

IV. DOMESTIC USES OF THE EXECUTIVE PEN

President Obama's pattern of proceeding unilaterally—by executive pen, as it were—whenever he failed to advance his legislative agenda in Congress was even more pronounced in the domestic policy arena, perhaps no more notoriously than in the context of his signature health care law.

Even before the Affordable Care Act was passed by Congress, President Obama deployed his executive pen to shore up legislative problems that arose after Democrats lost supermajority control of the Senate following the January 2010 special election to replace Senator Ted Kennedy, who had died in office the previous August.¹⁵³ Before that loss of filibuster-proof control of the Senate, Senator Barbara Mikulski had successfully proposed an amendment to the working draft of the Senate

151. Memorandum from John F. Kelly on Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) to Kevin K. McAlcenan, Acting Comm'r, U.S. Customs & Border Prot., James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., Thomas D. Homan, Acting Dir., U.S. Immigration & Customs Enforcement, Joseph B. Maher, Acting Gen. Counsel, Michael T. Dougherty, Assistant Sec'y for Border, Immigration, & Trade Policy 2 (June 15, 2017).

152. Corey Mitchell, *Status of DACA, Dreamers Remains 'Under Review,' Trump Administration Says*, EDUC. WK. (June 16, 2017), http://blogs.edweek.org/edweek/learning-the-language/2017/06/trump_administration_cancels_program_to_protect_immigrant_parents.html. The DACA memo has been revoked by President Trump with the intent "to wind down DACA in an orderly and minimally disruptive manner." *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, WHITE HOUSE (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law>. Several lawsuits have emerged since President Trump revoked the DACA memo, most notably one brought by former-Secretary Napolitano and one brought by 16 state attorneys general. *See* Tal Kopan, *Blue States Sue Trump Over DACA*, CNN POL. (Sept. 6, 2017), <http://www.cnn.com/2017/09/06/politics/daca-trump-states-lawsuits/index.html>; Michael D. Shear, *Napolitano Sues Trump to Save DACA Program She Helped Create*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/us/politics/napolitano-sues-trump-to-save-daca-program-she-helped-create.html?mcubz=0>.

153. *See supra* note 4 and accompanying text.

version of the bill that would require health insurance companies to provide “preventive care” services for women without cost.¹⁵⁴ Although Senator Mikulski specifically disavowed arguments that the language would mandate the provision of abortion and contraceptive coverage, a group of pro-life Democrats in the House of Representatives who otherwise supported the Affordable Care Act balked at the language, which they believed would result in taxpayer funds being used for abortions.¹⁵⁵ The standoff, which threatened to derail the bill altogether, was finally broken when Congressman Bart Stupak, the group’s leader, negotiated a deal with the President, pursuant to which the President would issue an executive order confirming that the Affordable Care Act did not mandate abortion services.¹⁵⁶

In that Executive Order, issued three days later, President Obama offered his assurance that the Affordable Care Act “maintain[ed] current Hyde Amendment restrictions” on federal funding of abortions, and also that “longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. [§] 300a–7, and the Weldon Amendment, section 508(d)(1) of Public Law 111–8) remain intact.”¹⁵⁷ The Weldon Amendment is particularly germane, as that provision, contained in appropriation bills since 2004, prohibits federal agencies from “subject[ing] any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”¹⁵⁸

154. David M. Herszenhorn & Robert Pear, *Senate Passes Women’s Health Amendment*, N.Y. TIMES (Dec. 3, 2009), <https://prescriptions.blogs.nytimes.com/2009/12/03/senate-passes-womens-health-amendment/>.

155. See, e.g., Stephanie Condon, *Stupak’s Life a “Living Hell” Because of Abortion Position*, CBS NEWS (Mar. 18, 2010), <http://www.cbsnews.com/news/stupaks-life-a-living-hell-because-of-abortion-position/>; see also Patient Protection and Affordable Care Act, 42 U.S.C. § 18022(a) (Supp. II 2015) (allowing “qualified health plans” that receive certain federal funds to provide coverage for abortion services using segregated funds); *id.* § 18022(b)(1)(I) (requiring “[p]reventive and wellness services” in the “essential health benefits” necessary to be a qualified health plan permitted to operate on a state health insurance exchange).

156. Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House Announces Executive Order on Abortion*, WASH. POST (Mar. 21, 2010), <http://voices.washingtonpost.com/44/2010/03/white-house-announces-executiv.html>.

157. Exec. Order No. 13535, 75 Fed. Reg. 15599 (Mar. 24, 2010).

158. See, e.g., Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 508(d)(1), 123 Stat. 524 (2009).

President Obama subsequently reneged on the pledge made in his Executive Order when his Department of Health and Human Services adopted regulations that required health insurance companies to offer abortifacient contraceptives as a condition of participating in health care exchanges, directly contrary to the Weldon Amendment language.¹⁵⁹ My point here is not to revisit the validity of those regulations, which I have elsewhere argued contravened the authority delegated to the executive by the Affordable Care Act,¹⁶⁰ but to point out what the incident revealed about President Obama's view of executive orders. If the language in the Affordable Care Act that was of such concern to Congressman Stupak and his (albeit relatively few) pro-life Democrat colleagues actually mandated the provision of abortifacient coverage, that language would prevail over prior-enacted language in the Weldon Amendment.¹⁶¹ A proper understanding of executive orders would not have allowed the President to supersede that statutory language and revive the contrary language in the Weldon Amendment.¹⁶² President Obama apparently thought otherwise.

The contraceptive mandate was not the only rewrite of the Affordable Care Act's statutory text undertaken by the Obama Administration.¹⁶³ President Obama's Department of Health and Human Services unilaterally issued waivers of the various other statutory mandates imposed by the Affordable Care Act, both prior to the 2012 election (leading some to speculate that the waivers were designed to avoid the political fallout from

159. Brief of *Amicus Curiae* Bart Stupak and the Center for Constitutional Jurisprudence in Support of Petitioners at 9–12, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191), 2016 WL 183795, at *9–12. The Administration's duplicity on this score prompted Congressman Stupak to request that I file an *amicus curiae* brief on his behalf in the Little Sisters of the Poor contraceptive mandate cases, challenging the Administration's contraception and abortifacient regulations. *Id.*

160. See John C. Eastman, *No Free Lunch, but Dinner and a Movie (and Contraceptives for Dessert)?*, 10 N.Y.U. J.L. & LIBERTY 282 *passim* (2016).

161. See Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 254–55 (2016).

162. See *id.*

163. See, e.g., Chris Conover, *The White House's Five Most Egregiously Unilateral Changes to Obamacare*, FORBES (June 2, 2014), <https://www.forbes.com/sites/theapothecary/2014/06/02/potus-to-americans-go-ahead-take-the-law-into-your-own-hands/#303444162d69> (noting that there had thus far been “at least 23 major changes to the law made through unilateral executive action”); Grace-Marie Turner, *70 Changes to Obamacare . . . —So Far*, GALEN INST. (Jan. 28, 2016), <http://galen.org/2016/changes-to-obamacare-so-far/> (documenting “at least 43 [changes to the Affordable Care Act] that the Obama administration has made unilaterally”).

significant increases in premiums that would have occurred but for the waivers),¹⁶⁴ and after the election (largely to the benefit of leading Democrat Party constituencies).¹⁶⁵ And it unilaterally interpreted the core state exchange subsidy to apply, not just to exchanges “established by the state,” as the statutory language provided, but also to exchanges established not by the state governments, but by the federal government, a move ignominiously upheld by the Supreme Court in *King v. Burwell* after a rather tortured reading of the statutory text.¹⁶⁶

For example, in October 2010, the IRS announced that it was delaying the Act’s mandate that employer’s report to their employees on W-2 forms the full cost of employer-provided health care.¹⁶⁷ The law required that the information be included on W-2 forms issued in January 2012 for the 2011 tax year.¹⁶⁸ The delay meant that such information—which likely would raise serious concerns among voters—would not be provided on W-2 forms until the 2012 tax year, to be issued in January 2013, a couple of months after the 2012 presidential election.¹⁶⁹

Similarly, the Administration announced in early 2014 that an employer mandate that was due to begin that year would be pushed off until 2016, a delay which “many across the ideological spectrum viewed . . . as an effort by the White House to defuse another health care controversy before the fall midterm elections,” according to the *Washington Post*.¹⁷⁰ The mandate was already causing a number of small employers to reduce

164. See, e.g., Matthew Boyle, *Obamacare Waivers Weren’t in Original Law, Appearance of Political Favors Persists*, DAILY CALLER (June 7, 2011), <http://dailycaller.com/2011/06/07/obamacare-waivers-werent-in-original-law-appearance-of-political-favors-persists/>.

165. Glenn Kessler, *Did Obama Exempt 1,200 Groups, Including Congress, From Obamacare?*, WASH. POST (Oct. 16, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/10/16/did-obama-exempt-1200-groups-including-congress-from-obamacare/?utm_term=.1780fb203ac9.

166. *King v. Burwell*, 135 S. Ct. 2480 *passim* (2015) (citing 42 U.S.C. § 18031(a) (2012)).

167. I.R.S. Notice 2010-69, 2010-44 I.R.B. 576 (Oct. 12, 2010).

168. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9002(b), 124 Stat. 119, 853–54 (codified at 26 U.S.C. § 6051(a)(14) (2012)).

169. See I.R.S. Notice 2010-69.

170. Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html?hpid=z1&utm_term=.60f416f08714.

employee hours to part-time in order to avoid the mandate, and University of Chicago economics professor Casey Mulligan estimated that as many as 10 million workers might be downgraded to part-time because of the mandate.¹⁷¹ The Administration's delay pushed that pain past the 2014 midterm elections.

And in what was probably the biggest "pain avoidance" maneuver of all, the Administration used a creative interpretation of statutory authority for demonstration projects¹⁷² to funnel more than \$8 billion dollars of taxpayer funds to "offse[t] a significant portion of [Medicare Advantage] payment reductions" mandated by the Affordable Care Act.¹⁷³ Under the law as written, the Centers for Medicare and Medicaid Services (CMS) were authorized to provide quality bonus payments only to Medicare Advantage plans that achieved 4, 4.5, or 5 stars on CMS's 5-star quality rating system, beginning in January 2012.¹⁷⁴ Nevertheless, in November 2010, the CMS proposed that "the rules for determining [quality bonus payments] set forth in the Affordable Care Act . . . would be waived, and [quality bonus payments] would instead be determined under the terms . . . of [a] national quality bonus payment demonstration project."¹⁷⁵ The proposed changes were finalized the following April.¹⁷⁶ The "demonstration project" provided quality bonus payments to Medicare Advantage plans with 3 or more stars on the quality rating system—not just those with 4 or more stars, as

171. Gene Epstein, *More Part-Time Jobs on the Horizon*, WALL ST. J., Sept. 15, 2013, at 2.

172. Social Security Amendments of 1967, Pub. L. No. 90-248, § 402, 81 Stat. 821, 930-31 (1968), amended by 42 U.S.C. § 1395b-1 (2012).

173. Letter from James C. Cosgrove, Dir., Health Care, U.S. Gov't Accountability Office, to Orrin Hatch, Ranking Member, Comm. on Fin. 5 (Mar. 21, 2012) (on file with author); see also PATRICIA A. DAVIS, ET AL., MEDICARE PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA): SUMMARY AND TIMELINE (2010), http://www.politico.com/static/PPM191_timeline.html (describing that the law included approximately \$136 billion in cuts to Medicare Advantage plans starting in 2012).

174. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3201(f), 124 Stat. 119, 448-49 (Mar. 23, 2010), amended by 42 U.S.C. § 1395w-23 (2012).

175. Medicare Program; Proposed Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2012 and Other Proposed Changes, 75 Fed. Reg. 71190, 71220 (proposed Nov. 22, 2010) (codified at 42 C.F.R. pts. 417, 422, 423).

176. Medicare Program; Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2012 and Other Changes, 76 Fed. Reg. 21432, 21498 (Apr. 15, 2011) (codified at 42 C.F.R. pts. 417, 422, 423).

mandated by the Act—and it accelerated bonus payments, beyond what was authorized by the Act, to plans with 4 or more stars.¹⁷⁷ The \$8.3 billion price tag for the demonstration project, combined with the fact that its design was so structurally flawed as to prevent any meaningful assessment of whether the altered bonus-payment structure actually produced the added incentives that Health and Human Services claimed it would, led the Government Accountability Office to express its “concern[] about the agency’s legal authority to undertake the demonstration”—governmentspeak for “This is illegal!”—and to recommend that the demonstration project be cancelled.¹⁷⁸

On the flip side of the coin, the Administration was similarly cavalier with statutory text in order to provide benefits to its political supporters or advance causes they supported. The Administration unilaterally allowed for the provision of subsidized health care benefits to illegal immigrants, for example, contrary to the statute’s explicit ban on such coverage,¹⁷⁹ by redefining the phrase, “lawfully present alien,” to include illegal aliens if a “member of the taxpayer’s family is an alien lawfully present in the United States.”¹⁸⁰ And in 2013, the Administration announced in the preamble to a “final rule” published in the Federal Register that it would be “exempt[ing] certain self-insured, self-administered plans from the requirement to make reinsurance contributions for the 2015 and 2016 benefit years.”¹⁸¹ It made good on that promise about a month later.¹⁸² The “requirement” referenced in the Federal Register notice was contained in the statute’s text.¹⁸³ The exemption unilaterally issued by the Administration applied only to the groups that “self-administered” their own insurance plans, namely employee

177. Letter from Lynn H. Gibson, Gen. Counsel, U.S. Gov’t Accountability Office, to Kathleen Sebelius, Sec’y of Health & Human Servs. 2–3 (July 11, 2012), <https://www.gao.gov/assets/600/592303.pdf>.

178. *Id.* at 1–2.

179. 42 U.S.C. § 18032(f)(3) (2012) (“If an individual is not, or is not reasonably expected to be for the entire period for which enrollment is sought, a citizen or national of the United States or an alien lawfully present in the United States, the individual shall not be treated as a qualified individual and may not be covered under a qualified health plan in the individual market that is offered through an Exchange.”).

180. 76 Fed. Reg. 50931, 50940 (Aug. 17, 2011) (codified at 26 C.F.R. pt. 1).

181. 78 Fed. Reg. 65045, 65051 (Oct. 30, 2013) (codified at 45 C.F.R. pts. 144, 146, 147).

182. 78 Fed. Reg. 72322, 72340 (Dec. 2, 2013) (codified at 45 C.F.R. pts. 144, 147, 153, 155, 156).

183. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1341(b)(1)(A), 124 Stat. 119, 105 (codified as amended at 42 U.S.C. 18061(b)(1)(A) (2012)).

unions—one of the largest contributors to the Democrat Party.¹⁸⁴ The exemption allowed the unions to avoid their share of the \$25 billion that the reinsurance fee was expected to generate over three years.¹⁸⁵

A similar interpretive legerdemain played out with the Obama Administration's reinterpretation of Title IX of the Education Amendments of 1972 (Title IX). That law provides that “[n]o person . . . shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance[.]”¹⁸⁶ At the time, and for nearly 40 years since Title IX was adopted, no one understood the law to prohibit single-sex bathrooms, showers, locker rooms, and other intimate facilities.¹⁸⁷ Indeed, the statute expressly provided that “nothing contained [in it] shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes.”¹⁸⁸ The Department of Education's implementation of regulations confirmed this commonsense understanding of what the statute and its express exception required and did not require: “A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”¹⁸⁹

That longstanding understanding of Title IX was turned on its head by Obama Administration officials in January 2016—not by an amendment to the statute adopted by Congress or by an amendment to the statute's implementation of regulations adopted by the Department of Education pursuant to the notice-and-comment rulemaking process required by the Administrative Procedures Act. Rather, it was turned on its head by an

184. Larry Bell, *Unions Get Big ObamaCare Christmas Present as Other Self-Insured Groups Get Scrooged*, FORBES (Dec. 22, 2013), <https://www.forbes.com/sites/larrybell/2013/12/22/unions-get-big-obamacare-christmas-present-as-other-self-insured-groups-get-scrooged/#12e7695269bf>; Michael Tennant, *Obama Administration Poised to Exempt Unions from ObamaCare Tax*, NEW AM. (Nov. 12, 2013), <https://www.thenewamerican.com/usnews/health-care/item/16924-obama-admin-poised-to-exempt-unions-from-obamacare-tax>.

185. Bell, *supra* note 184.

186. 20 U.S.C. § 1681(a) (2012) (emphasis added).

187. See, e.g., Jeannie Suk Gersen, *The Transgender Bathroom Debate and the Looming Title IX Crisis*, NEW YORKER (May 24, 2016), <http://www.newyorker.com/news/news-desk/public-bathroom-regulations-could-create-a-title-ix-crisis>.

188. 20 U.S.C. § 1686 (2012).

189. 34 C.F.R. § 106.33 (2016) (emphasis added).

opinion letter issued from deep within the bowels of the Department's bureaucracy.¹⁹⁰ The letter defined "sex" to include "gender identity,"¹⁹¹ thereby rendering the statutory authority for separate-sex living quarters (and the implementing regulatory authority for separate-sex toilet and shower facilities) meaningless.¹⁹² Worse, the letter was signed, not by the Secretary of Education himself, or by the Assistant Secretary in charge of the Department's Office for Civil Rights, or even by the Principal Deputy Assistant Secretary. It was signed by James Ferg-Cadima, the Acting Deputy Assistant Secretary for Policy.¹⁹³ In other words, this fundamental shift in policy and rejection of "common sense [and] decency,"¹⁹⁴—directly contrary to a statutory exemption and express language in the statute's implementing regulation—was manufactured out of whole cloth by a single, relatively low-level, unelected, and unconfirmed bureaucrat at the Department of Education's Office of Civil Rights.¹⁹⁵ But President Obama's Department of Justice defended it all the way to the Supreme Court, before President Trump's revocation of the guidance letter led the Supreme Court to vacate the lower court decision and remand for further consideration.¹⁹⁶ Nevertheless, the "reinterpretation" of the law offered by the Obama Administration and its claim of entitlement to judicial deference to that reinterpretation was such an egregious challenge to basic separation-of-powers principles that many Supreme Court observers thought the overreach would yield a Supreme Court decision significantly curtailing the Court's *Auer* deference doctrine.¹⁹⁷

190. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Policy, Office of Civil Rights, to Emily T. Prince 1 (Jan. 7, 2015) (on file with author).

191. *Id.*

192. See, e.g., Christine Hauser, *Transgender Directives for Schools Draw Reaction from Across the Country*, N.Y. TIMES (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/transgender-students-and-new-rules-in-public-schools.html>.

193. Ferg-Cadima, *supra* note 190, at 2.

194. *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992).

195. Ed Whelan, *Transgender Activism Has Produced a Legal Absurdity*, NAT'L REV. (May 10, 2016), <http://www.nationalreview.com/article/435172/transgender-bathrooms-title-ix-justice-departments-transgender-activism> (describing James Ferg-Cadima as an "obscure functionary").

196. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 714–15 (4th Cir. 2016), *rev'd and remanded*, 137 S. Ct. 1239 (2017); Ariane de Vogue, *Supreme Court Temporarily Blocks Order on Transgender Bathroom Use*, CNN POL. (Aug. 3, 2016), <http://www.cnn.com/2016/08/03/politics/supreme-court-transgender-bathroom/index.html>.

197. Ariane de Vogue, *Supreme Court Takes Up Transgender School Bathroom*

Environmental policy, too, had its share of interpretative overreach in the Obama Administration, giving rise to a much more searching review of administrative agency decisions than had become commonplace in the courts. After the President's proposal to institute a cap-and-trade program failed to get even a floor vote in the Democrat-controlled Senate in 2010 (after passing in the House in 2009),¹⁹⁸ for example, the Environmental Protection Agency, answerable to President Obama, "reinterpreted" provisions of the Clean Air Act to achieve the very policy that President Obama had failed to get approved by Congress.¹⁹⁹ As then-Representative (and now-Senator) Edward Markey, the bill's co-sponsor, remarked, President Obama's Clean Power Plan was "based largely on what was inside of the Waxman-Markey bill that we passed"²⁰⁰ in the House (but which did not even get a vote in the Senate). And with its Clean Power Plant regulations, the EPA interpreted the statutory phrase "appropriate and necessary" as precluding it from considering costs in regulating emissions from stationary power plants, resulting in a regulation that the EPA itself estimated would cost the power plants approximately \$10 billion per year, in order to yield environmental benefits of between \$4 and \$6 million per year.²⁰¹ That regulatory move, and the EPA's contention that the courts should defer to its interpretation of the statute, prompted the Court to begin

Case, CNN POL. (Oct. 28, 2016), <http://www.cnn.com/2016/10/28/politics/supreme-court-takes-up-transgender-school-bathroom-case/index.html>.

198. The American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. 1st Sess. (2009) (a.k.a. The Waxman-Markey Bill), passed the House on June 26, 2009, Cong. Rec. H7471-7619, but died in the Senate.

199. Coral Davenport, *Appeals Court Hears Challenges to Obama's Climate Change Rules*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/politics/appeals-court-hears-challenge-to-obamas-climate-change-rules.html>; see National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24976, 24988 (proposed May 3, 2011) (codified at 40 C.F.R. pts. 60, 63).

200. Amanda Reilly & Kevin Bogardus, *7 Years Later, Failed Waxman-Markey Bill Still Makes Waves*, E&E NEWS (June 27, 2016), <https://www.eenews.net/stories/1060039422>.

201. *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citing National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304, 9306 (proposed Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63)).

reconsidering its deference doctrines more generally.²⁰² As Justice Thomas noted in his concurring opinion, “[W]e should be alarmed that [the EPA] felt sufficiently emboldened by [our *Chevron* doctrine] precedents to make the bid for deference that it did here. . . . [W]e seem to be straying further and further from the Constitution without so much as pausing to ask why.”²⁰³

There are many more examples of various agencies in the Obama Administration pushing the envelope on statutory text beyond the breaking point, setting up not just repeals by the Administration which has succeeded it, but a more serious reconsideration of the Court’s deference doctrines than many would not have thought possible just a decade ago. In other words, President Obama’s aggressive use of the executive pen to advance his *legislative* goals—goals that, under the Constitution’s separation of powers, should only have been advanced by acts of Congress—may well prove to be the death knell for deference doctrines that were significantly undermining the Constitution’s separation-of-powers design. If that happens—and the fact that many who would have opposed such efforts under President Obama or President Hillary Clinton may now welcome them as a wall to constrain President Trump—we may end up with a lasting and important legacy of President Obama, though one that arose in reaction to his pushing the separation-of-powers envelope.

202. *Id.* at 2713–14.

203. *Id.*