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The Letter of the Law: Administrative Discretion and Obama's Domestic Unilateralism

Abstract: In his 2014 State of the Union address Barack Obama pledged to act without Congress on a variety of fronts, following up his “we can’t wait” campaign of unilateralism before the 2012 election. The partisan furor this engendered tended to obscure the longstanding efforts of presidents to “faithfully execute” the law in a manner that aligns with their policy preferences. This paper examines the broad logic of those efforts, and delineates five areas where the Obama administration has been particularly aggressive: in its (1) recess appointments; (2) refusal to defend federal law (notably, the Defense of Marriage Act) in court; (3) use of prosecutorial discretion in declining to pursue violations of immigration and drug laws; (4) use of waivers; and (5) its utilization of the regulatory process to interpret the meaning of statutes, as with the Clean Air Act and the Affordable Care Act. Presidents do have flexibility in many cases; but this ends where they seek to alter the plain “letter of the law.”

DOI 10.1515/for-2014-0023

Kommandant-In-Ch[i]ef! Socialistic Dictator!

So read the Twitter feed of one member of Congress, fulminating from the House floor as he waited for President Barack Obama to deliver his State of the Union address in early 2014.¹

Other critics of the president had better grammar and more traditional media platforms, but came to the same general conclusion. A “brazen” Obama had

¹ The full tweet from Rep. Randy Weber (R-TX) read: “On floor of house waitin on ‘Kommandant-In-Chef’ [sic]... the Socialistic dictator who’s been feeding US a line or is it ‘A-Lying?’” The original message may be found at <https://twitter.com/TXRandy14/status/428334051595132928> (accessed February 24, 2014).

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revived the “imperial presidency,” charged Sen. Ted Cruz (R-TX). An “unparalleled use of executive power,” testified Rep. Jim Gerlach (R-PA). “Increasingly lawless,” complained Rep. Paul Ryan (R-WI).²

Prompting this outcry was a series of unilateral actions taken by the Obama administration — most proximately, his declaration in the 2014 State of the Union that “a year of action” was in store, regardless of whether any of that action took place on Capitol Hill. As the president had already told a White House audience, “I’m going to be working with Congress where I can, ...but I’m also going to act on my own if Congress is deadlocked. I’ve got a pen to take executive actions where Congress won’t...” (Obama 2014). Former White House chief of staff John Podesta had been brought back to the West Wing shortly before, hired to signal what the Washington conventional wisdom (via its electronic embodiment, *Politico.com*) — called “a more aggressive focus by the White House on using executive authority to circumvent Congress in the final 3 years of the administration” (Allen and Brown 2013). Podesta did not lower the tensions with his own analysis: “They *need* to focus on executive action given that they are facing a second term against a cult worthy of Jonestown in charge of one of the houses of Congress” (Thrush 2013).

The nasty rhetoric was notable in showing that such rancor could be reached even without touching on the usual flashpoints of presidential unilateralism lodged in the war powers, from surveillance to drone strikes.³ But its fervor tended to obscure the wider logic of executive action in the broader context of the administrative presidency. Such unilateral tactics were not new even within the Obama presidency, and certainly not within the modern presidency more generally. “In a complex, technologically advanced society in which the role of government is pervasive,” Richard Nathan (1983, p. 82) pointed out more than three decades ago, “much of what we would define as policymaking is done through the execution of laws in the management process.”

Since the 1930s, the American national state has expanded dramatically — urged on by matters of Depression, war (of various temperatures), civil rights, and widespread regulatory zeal. Partisan polarization has made achieving legislative action more difficult, and what Elena Kagan (2001) called asserting “directive authority” over the bureaucracy more appealing. As a result, presidents have both enhanced opportunity and motive to utilize administrative strategies

² See, respectively, Cruz (2014); Bell (2014); U.S. House (2014).

³ That topic is also beyond the scope of this essay, though Obama’s continuation of many of his predecessors’ positions and tactics would tend to confirm the notion that presidential personality matters little to incumbents’ institutional behavior.

seeking to “control” the bureaucracy and shape policy implementation. This in turn sheds light on the Constitutional mandate that the president “take care that the laws be faithfully executed.”

On its face this would seem to make the president merely a presider, not a “decider.” Yet as Alexander Hamilton (1793) long ago observed, “he who is to execute the laws must first judge for himself of their meaning.” Thus such (often low-salience) mechanisms have been an important part of how presidents have influenced governmental outcomes: in short, part of the very definition of presidential power. President Obama, with his predecessors, has interpreted laws’ meaning in line with his own preferences, via a wide range of mechanisms including unilateral directives, the issuance of regulations, waivers from present law, and the use of prosecutorial discretion. House majority leader Eric Cantor (R-VA), in turn, shot back with a website devoted to cataloging what he argued were examples of “Ignoring the Plain Letter of the Law & Failing to Faithfully Execute the Law,” in areas ranging from health care to the disposition of nuclear waste.⁴

In short, when it comes to faithful execution of the laws, “fidelity” has something of the same ring as it does in divorce court: it is very much in the eye of the beholder. Today’s arguments over Obama’s actions are consistent with arguments over presidential authority going back to the earliest days of the Republic – and with the incentives and constraints facing all presidents. As such they have important implications for how much discretion presidents should have in translating their preferences into executive policymaking. Below, I will trace a brief history of their tools for so doing, then focus on the Obama administration’s approach to unilateralism. The heart of the paper explicates the Obama tactics attracting the most opprobrium and tries to place them in broader context. In some cases, the president clearly does have the flexibility to act. In others, though, the Obama administration has pushed too far in evading the legislative process as it amends the letter of the law. The appropriate remedy is more, and better, lawmaking; but if gridlock protects us against congressional overreach, it also empowers the unilateral presidency.

A Page of History

Article II of the US Constitution begins with the declaration that “the executive power shall be vested in a President...” But it does not define what that power is,

⁴ The site can be found at <http://majorityleader.gov/theimperialpresidency/> [accessed March 15, 2014].

nor how far it extends, nor where its reach bumps up against the prerogatives of the other branches of government.

Those definitions have had to be worked out, through the annals of inter-branch contestation – battles that began almost immediately when one-time *Federalist* allies Alexander Hamilton and James Madison squared off over the legitimacy of Washington’s Neutrality Proclamation. The broader ebb and flow of presidential-congressional relations has been traced elsewhere in detail (see, *inter alia*, Schlesinger 1973; Sundquist 1982; Rudalevige 2005; Calabresi and Yoo 2008; Ellis 2012; Fisher 2014); the trend, of course, has been towards greater presidential autonomy.

While presidents have certainly been creative in annexing empty space in the Constitution for their own use, they have also proven themselves skilled at interpreting its notable textual ambiguity in their favor. Did the executive power – as Theodore Roosevelt would later argue in his *Autobiography* (1985, p. 372) – allow presidents to do more or less anything, so long as it was not expressly forbidden them in the constitution or the laws? One Supreme Court justice later commented sarcastically that if such “illimitable” power existed, it seemed odd that the framers should have bothered to haggle over the need to grant that executive the authority to ask for memos from his subordinates.⁵ James Wilson of Pennsylvania, an important advocate of a strong executive at the Constitutional Convention, clarified that “the only powers he conceived strictly Executive were those of executing the laws, and appointing officers...” (Adler and Genovese 2002, p. xxii). Yet Justice Holmes once noted that a “page of history is worth a volume of logic,”⁶ and so it has proven. In the 20th and now 21st centuries, exactly what Wilson sought to downplay rose dramatically in importance.

The second (“appointing officers”) will receive less attention in what follows but might be noted first, since executing the law is clearly tied to its executors – and since the executive departments and agencies now house some 3.3 million civilian and military personnel who, on paper at least, report to the president.⁷ Clearly this metropolis-sized population goes far beyond any one person’s span of control. Thus presidents have reacted in two ways. First, they have increased the size of their own, centralized staff – the Executive Office of the President (EOP) has grown to around fifteen hundred staff in its own right, in the White House proper and in key support agencies such as the Office of Management

⁵ Justice James McReynolds, dissent to *Myers v. U.S.*, 272 U.S. 52 (1926), at 118.

⁶ *New York Trust Co. v. Eisner*, 256 US 345 (1921).

⁷ This figure does not include postal workers, workers paid for by government grants, or those contracted as third parties to do government work.

and Budget (OMB). They have also paid increased attention to the wide range of political appointments within their putative control, seeking to (as one George W. Bush aide put it) “implant their DNA throughout the government” (Allen 2004). This meant looking for direct loyalty even in the lower-level appointees once frequently controlled by Cabinet secretaries, if not always with the desired – or desirable – results (Lewis 2008).

The growing number of executive personnel reflected the growth in the scope and expectations of the US government generally. The sheer number of laws and the institutionalization of a regulatory state meant that management and administration became critical functions. And that in turn highlighted the Article II mandate that the president “take care that the laws be faithfully executed.”

As noted above, that clause provided for more contention than one might immediately assume. Partly this is because there are so many laws – some of them contradicting others, and many more sitting in the statute books awaiting rediscovery (for instance, the power to designate land a “national monument” came from a 1906 law; Obama’s push to increase the minimum wage and overtime pay in 2014 rested on authority granted to presidents back in 1938). Further, complex substantive debates tend to generate complex statutes: the Affordable Care Act ran to more than 900 pages, No Child Left Behind a compact 670. “Laws are blunt instruments,” one Bush appointee notes, “and no law is perfect. Most consist of vague language and conflicting provisions, embrace nonspecific purposes, and lead to unintended consequences” (Hickok 2010, p. 79). Indeed, one could argue that good legislating leads to bad legislation, from the point of view of specificity: maneuvering a bill through its polarized gauntlet on Capitol Hill means allowing all sides to point to the same language as supporting their ideals.

These facts of political life grant purchase to presidents seeking room to maneuver, implementing their preferred version of policy from the universe of possibilities. And they imply real advantage to the use of unilateral administrative instruments as a mechanism for shaping amorphous authorities into policy change. Directing bureaus to implement the law in a certain way has become a key element of how lawmaking plays out on the ground.⁸ Other branches of government have tended to empower this development. As noted above, power granted by Congress frequently aggregates in the US Code over time. In the 1930s, the

⁸ Obviously, following from the discussion above, it also helps to have loyalists in place across the executive branch to follow those directives. Another related point is the presidential embrace of theories of presidential prerogative authority. This leads to broad claims about secrecy, war powers, covert action, and the unilateral abilities of the president to act in the absence of legislative authorization (or even in the face of legislative disapproval). As such it goes beyond the scope of the present essay.

Supreme Court originally sought to limit executive discretion by holding the Congress could not delegate broad legislative authority to administrative agencies (as in the famous “sick chicken” case, *Schechter Poultry Corp. v. US*). But the Court backed away from these limits. Subsequently the New Deal, World War II, the Cold War, the Great Society, and the explosion of environmental and consumer regulation in the 1970s all built up the size and scope of national government. To take advantage, presidents built up “the administrative presidency” noted above, geared towards controlling bureaucratic outcomes through a combination of centralization and politicization (Nathan 1983; Moe 1985, 2009; Rudalevige 2010).

This meant developing an array of managerial tools. Of these, executive orders get the most attention; they have the dual virtues of being substantively important (much of the time) and easy to measure. The vast majority are published in the *Federal Register* and they follow a fairly standard, if not always transparent, formulation process (see Rudalevige 2012). However, and perhaps partially as a result, they are not always presidents’ preferred vehicle for directing administrative behavior. Over time, the number of formal executive orders issued has actually declined. As Figure 1 shows, a huge surge in such orders during the New Deal and World War II gave way to a much lower equilibrium level, especially after 1980 or so.

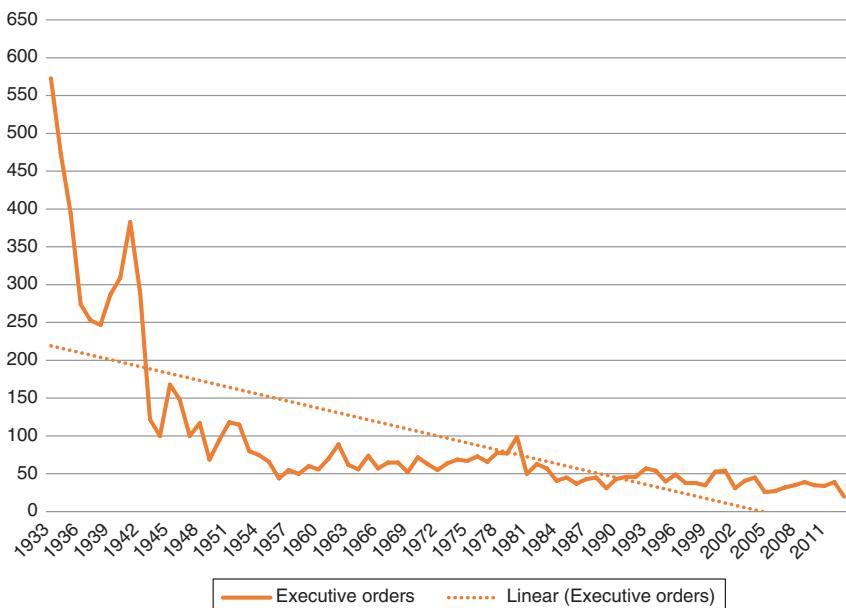


Figure 1 Number of Executive Orders Issued, 1933–2013.

Source: *Federal Register*, as compiled by the author.

Taking up the slack have been other kinds of directives. Kagan's (2001) novella-length review "Presidential Administration" centers on the use of presidential memoranda to agencies and the pro-active prodding of departmental rulemaking. More broadly a 2008 Congressional Research Service report listed 27 types of unilateral directives, including not only the well-known variants of executive orders and presidential proclamations but also various formal findings, designations, letters, memoranda, and a wide range of national security orders (Relyea 2008; and see Dodds 2013, pp. 4–10). Thus, while Obama issued fewer executive orders than his immediate predecessors – indeed, over the 2009–2013 period, he had issued fewer executive orders per year than any president since Grover Cleveland – it did not follow that he had renounced the administrative presidency. Obama's 20 executive orders in 2013 marked the lowest single-year total in more than a century. But that same year he issued 41 presidential memoranda to the heads of departments and agencies, along with nine additional presidential "determinations" designed to serve as the basis for administrative action.⁹ This count does not include any such memoranda not published on the White House website, nor classified orders, nor the half dozen-plus Presidential Policy Guidance or the Presidential Policy Directive documents produced that year through the National Security Council advising process.¹⁰ Nor does it include proposed regulations, signing statements, legal interpretations, or administrative orders technically issued by department heads but at White House behest.

The Obama Evolution

In short, Obama was president, and acted as presidents do: as Terry Moe (2009, p. 704) argues, in an important (if obviously stylized) sense "presidents are not individual people.... They are actor-types occupying an office whose powers and incentives are institutionally determined." Leon Panetta – the former Clinton chief of staff who would soon join the Obama administration as CIA director – put it this way: "I don't think any president walks into their job and starts thinking about how they can minimize their authority" (Nather 2007, p. 3702).

It is true that Obama had seemed an unlikely unilateralist. During the 2008 campaign he had spoken out against Bush-era practices in the war on terror, and

⁹ Compiled from <http://www.whitehouse.gov/briefing-room/presidential-actions/Presidential-Memoranda/2013>.

¹⁰ These are mostly not made public; but see the attempted collation by the Federation of American Scientists at <https://fas.org/irp/offdocs/ppd/index.html> (accessed February 26, 2014).

in his inaugural address he rejected “as false the choice between our safety and our ideals.” Indeed, in his first week in office he did an odd thing for a president: he renounced precedent that gave his office power, or claimed to. As part of a series of directives, Obama buried under bureaucratic boilerplate a series of legal opinions from the Bush Justice Department’s Office of Legal Counsel that had asserted extraordinary emergency powers for the president at home and abroad.¹¹

But Obama had sent other signals as well. He had voted in the Senate for the 2008 FISA Amendments Act legalizing the NSA’s warrantless surveillance program, and to reauthorize the Patriot Act in 2006. As a candidate, he argued “it is appropriate to use signing statements to protect a president’s constitutional prerogatives” (and promptly used them, as president). And it is worth noting that the new administration’s reversal of its predecessor’s unilateral actions was conducted unilaterally – extant executive orders were changed by new executive orders (ten in the first two weeks of his term, plus another ten memoranda to the executive agencies).

“We Can’t Wait!”

Nonetheless the first 2 years of the Obama administration prioritized the president’s ambitious legislative agenda. This made sense, given the large Democratic majorities in Congress that had accompanied the president to office. The president’s program strained those majorities to their limits, passing a huge economic stimulus bill, new financial regulations (the Dodd-Frank Act), and of course the Affordable Care Act (Sinclair 2012). Even the lame duck session after the 2010 midterms was relatively productive.

However, additional legislative priorities addressing climate change and immigration reform were not achieved, and after the midterm elections thinned Democratic ranks on Capitol Hill, the 112th Congress ground to a halt. There were calls for cooperation through the summer of 2011, as the president and new Republican Speaker of the House John Boehner sought a “grand bargain” to address the nation’s long-term fiscal future. But those negotiations ended in acrimony and worse, with the nation nearly in default as Congress dallied in raising the statutory debt ceiling.

That incident led many to call on the President to raise the debt limit unilaterally, relying on a little-read section of the 14th amendment. He declined to do so. However, from that point the administration shifted from prioritizing

¹¹ See Executive Order 13491. Note that the Bush administration had also distanced itself from the full breadth of some of these opinions, especially late in 2008 (Smith and Eggen 2009).

negotiations to a more aggressive approach more reminiscent of Harry Truman's attack on the "do-nothing" Congress back in 1948. By October 2011, Obama had organized a conscious strategy designed to show a presidency overcoming gridlock in advance of the 2012 election (Savage 2012). "We can't wait" for Congress to act, the president declared, and by the summer of 2012 a collation of that impatience included forty-plus executive initiatives, ranging from cutting lending fees on government-backed mortgages to the creation of a new national park in Virginia. It also included more controversial changes regarding immigration and education, discussed in more detail below.

It was not that the Obama administration had never seized on opportunities to act unilaterally before that point. For instance, Obama had approved using billions of dollars in funds appropriated to bail out financial institutions in 2008 to rescue General Motors and Chrysler from bankruptcy.¹² Now, though, with the large-scale statutory shifts of 2009–2010 in place, there was new law to implement. "The next phase," Obama political aide David Axelrod noted, "is... less about legislative action than it is about managing the change that we've brought about" (Nicholas and Parsons 2010). That occurred through various forms of directives and regulatory actions.

Obama spoke often – if perhaps wistfully – during the 2012 campaign of a more productive executive-legislative relationship. His reelection, he thought, "might break the fever" of polarized partisanship (Hennessey 2013). However, that was never likely; and even before his inauguration, after the gun control package proposed in the wake of an elementary school massacre failed to overcome a Senate filibuster, Obama announced a set of 23 "executive actions" he hoped would reduce gun violence. Far more substantially,¹³ as discussed below, the approaching deadline for full implementation of the Affordable Care Act prompted the president to make a number of changes to delay some of its effective dates and thus mitigate its impact, even before the disastrous first rollout of the new HealthCare.gov website in October 2013.

At the same time, even the most optimistic of grand bargainers grew disillusioned as fiscal 2013 came to an end in late September. Once again, Congress played chicken with default on the national debt as arguments over spending

¹² Further, the administration had placed a six-month moratorium on offshore oil drilling in the wake of the massive Gulf Coast oil spill from BP's Deepwater Horizon rig in 2010 (and extracted a \$20 billion compensation fund from BP to boot).

¹³ The promised gun control actions ranged from the overdue – naming a director of ATF, an agency that had been without a confirmed head since 2006(!) – to the long-term (ramping on research on the causes of gun crime) to the tangential (finalizing mental health parity regulations under the ACA). See <http://www.whitehouse.gov/issues/preventing-gun-violence>.

limits and the debt limit, combined with a futile demand from conservative Republicans to repeal the ACA, shut down the federal government for the first time since 1995. Sixteen days later a budget agreement was put in place, but without much Republican support in the House (144 GOP representatives voted against). The first session of the 113th Congress limped to a halt in December as the least productive Congress since World War II.¹⁴

“A Year of Action”

And so the story comes full circle to the 2014 State of the Union and Obama’s pledge to use his “pen and phone” to implement “a year of action” (Baker 2014). Within the address itself, specific actions on this front were relatively sparse, though another White House website was spawned and sat alongside its older “we can’t wait” cousin.

Nonetheless Obama’s promise that “wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do,” fed into the prevailing narrative of presidential imperialism critics bemoaned. “It is quite clear that he ignores what is in the law and he does what he wants to do,” Rep. John Fleming (R-LA) told *The Daily Caller*, whose headline read “Obama To Bypass Congress in 2014, Rule by Agency Decree” (Munro 2014). The House Judiciary Committee convened a hearing in late February to discuss what its members termed “lawlessness” in this regard (U.S. House 2014). “The President has no authority to bypass Congress and unilaterally waive, suspend, or amend the laws based on his policy preferences,” argued the committee chair, Rep. Bob Goodlatte (R-VA). “President Obama’s actions have pushed executive power beyond all limits and created what has been characterized as an ‘uber-presidency.’” Administration supporters, in turn, highlighted the relatively small number of executive orders issued by Obama and noted that other presidents, including iconic figures such as Thomas Jefferson and Abraham Lincoln, had also extended the bounds of executive power (e.g., Marcus 2014).

Administrative Discretion, in Five Acts

As suggested above, these arguments talk past each other. Thus it is worth examining more systematically the most salient of the issues concerned, those that

¹⁴ At least by the metric of laws enacted. Only sixty-five made it to the president’s desk. Over its full two year duration, by contrast, the “do nothing” 80th Congress passed 906.

overlap across a series of prominent critiques (e.g., the Cantor website noted above; Cruz 2014; U.S. House 2014; Will 2013). How well-founded were the objections to Obama's use of administrative discretion in key areas? Were his actions "beyond all limits?" Were they "lawless?"

What follows, then, will cluster around five specific tactics, to wit:

1. The use of recess appointments when the Senate was, arguably, not in recess;
2. The refusal of the administration to defend federal law, notably the Defense of Marriage Act (DOMA), against court challenges;
3. Another version of prosecutorial discretion, namely the decision to fail to pursue violations of immigration and drug laws;
4. The use of waivers to amend the impact of state mandates, specifically under the 1996 welfare reform act and the 2001 reauthorization of the Elementary and Secondary Education Act; and
5. Relatedly, the use of the regulatory process to potentially change the meaning of statute, most notably in the implementation of the Affordable Care Act and the Clean Air Act.

Other bureaucratic actions sometimes bruted as "abuses of power" – the Internal Revenue Service's alleged persecution of Tea Party organizations seeking tax-exempt status, or even the tragic attacks in Benghazi, Libya – certainly attracted legislative and public attention. But the five groupings above seem the most plausible as presidential action (rather than bureaucratic initiative, or miscue) and are those which raise the most interesting questions of "faithful execution" and the rule of law.

Recess Appointments

The first step towards implementing one's preferred policy, as noted earlier, is to have people in place to do so. And the Obama administration, like its recent predecessors, suffered from long delays in getting its nominees confirmed. Some of that resulted from the increasingly arduous process itself (see, e.g., Mackenzie 2001); but as the Obama presidency progressed the Democratic majority in the Senate became increasingly frustrated with the minority strategy of filibustering nearly every nominee, no matter how uncontroversial, thus requiring multiple votes, many hours, and 60 senators to achieve their confirmation. Judicial nominees were, as usual, a particular flashpoint. But in other areas there were problems too. Regulatory agencies like the National Labor Relations Board (NLRB) had no quorum, and thus could not legally take action. And the full powers of the Consumer Financial Protection Bureau (CFPB), under the terms of the law that

created it (the Dodd-Frank Act of 2010), only took effect once it had a director in place.

Successive Senate majorities had been talking about the “nuclear option” – the idea of exploding the filibuster – for a decade or more; in November 2013 Democrats finally pulled the trigger (Kane 2013), meaning that executive nominations (except for those of Supreme Court justices) cannot be filibustered. The president was certainly pleased with this development, especially given the possibility of losing the Democratic Senate in the upcoming midterm elections. But it represented a partisan team effort.

By contrast, Obama’s moves on recess appointments sought to bypass Senate action altogether. The recess appointment clause allows presidents to fill executive vacancies that (as Article II puts it) “may happen during the Recess of the Senate,” until the end of the next legislative session. In January 2012, President Obama used this power to name former Ohio attorney general Richard Cordray to head the CFPB, which had been rendered inactive because of the Senate’s refusal to confirm its director.¹⁵ At the same time, by the same means, Obama added three new members to the NLRB.

Originally the recess appointment authority reflected 18th century barriers to travel and communication that made the Senate frequently unavailable to provide the “advice and consent” needed to seat proposed appointees. But in early 2012, the Senate was not in recess – or at least it said it was not. Since 2007, originally as a Democratic response to President George W. Bush’s aggressive use of recess appointments (he made over 170), the Senate had held brief *pro forma* sessions even during periods of legislative inactivity. The idea was explicitly *not* to recess for any period of sufficient duration that would allow for recess appointments. (There is no formal definition of what constitutes “sufficient,” though 3 days has been a common benchmark.)

The Bush administration caviled, but did not ultimately press the point. Obama, however, took the next step, arguing that the Senate did not – perhaps even could not – conduct regular business during these sorts of sessions. Thus, it was *de facto* in recess. And thus, recess appointments could be made. The Justice Department’s Office of Legal Counsel (OLC) told Obama that “the President... has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.”

The Senate objected along predictable partisan lines but made no formal response. However, those regulated by the CFPB and NLRB brought suit, arguing

¹⁵ Cordray had received 53 votes for confirmation in late 2011 but fell short of the 60 his nomination required to defeat a filibuster led by GOP Senators who wanted to replace the CFPB director position with a board of directors.

that the actions taken by the appointees could not be valid if the appointees themselves were not legally appointed. Cordray had, in the meantime, been confirmed by the full Senate; but in January 2013, the D.C. Circuit Court of Appeals ruled in favor of the Noel Canning Company against the NLRB appointments, arguing that “allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.”¹⁶

The circuit court majority went further still in issuing a truculent broadside against the very practice of recess appointments as historically understood, arguing that there was an emphatic difference between the Senate simply being in recess, and “the Recess of the Senate” envisioned in Article II, Section 2. The latter, it decided, meant only the gap between legislative sessions – thus, only “inter-session” rather than “intra-session” breaks could count as recesses for the purpose of making recess appointments. Furthermore, only vacancies that actually came into being during that inter-session recess would be eligible to be filled in this manner. Together, these conditions constituted a dramatic truncation of the recess appointment power.

The Supreme Court, which heard oral arguments on the case in early 2014, allowed Senate Republicans to appoint their own counsel to argue on behalf of the chamber’s interests. (Probably not coincidentally, that attorney was Miguel Estrada, whose own nomination to the D.C. circuit in 2001 was scuttled by Democratic filibuster.) How, Estrada asked, could “the Constitution have been violated by the actions of the Senate in arranging its own affairs...?”¹⁷

The Court seemed sympathetic to that question and dubious of the notion that the president could inform senators that the Senate was not in fact in session. Obama’s bold stroke seemed destined to be overturned. But it was less clear how the Court would rule on the more sweeping definitional questions of timing and thus on the extent of limits placed on the recess appointment power.

Defending DOMA

Arguments over the coordinate construction of constitutionality have a long pedigree (Whittington 1999; Johnsen 2000; Huq 2012). Must the president execute

¹⁶ *Noel Canning v. National Labor Relations Board*, No. 12-1115, U.S. Circuit Court for the District of Columbia, 25 Jan. 2013, <http://www.documentcloud.org/documents/562023-recess-appointments-ruling.html> (accessed 26 Feb. 2014).

¹⁷ See the oral argument in *NLRB v. Noel Canning*, U.S. Supreme Court, No. 12-1281, January 13. Transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_3d9g.pdf.

a law with which she disagrees? Almost certainly so. But must he execute – or defend in court – a law he thinks is actually unconstitutional?

This is an area where signing statements, and Statements of Administration Policy issued while a bill is still in the legislative process, have provided means for presidents to provide their own constitutional interpretations and to assert they will manage its text in a way they decide meets Constitutional muster (Crouch, Rozell, and Mitchell 2013) – in the boilerplate, to “interpret and implement these sections in a manner that does not interfere with my constitutional authority” (Obama 2013a). Obama promised in 2008 that he would “not use signing statements to nullify or undermine congressional instructions as enacted into law.” However, that pledge could not survive the issuance of an actual signing statement: evading such instructions is normally the point of such a statement.

A law already in place presents other challenges. The Defense of Marriage Act (DOMA) was passed in 1996; though no state at that time granted legal recognition to same-gender unions, DOMA prohibited the federal government from recognizing such marriages for the purpose of providing benefits under federal law. Bill Clinton, worried about election-year wedge issues, signed the law (albeit without fanfare in the middle of the night), noting that “I have long opposed governmental recognition of same-gender marriages, and this legislation is consistent with that position” (Clinton 1996).

The Obama administration had enforced DOMA even as increasing numbers of states (ten by the end of 2012) legalized same-gender marriage. But in 2011, two cases arose that forced it to make a legal argument presidents had thus far evaded. Namely, should the difference between heterosexual and homosexual marriage be judged by the relatively lenient “rational basis” standard, or should “strict scrutiny” apply, as it would regarding laws where distinctions were made on the basis of race or gender?

President Obama decided that the latter was the case, and that DOMA did not meet that standard. Thus he ordered the Justice Department not to defend the law as the litigation questioning its constitutionality made its way through the federal courts. Attorney General Eric Holder (2011), in a letter to congressional leaders, said the president had decided DOMA violated the equal protection provisions of the 14th amendment and provided a detailed history of Supreme Court precedent with regards to what groups might qualify for the protection of heightened scrutiny. Gays and lesbians, Holder concluded, met the Court’s standards: thus “this is the rare case where the proper course is to forgo the defense of this statute.” Others were not so sure. This “is a transparent attempt to shirk the department’s duty to defend the laws passed by Congress,” argued Rep. Lamar Smith (R-TX), then chair of the House Judiciary Committee, bemoaning the impression that “the

personal views of the president override the government's duty to defend the law of the land" (Savage and Stolberg 2011).

Most commentators suggest this action is rightly rare, but not unprecedented. Seth Waxman, who served as solicitor general during the Clinton administration, argues that the executive branch should defend a law "whenever professionally respectable arguments can be made in support of its constitutionality" (2001, p. 1078) – quite a low bar, though one he raises when separation of powers issues are concerned (as with the *Chadha* legislative veto case in 1983). Still, there are numerous examples where the executive branch has declined to defend and sometimes even to enforce a legislative enactment. Such cases include a Bush administration decision in 1990 to oppose a law governing FCC regulations and the Clinton administration's desertion of a 1960s law that was the basis of an effort to overturn the famous *Miranda* doctrine against self-incrimination (Waxman 2001; and see Huq 2012).

In 2013 Clinton declared he had made a mistake: "I have come to believe that DOMA is... incompatible with our Constitution." And in *Windsor v. United States*, decided in June of that year, a divided Supreme Court agreed. The aftermath provided for a wave of regulation as hundreds of federal provisions had to be reinterpreted to accommodate same-gender couples. As more cases challenged state bans on such marriages, Holder encouraged state attorneys general to follow his lead and not to defend the bans – a stance which prompted further protest from states' rights advocates. In the oddest result, perhaps, a federal district court ruling striking down Utah's prohibition was stayed by the court; meanwhile, though, the Obama administration announced it would treat the marriages of same-sex couples already performed in that state as valid (Savage and Healy 2014). Thus DOMA was turned on its head: the federal government recognized marriages in Utah that Utah itself did not.

Putting Prosecution Aside

In other issue areas the Obama administration decided not to pursue violations of federal law in order to avoid conflict with state-level actions. This was most notable after Colorado and Washington voters adopted referenda in 2012 legalizing the recreational use of small amounts of marijuana. Even though pot use would still be illegal in those states under federal law, Justice Department guidance (Cole 2013) told US Attorneys to back off. "We've got bigger fish to fry," the president noted in an interview. "It would not make sense for us to see a top priority as going after recreational users in states that have determined that it's legal."

DOJ stressed that this in no way diminished the government's ability to prosecute nor the standing of the law itself; it merely sought to "guide...the exercise of investigative and prosecutorial discretion." And in some cases, enforcement would proceed – for example, when minors were targeted or when prosecutors identified the involvement of "criminal enterprises, gangs, and cartels." Interestingly, despite early disavowal of interest by the administration in pursuing medical marijuana cases – involving a much larger sample of states and regulation regimes – US Attorneys had nonetheless shown little reluctance to step in. So it was not clear how much leeway Washington and Colorado would ultimately receive.

A separate class of cases, federal this time, that Justice sought not to prosecute involved another group of drug users – non-violent, low-level offenders who would receive what Holder (2013) called "draconian" punishment under extant mandatory minimum sentencing laws. "Too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason," the Attorney General said, and the president has "made it part of his mission to reduce the disparities in our criminal justice system." One way to do this, given limited resources, was to charge the drug users in the category above with different crimes that would lead to sentences "better suited to their individual conduct" rather than the mandatory minimums set in statute.

A third instance of mandated non-enforcement – and probably the most sweeping – had to do with halting deportations of certain young illegal immigrants. The administration had long endorsed the so-called DREAM Act – standing for Development, Relief, and Education for Alien Minors, which in various versions aimed to provide a route to American citizenship for young people who had been brought to the US as children and done well in their new country. (For instance, they must not have compiled a criminal record, and have gone on to get a high school diploma or beyond.) But the bill failed to pass the Senate in 2010, and its subsequent prospects seemed dim.

In June 2012, however, President Obama resuscitated the heart of the DREAM Act using an administrative directive issued through Secretary of Homeland Security Janet Napolitano. In a memo to her department, Napolitano (2012) noted that "I am setting forth how, in the exercise of our prosecutorial discretion," the department "should enforce the immigration laws." In this case, that discretion was to be used to grant "relief from removal" or "deferred departure" (Bruno et al. 2012, p. 4): to move aliens meeting the criteria above to the back of the line for deportation, granting them a 2-year waiver from such proceedings and, meantime, the ability to work legally in the US. It did not grant them citizenship: "only the Congress," the DHS memo noted, "acting through its legislative authority," could do that. "It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."

Some questioned whether groups or categories of alleged offenders – as opposed to individuals on a case by case basis – could or should be pre-emptively cleared (Price 2014). And others, like legal scholar Jonathan Turley, criticized Obama's tack more generally: "The president disagreed with Congress on immigration law," he argued (Dennis and Fuller 2013); "His response was to effectively negate the law."

Still, given that the Obama administration had taken a tough stance on deportation generally – one angry immigration advocate called him the "deporter-in-chief" (Epstein 2014) – it was hard for charges of dereliction of duty in this area to stick on political grounds. And substantively, like the cases above, this directive did not change the law *per se*; rather, it set forth who was to be prosecuted first, or rather last. Since the DHS budget did not allow it to deport everyone eligible for same in any given year, various versions of "deferred departure" had been put into policy over time. Wide prosecutorial discretion in such cases had long been recognized in the courts (and, despite GOP complaints, by the Congressional Research Service: see Bruno et al. 2012, pp. 8–11). This was in fact a particularly strong finding in the area of immigration law; as long ago as 1950 the Supreme Court held that in immigration matters "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program."¹⁸

The broader principle of prosecutorial discretion seemed likewise well-settled, especially under statutes that left room for such judgments in a world of insufficient resources. Congress could write into law limits on presidential flexibility, as discussed below. But otherwise, as the Supreme Court (via Justice William Rehnquist) held in the 1985 case *Heckler v. Chaney*, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."¹⁹

Waiving at the Law

Another mechanism to alter the legislatively-intended impact of a statute was to utilize administrative waivers to portions of that law (see Barron and Rakoff 2013). Two prominent examples under the Obama administration dealt with

¹⁸ *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). More recently see the Court's holdings in *Arizona v. United States*, 132 U.S. 2492 (2012) and *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

¹⁹ *Heckler v. Chaney*, 470 U.S. 821 (1985).

welfare reform (under the Personal Responsibility and Work Opportunity Act of 1996) and the 2001 reauthorization of the Elementary and Secondary Education Act popularly known as No Child Left Behind (NCLB).

There is a long history of waivers to welfare requirements, aimed at allowing states to experiment with different mechanisms for achieving policy goals. Traditionally, Republicans favored more waiver authority, not less, while Democrats were nervous about what states might evade given such autonomy. In 1988, for instance, Attorney General Ed Meese reported that the president had decided to (a) support only welfare reform legislation that enhanced the president's ability to grant more waivers, and (b) set a goal that half of all the states would receive waivers from federal welfare requirements.

The 1996 welfare reform act re-entered the public consciousness in July 2012 when Republican presidential nominee Mitt Romney accused the Obama administration of seeking to remove the work requirements from the Temporary Aid to Needy Families (TANF) program created by the 1996 law. While more excitable websites exclaimed things like “Obama guts welfare reform with executive order!”,²⁰ no executive order *per se* was involved. Romney’s charge stemmed instead from a guidance letter issued by the Department of Health and Human Services (HHS 2012) noting the administration’s interest in “encouraging states to consider new, more effective ways to meet the goals of TANF, particularly helping parents successfully prepare for, find, and retain employment.... HHS is issuing this information memorandum to notify states of the Secretary’s willingness to exercise her waiver authority... to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families.” As this suggests, waivers are driven by discretionary power within the statute itself, normally vested in the departmental secretary rather than the president directly (though presumably presidents expect their appointees to care what they think about such matters).

The HHS guidance was apparently spurred by a presidential memorandum to the heads of executive departments and agencies, issued in February 2011 and geared toward “administrative flexibility” for state and local governments. In a subsequent memo, OMB director Jacob Lew told department heads to “use waivers as a component of bold pilots to test promising hypotheses about how to improve outcomes at lower cost” (2011, p. 7, 15).

²⁰ See <http://sayanythingblog.com/entry/obama-guts-welfare-reform-with-executive-order/> (accessed 27 Feb. 2014).

It was hard to know what would count as “effective” and “outcomes” under the boilerplate HHS released, and thus whether the guidance was as sinister as the Romney campaign and its allies insisted. Section 415 (“Waivers”) of the 1996 statute, however, seems to specify that presidents could *not* use waivers to disrupt the recipient work participation requirements imposed elsewhere in the law – though potentially such waivers could modify what qualified as “work.” In any case the department quietly decided not to push the point.

In the No Child Left Behind Act, though, waivers were used very aggressively. The authority to set aside provisions of the law was, again, directly vested in the Secretary. Waivers could be granted, at a state’s request, if it could show that the waivers will “(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students.”²¹ As with welfare reform, some portions of NCLB were exempted from the possibility of waiver – including civil rights requirements, for example, and the NCLB’s new funding formulae. But the big-ticket, titular, item – that all students become “proficient” in math and reading by 2014 – was not. Thus, in exchange for various policy commitments at the state level that the Obama administration felt would increase the quality of instruction for students and improve their academic achievement – for example, the creation of a new teacher evaluation rubric – the Secretary of Education had the authority to waive that burden. Given that few (if any) schools nationally seemed likely to meet the 100% proficiency target of the 2001 law by the deadline, waivers seemed a plausible route to take. At this writing 41 states have requested them. That the administration extracted policy concessions in return was merely the cost of staying on the right side of the law.

Most broadly, waivers exist to promote policy experimentation and to provide a given administration with flexibility under what are normally broad statutes where it is difficult to foresee in advance how implementation might play out. (After all, Congress presumably did not foresee in the heady days of 2001 that it would be seven full years late – and counting – in reauthorizing NCLB.) Whether waivers enhance, gut, or simply modify, a given law is usually in the eye of the beholder – and whether that beholder likes the policy change in question. During the 2012 campaign, Romney himself repeatedly pledged to repeal “Obamacare” on “Day 1” of his administration. In the absence of legislative action to do that, keeping that promise would presumably include the issuance of waivers to states chafing at the Affordable Care Act’s provisions. Thus unless waivers are forbidden in the text of a statute, the issue is rarely waivers themselves, but what is waived.

²¹ P.L. 107-110, Section 9401 (“Part D – Waivers”).

Regulation or Emendation?

Waivers are delegations of power to the president that flow from the text of a law. In being used, they change the impact of that law; but to some degree, that change is anticipated by legislators. That is not necessarily the case in the use of regulation.

As with waivers, most statutes vest the power to promulgate regulations that carry out a given law in department heads or agency administrators, not directly in presidents. Over time, however, presidents have tried to assert more direct control over this process, with Richard Nixon making some preliminary efforts along these lines tied to his price and wage control campaign in the early 1970s. Ronald Reagan used the recently created Office of Information and Regulatory Affairs (OIRA) within OMB to institutionalize regular cost/benefit analysis for agency regulatory programs, a system that has remained in place in varying forms ever since (Kagan 2001, pp. 2277–2281; Kerwin and Furlong 2010). Indeed, according to Clinton White House aide Elena Kagan (2001, p. 2281), it was her then-boss who truly “treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done.” For presidents like Reagan, the idea was to prevent regulations from taking effect; but for Clinton, the idea was to have the White House pro-actively spur the development of new regulations, often via presidential memoranda to a given agency head.

Both sides of this process – monitoring executive branch regulatory behavior, and intervening in it – remain available to Clinton’s successors. For instance, in May 2010 Obama sent a memorandum to the Secretaries of Energy and Transportation and the Administrators of the Environmental Protection Agency and National Highway Traffic Safety Administration directing them (technically, “requesting” them) to tighten greenhouse gas and fuel efficiency standards such that “coordinated steps...produce a new generation of clean vehicles.” One result came in March 2014, when the EPA announced new rules that would ban most sulfur from gasoline and force changes in both automotive and oil refinery technology.

Such a rule, if unwelcome to the oil industry, was nonetheless clearly within the EPA’s bailiwick. In two other key areas, substantive priorities of the Obama administration, critics charged rulemakers had instead gone too far. One likewise dealt with the EPA – an agency worthy of its own book on the shelf of regulatory history. The key element of the story for present purposes begins in 2007, when the Supreme Court ruled that EPA did have authority to regulate greenhouse gases should the agency determine they caused the harm the Clean Air Act sought to prevent. When EPA subsequently determined just that, the Bush administration

declined to take action, going so far as to refuse receipt of the EPA's report at the White House.

The agency's findings found a far more receptive audience with the incoming Obama team. With the failure of the 111th Congress to pass legislation attacking global warming, the administration shifted instead to an administrative approach grounded in the EPA's authority under the Clean Air Act. That process was slowed by 2.5 million public comments and by a risk-averse White House during the 2012 campaign, but picked up steam in 2013 as officials sought to ensure new rules were in place in time to be implemented before President Obama left office. One piece of the massive rule-writing project aimed to extend Clean Air Act authority to existing power plants, especially those fueled by coal. Even agency attorneys suggested "the legal interpretation is challenging" (Davenport 2014). For their part industry figures and legislators from mining states promised the "war on coal" would move to a new front in Congress and the courts (Shear 2013).

One aspect of the administrative agenda had already shifted there: the EPA's effort to limit greenhouse gases produced by new development. The Clean Air Act states that the EPA should regulate any facility that generates more than 250 tons of a given pollutant. But when it comes to greenhouse gases that is a very small number: everything from new schools to apartment buildings to small businesses might reach the 250 ton threshold. And this, the EPA argued, would be an "absurd result." Its approach was not to seek an amendment to the law, but to use a new regulation to change the limit for carbon pollutants to 75,000 tons per year.

This had the clear benefit of greatly reducing the number of affected facilities – it meant less, rather than more, agency oversight of industry. But it did so (one opposing legal brief argued) by "amending [and] disregarding specific, unambiguous statutory text." When the case came to the Supreme Court in late February 2014, the Obama administration argued that the agency was putting in place "a transition, not a rewrite" and that the law was flexible enough to accommodate this. (The goal of the regulation, the Solicitor General reassured the Justices, was "not to gradually expand the permitting requirement until they've got all the Dunkin' Donuts in America under it.") Nonetheless the Court seemed dubious. One Justice mused: "The solution EPA came up with actually seems to give it complete discretion to do whatever it wants, whenever it wants."²² Unproudly for the president, this was Justice Elena Kagan – author of "Presidential Administration."

²² *Utility Air Regulatory Group v. EPA*, U.S. Supreme Court, No. 12-1146. A transcript of the oral argument is available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1146_nk5h.pdf (accessed March 2, 2014).

The same principle was in play – with if anything even higher political stakes – elsewhere. “This Administration’s lawlessness has been most widely noticed with President Obama’s implementation of Obamacare,” complained Rep. Diane Black (R-TN) in House testimony (U.S. House 2014). Black’s reference was to a series of delays to Affordable Care Act requirements beginning in February 2013, most notably in July of that year when the administration put off the employer mandate portion of the bill for 12 months and again in February 2014 when that deadline was extended yet again for medium-sized companies (those with more than 50, but fewer than 100, employees). Other shifts included a smaller shift in the deadline for the individual mandate; adjustments to the online marketplace for small businesses; and, with HealthCare.gov then still in tatters, extension of the general deadline for enrollment online. When insurance companies (quite properly) began to cancel plans that did not meet the ACA’s minimum requirements, undermining the president’s pledge that “if you like your plan, you can keep it,” Obama extended insurers the discretion to extend the plans for an additional year – and did so again in early 2014 to push such cancelations safely past the 2014 and even the 2016 elections. The Internal Revenue Service, for its part, announced it would read the ACA to include individuals enrolled via the federal exchange as well as state-run exchanges as eligible for tax credits to subsidize their policies (Calmes 2013; Dennis and Fuller 2013; Parker and Pear 2013; Eilperin and Goldstein 2014).²³

As that last suggests, many of these shifts involved the issuance of tax regulations or interpretations of the law’s text. These were described by Treasury officials as well within their ongoing statutory authority under the Internal Revenue code; as Assistant Secretary Mark Mazur told a House committee chair in July 2013, “an exercise of the Treasury Department’s longstanding administrative authority to grant transition relief when implementing new legislation” (Mazur 2013). Others, such as an additional package of rules changes in March 2014, were announced by an administrative bulletin through the Centers for Medicaid and Medicare Services (HHS 2014).

Rep. Steve King (R-IA) complained in response that “We are a nation governed by laws written by Congress, not memos and blog posts written by bureaucrats” (Dennis and Fuller 2013). Given the choice between opening the ACA itself up for legislative attack and moving forward with “memos and blog posts,” though, the administration had clearly calculated the latter was the surer course.

²³ Unconvinced, the state of Oklahoma filed suit over the language governing tax credits. A district court granted the state standing in the case but its substantive merits had not been argued as of this writing.

Assessing Discretion

So did these uses of administrative tools suggest an “imperial,” or even an “uber-” presidency? Potential reactions divide into three categories: put bluntly, these are “yes”; “no”; and “maybe.”

The first set of arguments denies any role for discretion: the president must execute the law without autonomy. As Raoul Berger (1974, p. 308) put it during Watergate, “To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic.” Some scholars have turned to early dictionaries to track the word “faithfully,” deducing that the take care clause requires the president to put the laws into effect “without failure” and “exactly” (Delahunty and Yoo 2013, p. 799). What this suggests when the law itself is ambiguous – or when it grants waiver power – is less clear.

The second, by contrast, emphasizes presidential autonomy, especially in prosecuting wrongdoing. When a crime has been committed – whether that be one’s recreational use of marijuana in certain states, or one’s illegal presence in the US (or even the failure to provide health insurance for one’s employees) – a swath of jurisprudence suggests that, as the Supreme Court put it in *US v. Nixon*, “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”²⁴ The *Chaney* decision already cited is a presidential favorite; but judicial quotes to the same effect are not hard to find. This extensive discretion is founded both in the separation of powers, which implies that presidents must have at least some independent judgment with regard to legislative action, as well as on the pardon power – one of the few unchecked executive powers in the Constitution.²⁵

The third possibility falls between these two extremes, suggesting the possibility of contingent discretion. As legal scholar Dawn Johnsen argues (2000, p. 10): “most commentators...find greater constitutional clarity than I believe exists.... Both views – mandatory enforcement and routine non-enforcement – have the virtue of providing clear direction for the President’s execution of the laws. But neither fully reflects the President’s complex constitutional obligation...”

Under what conditions, then, does the president’s range of discretion expand? One variable might hinge on the motives behind administrative behavior; few argue that non-enforcement should proceed purely from policy differences, while legitimate constitutional arguments, by contrast, would be an

²⁴ Part of the reasoning in this case turned on regulations to which President Nixon had agreed, granting that discretion to the special prosecutor.

²⁵ See the useful discussion of these points, along with case references, in the 2013 U.S. D.C. Circuit Court of Appeals case *In re: Aiken County*, No. 11-1271.

appropriate rationale. Others argue that prosecutorial discretion is widespread in principle but must be case by case. That is, a president's choice not to prosecute under the law is normally illegitimate when it involves "categorical suspensions of enforcement or prospective exclusion of defendants from the scope of statutory provisions" (Price 2014). But the key contingency with which assessments of "presidential administration" must grapple is, simply, the "letter of the law." Congress may expand or rein in discretion by its own actions and by the text it chooses to enact.

It is certainly hard to argue that most of Obama's actions are "unprecedented" in any serious sense. As far back as Thomas Jefferson's refusal to grant William Marbury his judicial commission, presidents have resisted carrying out the letter of the law. The existence of waiver authority (or of executive orders, or of regulatory discretion) do not themselves threaten the Constitution or the rule of law. Indeed, there may be good reasons for Congress to authorize administrative discretion with regard to interpretation of complicated statute. Most basically, of course, in our system it is difficult to pass laws; circumstances can change rapidly; and there is a positive value placed on federalism and state-to-state differences which may require deviation from a "one size fits all" mandate. Further, once laws *are* in place, they tend to remain in place, granting presidents continuing authority to act under conditions unlikely to have been foreseen by the statute's original architects. The burden of changing the text of the law to adapt to current circumstance rests with Congress.

Still, where the president acts to change the text himself, he assumes legislative prerogative, and that raises grounds for concern. Where Congress has *not* authorized discretion, presidential power – to paraphrase Justice Jackson's famous *Youngstown* concurrence – is at its lowest ebb. This implicates the EPA and ACA cases above, and in a different way (by making rules for a legislative body), the "recess" appointment assertions. With regard to the Internal Revenue Code and the ACA, the administrative argues the statute speaks to discretion granted given an "alteration of law" – but the taxation provisions of the ACA had not been altered in a way that would logically trigger that authority.²⁶

A useful analogue might be to the line item veto law of the 1990s, which was rejected by the Supreme Court. The Court declined to "authorize the President to create a law whose text was not voted on by either House or presented to the President for signature." That new statute might be a better one, they conceded,

²⁶ Section 7805(a) of the IRC reads: the "Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."

than the one actually passed: “but it is surely not a document that may ‘become a law’ pursuant to Article I.”²⁷ Likewise, changing the threshold for pollution violations, or the effective date of a health care mandate, may make for more sensible law. But it is not the law that was passed.

Presidents must also be cautious in overseeing, and overruling, agency decisions grounded in bureaucratic expertise. A 12 year saga over the availability of “Plan B” emergency contraception pills – resisted by both Presidents Bush and Obama, despite the conclusions drawn by FDA scientists – finally ended in 2013 when a federal district court judge slammed the agency’s actions as “inconsistent with its policy and the Food, Drug, and Cosmetic Act.” The judge snapped that “the motivation for the Secretary’s action was obviously political.... The decision that the agency was forced to make, contrary to its own policies and judgment, is not entitled to any deference” by the judiciary.²⁸ Plan B arrived on pharmacy shelves shortly thereafter.

A Majority of One?

The Obama administration has clearly been aggressive in utilizing both its administrative discretion under existing law, and its regulatory authority to implement new law, in ways that suit presidential preferences. This was most true in areas where Congress did not act – either in the first place, as in the fields of climate change and immigration, or where the usual route of legislative technical corrections was blocked by ideological frenzy, as with “Obamacare.” The literature has made conflicting claims about whether unilateral orders are a substitute for legislation or complement it; these cases suggest a logic for the “substitute” side. Thus Obama’s “pen and phone” allowed him to make progress on his top priority agenda items, even if on a small scale. He also aimed for concomitant political benefits, highlighting congressional gridlock versus presidential efficacy.

It comes as no surprise that presidents would seek to extend their administrative authority – it has both absolute and relative advantages. Legislators may object to the presidential interpretation of the law; but presidents have a structural edge over their collective co-equal branch. As Alexander Hamilton shrewdly noted (1793), “the Executive in the exercise of its constitutional powers, may establish an antecedent state of things” which shapes the policy terrain

²⁷ *Clinton v. City of New York*, 524 U.S. 417 (1998).

²⁸ *Tummino v. Hamburg* (2013), No. 12-CV-763, U.S District Court for the Eastern District of New York, April 4; for a useful summary see Greenhouse (2013).

other political actors must cross. Obama's moves on immigration and mandatory minimum sentences, for example, aimed to pressure Congress to legislate in these areas by making the status quo undesirable.

But the strategy has limits, too. Some are political. In the spring of 2012 Obama declined to issue an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation. Instead, he urged that Congress pass the Employment Non-Discrimination Act (ENDA). Buffeted by election-year winds, the president discovered that sometimes, he *could* wait.

Some are practical – after all, presidents may find it harder to “control” the bureaucracy than recent rhetoric (and even the discussion above) suggests. For instance, when the Obama administration tried to rein in the prosecution of medical marijuana facilities in states that allow them, US attorneys pushed back and the Justice Department had to back off. The “unitary executive” remains a plural entity. Even orders ultimately issued by the White House may have their source elsewhere in the wider bureaucracy (Rudalevige 2010).

And finally, where the letter of the law is spelled out, judges – and even presidents – can read it. “Plan B” put agency expertise into effect; both the recess appointment and EPA regulatory initiatives seem unlikely to survive Supreme Court scrutiny.²⁹ It is worth noting that President Obama himself seems occasionally ambivalent about the breadth of his authority. He did not, for instance, invoke the authority some claimed for him in the 14th amendment during the various debt limit crises of 2011–2013. Nor did he assert the power to override statutory bars to the closure of the Guantanamo Bay prison, as impermissible constraints on his wartime authority as commander-in-chief. More widely, in fact (albeit beyond scope of this essay), Obama has often sought to ground his unilateralism in statutory delegations of power – the 2001 Authorization for the Use of Military Force, the Patriot Act, the FISA Amendments Act, and the like.³⁰ Last November, Obama (2013b) had an interesting exchange with a heckler shouting “you have a power to stop deportation for all undocumented immigrants in this country.” The President’s response was telling: “Actually I don’t.[I]f, in fact, I could solve all these problems without passing laws in Congress, then I would do so. But we’re also a nation of laws... And so the easy way out is to try to yell and pretend like I can do something by violating our laws.... It won’t be as easy as just shouting.”

²⁹ The ACA effective date changes may, by contrast, survive, because it is not clear who would sue over *not* having to provide insurance. Those affected are not angry – those angry (especially in Congress) are not directly affected, and so are without standing.

³⁰ His critics, to be sure, wondered if doing the wrong thing for the right reason was a significant improvement.

Ironically, it was the branch most directly affected – the legislative – that shouted the most, and the most ineffectually. One response backed by the House Republican caucus was the ENFORCE the Law Act, a painful acronym for “Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law.” This was designed to allow legislators to sue the president over his action or inaction, something judges wary of wading into inter-branch disputes have rarely allowed. However, given that Congress maintained the power to rein in the president’s discretion through the ordinary legislative process – to specify less freedom of action, to rule out waivers, even to fail to appropriate funds to support the affected agencies – this seemed to concede far more than it needed to.

The problem, of course, was that passing new laws is hard. Polarization has made it even harder. Thus gridlock empowers presidential unilateralism. But another aspect of polarization was the pressure it exerted to prioritize party loyalty over institutional autonomy. Rather than look contingently at Obama’s various uses of unilateral tools, lawmakers felt they needed either to universally condemn them or excuse them.

Still, that is an old problem. Justice Robert Jackson noted more than six decades ago the tendency not only of pundits but those in government to “confus[e] the issue of a power’s validity with the cause it is invoked to promote.”³¹ Those attacking presidential discretion now will, inevitably, favor it when exercised by their partisan allies; and those defending it will suddenly discover the wonders of strict fidelity to statutory language.

Political rhetoric, that is, will shift direction with each change in the occupant of the Oval Office. The only constant is that each of those occupants will take the chance to extend the administrative presidency. After all, as a Reagan staffer once put it, borrowing from Justice Holmes in urging his boss to make more recess appointments, “a page of history is worth a volume of political rhetoric.”³²

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³¹ *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952).

³² Peter J. Rusthoven to John Peterson, “Recess Appointments During Temporary Senate Recesses,” 26 July 1984. Ronald Reagan Library: John Roberts Papers, Series I: Subject Files, Box 47, [JGR/Recess Appointments (3)].

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