

## THE PRESIDENT'S PEN AND THE BUREAUCRAT'S FIEFDOM

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*"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."*<sup>1</sup>

The very first provision of the Constitution beyond the preamble, quoted above, specifies that the lawmaking power of the national government is to be exercised by Congress. A necessary corollary, recognized by the Supreme Court early in our nation's history, is that purely legislative powers can be exercised *only* by Congress, not by the executive or judicial branches of government.<sup>2</sup>

Of course, where to draw the line between purely legislative power that cannot be delegated, and permissible delegations of authority to fill in the details of a legislative judgment made by Congress, has proved to be a rather difficult task. The formula eventually worked out by the Supreme Court, one that upholds delegations as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body [authorized

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1. U.S. CONST. art. I, § 1.

2. *Wayman v. Southard*, 23 U.S. 1, 42 (1825); *see also* *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring in judgment) ("We have held that the Constitution categorically forbids Congress to delegate its lawmaking power to any other body.").

to fill in the details] is directed to conform,"<sup>3</sup> sounds good in theory, but has not proved very helpful in practice, for several reasons. First, the Court has approved such broad delegations as to render the "intelligible principle" limitation virtually meaningless, and has not invalidated a law on unconstitutional delegation grounds since 1935.<sup>4</sup> As Justice White observed in his dissent in *INS v. Chadha*,<sup>5</sup> the "intelligible principle" through which agencies have attained enormous control over the economic affairs of the country has been held to include such formulations as "just and reasonable,"<sup>6</sup> "public interest,"<sup>7</sup> "public convenience, interest, or necessity,"<sup>8</sup> and "unfair methods of competition."<sup>9</sup> In other words, the "intelligible principle" restriction on delegations of legislative power has amounted to no restriction at all and, as Justice Thomas recently noted, the Court "has abandoned all pretense of enforcing" it.<sup>10</sup>

Second, various deference doctrines created by the Supreme Court have exacerbated the problem that arose from failure to enforce the non-delegation doctrine. There is *Chevron* deference, pursuant to which the courts defer to administrative agency interpretations of ambiguous statutes as long as the interpretation is reasonable and not contrary to law.<sup>11</sup> There is

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3. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

4. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

5. 462 U.S. 919, 985 (1983) (White, J., dissenting).

6. *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 440 (1930) (upholding delegation to Secretary of Agriculture "to determine what are the just and reasonable rates" for stockyard services).

7. *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 21 (1932) (upholding delegation to Interstate Commerce Commission of power to authorize a railroad's acquisition of control of another railroad when the Commission deems the acquisition to be in "the public interest").

8. *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933) (upholding delegation to Federal Radio Commission the authority to allot broadcast licenses "from time to time, as public convenience, interest, or necessity requires").

9. *FTC v. Gratz*, 253 U.S. 421 (1920) (upholding delegation to the Federal Trade Commission the authority to determine and make unlawful "unfair methods of competition").

10. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring in judgment).

11. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

*Skidmore* deference,<sup>12</sup> essentially a weaker version of *Chevron* deference. And there is *Auer* deference,<sup>13</sup> pursuant to which the courts defer to an agency's interpretation of its own ambiguous regulation (no doubt implementing, under *Chevron* deference, an ambiguous statute!). My point here is not to provide a treatise on the nuances of the various deference doctrines, only to note that they have increasingly undermined the Constitution's basic separation of powers between the legislative and executive branches (and have resulted in an abdication of the judicial duty to interpret the law as well).

Several members of the Supreme Court have recently acknowledged the problem with the Court's deference doctrines. In *Perez v. Mortgage Bankers Association*,<sup>14</sup> for example, Justice Thomas took direct aim at the *Auer* deference doctrine. "These cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations," he wrote, adding:

That line of precedents . . . requires judges to defer to agency interpretations of regulations, thus, as happened in these cases, giving legal effect to the interpretations rather than the regulations themselves. Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.<sup>15</sup>

Justice Thomas also acknowledged that the practice of giving binding effect to agency interpretations of regulations runs afoul of the non-delegation principle as well. "It is difficult to see what authority the President has 'to impose legally binding obligations or prohibitions on regulated parties,'" he wrote. "That definition suggests something much closer to the legislative power, which our Constitution does not permit the Executive to exercise in this manner."<sup>16</sup>

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12. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

13. *Auer v. Robbins*, 519 U.S. 452 (1997).

14. 135 S. Ct. 1199 (2015).

15. *Id.* at 1213 (Thomas, J., concurring in judgment) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

16. *Id.* at 1219 n.4 (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014)).

Justice Thomas has also called into question the granddaddy of deference doctrines, *Chevron* deference. In *Michigan v. EPA*,<sup>17</sup> after noting that the EPA had asked the Court to defer to its interpretation of the statutory phrase, “appropriate and necessary,” a phrase that hardly defines *any* principle constraining the regulatory power, much less an intelligible one, Justice Thomas expressed concern that the EPA’s “request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes,” citing *Chevron* as the source of the problem.<sup>18</sup> He then issued a challenge to his colleagues to revisit the entire deference enterprise:

Although we today hold that EPA exceeded even the extremely permissive limits on agency power set by our own precedents, we should be extremely alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here . . . . We seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency “interpretations” of federal statutes.<sup>19</sup>

Even Justice Scalia, long an advocate for judicial deference to executive agencies as a remedy for judicial overreach,<sup>20</sup> had called into question several of the Court’s deference doctrines:

Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations. Never mentioning § 706’s directive that the “reviewing court . . . interpret . . . statutory provisions,” we have held that agencies may authoritatively resolve ambiguities in statutes. And never mentioning § 706’s directive that the “reviewing court . . . determine the meaning or applicability of the terms of an agency action,” we have—relying on a case decided before the APA [*Seminole Rock*]—held that agencies may authoritatively resolve ambiguities in regulations.<sup>21</sup>

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17. 135 S. Ct. 2699 (2015).

18. *Id.* at 2712.

19. *Id.*

20. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

21. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in judgment) (citations omitted).

Justice Scalia seemed to join Justice Thomas in inviting a rethinking of *Chevron* itself: "The problem is bad enough, and perhaps insoluble if *Chevron* is not to be uprooted, with respect to interpretive rules setting forth agency interpretation of statutes."<sup>22</sup> But he was positively hostile to the *Auer* deference doctrine, named after a case for which he himself had authored the opinion for the Court. "[A]n agency's interpretation of its own regulations," which the Administrative Procedures Act exempts from notice and comment rulemaking," is another matter," he wrote, adding:

By giving that category of interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.<sup>23</sup>

Justice Scalia concluded his criticism of *Auer* deference by announcing that he would be "abandoning *Auer*,"<sup>24</sup> though he passed away before he could make good on that promise.<sup>25</sup>

The third reason that the Constitution's separation of the lawmaking power from the enforcement power has not held is that Presidents have increasingly found it expedient to bypass even the relatively easy path to lawmaking via delegated regulatory authority implemented through the procedures of the Administrative Procedure Act, by issuing Executive Orders or interpretative guidance memoranda to directly implement what amounts to legislative policy. Here I want to explore a sampling of Executive Orders and guidance memoranda from

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22. *Id.* at 1212.

23. *Id.* at 1213.

24. *Id.*

25. Justice Scalia's replacement on the Court, Justice Gorsuch, appears more than ready to pick up where Justice Scalia left off, as he was already calling into question the Court's deference doctrines while sitting as a judge on the U.S. Court of Appeals for the Tenth Circuit. *See, e.g.,* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (2016); De Niz Robles v. Lynch, 803 F.3d 1165 (2015); United States v. Nichols, 784 F.3d 666 (2015).

the past two Presidential administrations that I believe have crossed the line from constitutionally permissible orders directing the conduct of the executive branch to unconstitutional orders that have intruded on the legislative power.

First, let me take up President Bush's re-write of the Troubled Asset Relief Program ("TARP") in 2008. The law adopted by Congress authorized the Secretary of the Treasury "to purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this chapter and the policies and procedures developed and published by the Secretary."<sup>26</sup> As the text of the law makes clear, the authority conferred on the Treasury Secretary by Congress extended only to the purchase of troubled assets "from any financial institution."<sup>27</sup> When President Bush decided that the automotive industry also needed bailout relief, he asked Congress to amend the TARP law to authorize auto industry bailouts as well.<sup>28</sup> President Bush's proposal, the Auto Industry Financing and Restructuring Act,<sup>29</sup> passed the House of Representatives on largely party lines (Democrats in support, Republicans against),<sup>30</sup> but died after the bill to which it was attached in the Senate failed

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26. 12 U.S.C. § 5211(a)(1) (2012). Standing alone, this provision appears to violate the non-delegation doctrine, but there is something of an "intelligible principle" in the statute's definition of "troubled assets" that arguably cured that problem. "Troubled assets" were defined as mortgages, securities, or other financial instruments "that the Secretary . . . determines the purchase of which is necessary to promote financial market stability . . ." *Id.* § 5202(9). I do not address here the other big constitutional problem of whether the program is a valid exercise of Congress's spending power, though I have argued elsewhere that TARP violated that constitutional provision as well. John C. Eastman, Remarks at Symposium on Federalism and Separation of Powers (Mar. 9, 2009), reprinted in *ENGAGE*, July 2009, at 74, [http://www.fed-soc.org/library/doclib/20090720\\_EastmanEngage102.pdf](http://www.fed-soc.org/library/doclib/20090720_EastmanEngage102.pdf) [<https://perma.cc/9DRQ-HCE2>]; see also John C. Eastman, *Restoring the 'General' to the General Welfare Clause*, 4 *CHAP. L. REV.* 63, 79 (2001) (noting that a proposal to provide a "bounty"—that is, a bailout—to New England cod fisherman was rejected by an early Congress as unconstitutional until it was modified merely to rebate taxes that had been improperly assessed).

27. 12 U.S.C. § 5211(a)(1).

28. Jeanne Sahadi, *Bush: Protect taxpayers in auto bailout*, CNN MONEY (Dec. 5, 2008, 12:53 PM), [http://money.cnn.com/2008/12/05/news/economy/economic\\_fallout\\_jobs/index.htm?postversion=2008120512](http://money.cnn.com/2008/12/05/news/economy/economic_fallout_jobs/index.htm?postversion=2008120512) [<https://perma.cc/ALF9-PRFR>].

29. H.R. 7321, 110th Cong. (2008).

30. See 154 CONG. REC. H10935 (2008).

to garner enough support to overcome a filibuster.<sup>31</sup> Nevertheless, President Bush unilaterally extended TARP loans to the auto industry a week later, the very thing he had sought to do via his proposed but defeated legislation.<sup>32</sup>

Although *candidate* Barack Obama was critical of President Bush's use of executive power when he was campaigning for President in 2008,<sup>33</sup> *President* Obama took the precedent established by President Bush and ran with it once he was in the oval office.<sup>34</sup> He used the newfound power of the President to direct TARP funds to redirect billions of dollars from secured creditors to unsecured union obligations, for example, contrary to numerous provisions of the bankruptcy code.<sup>35</sup> He imposed, by executive order, a ban on taxpayer funding of abortions in

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31. See David M. Herszenhorn & David E. Sanger, *Senate Abandons Automaker Bailout Bid*, N.Y. TIMES (Dec. 11, 2008), <http://www.nytimes.com/2008/12/12/business/12auto.html> [<https://perma.cc/W9G9-TNZN>].

32. WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, FACT SHEET: FINANCING ASSISTANCE TO FACILITATE THE RESTRUCTURING OF AUTO MANUFACTURERS TO ATTAIN FINANCIAL VIABILITY (Dec. 19, 2008), <https://georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html> [<https://perma.cc/5HXQ-FGR4>].

33. See, e.g., Charlie Savage, *Barack Obama's Q&A*, BOS. GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA> [<https://perma.cc/8Y93-AEF5>].

34. A similar story played out over the interpretation of the Spending Clause in the 1820s. Jefferson, Madison, and Monroe all vetoed various attempts by Congress to spend for purely local, pork-barrel projects in violation of what was then understood to be the limitation that Congress's spending power extended only to the "general"—that is, national—"welfare" and not to local projects. But at the tail end of Monroe's second term, President Monroe signed a few appropriations bills merely to study a few local spending projects. See, e.g., Act of April 30, 1824, ch. 46, 4 Stat. 22; Act of May 26, 1824, ch. 153, 4 Stat. 38. That minor deviation from the Constitution's limits was then relied on by President John Quincy Adams to support a whole slew of local spending projects, the precedent having been established. Cf. JONATHAN SWIFT, *GULLIVER'S TRAVELS* 187 (Dover 1996) (1726) ("[Stare decisis] is a maxim among . . . lawyers, that whatever has been done before may legally be done again."); SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992*, at 1 (1995). As President Polk would later acknowledge, "the floodgates being thus hoisted, . . . applications for aid from the treasury, virtually to make harbors as well as improve them, clear out rivers, cut canals, and construct roads, poured into Congress in torrents, until arrested by the veto of President Jackson." *President Polk Veto Message, Dec. 15, 1847*, in 43 H.R. JOURNAL 82, 92 (1847).

35. See Andrew M. Grossman, *Bailouts, Abusive Bankruptcies, And the Rule of Law*, HERITAGE FOUND. (May 21, 2009), [http://origin.heritage.org/research/testimony/bailouts-abusive-bankruptcies-and-the-rule-of-law#\\_ftnref17](http://origin.heritage.org/research/testimony/bailouts-abusive-bankruptcies-and-the-rule-of-law#_ftnref17) [<https://perma.cc/3FY5-3ADX>].

order to prevent pro-life Democrats in the House of Representatives from derailing his signature Affordable Care Act after the Senate-passed version failed to include such a ban.<sup>36</sup>

But there are many other examples of President Obama's use of the presidential pen to accomplish legislative ends, particularly after Democrats lost control of the Senate in 2014. As he infamously said at the first cabinet meeting in 2014:

[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. 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.<sup>37</sup>

So, after years of failed efforts in the Congress to amend federal civil rights laws to include "sexual orientation and gender identity" in the statutory ban on discrimination based on race, color, religion, sex, or national origin,<sup>38</sup> President Obama unilaterally imposed on federal contractors, through the use of his executive pen, a mandate that all federal contractors certify that they do not make employment decisions based on "sexual orientation [or] gender identity" as well.<sup>39</sup> President Obama's order added "sexual orientation and gender identity" to the mandate on federal contractors contained in Executive Order 11,246,<sup>40</sup> which was signed by President Lyndon Johnson back in 1965 to help implement the anti-discrimination provisions

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36. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010); *see also* Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House announces executive order on abortion*, WASH. POST (March 21, 2010), <http://voices.washingtonpost.com/44/2010/03/white-house-announces-executive.html> [<https://perma.cc/6BQD-UCZQ>]. Alas, the President's promise to Congressman Stupak was short-lived, as regulators at the Department of Health and Human Services shortly thereafter "interpreted" the Affordable Care Act's "preventive care" mandate to include abortifacients. *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act*, 70 Fed. Reg. 46,621 (Aug. 3, 2011).

37. Barack Obama, *Remarks by the President Before Cabinet Meeting* (Jan. 14, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/14/remarks-president-cabinet-meeting> [<https://perma.cc/DES7-CLM6>].

38. *See, e.g.*, Employment Non-Discrimination Act ("ENDA"), H.R. 1755, 113th Cong. (2013). The first proposal to add "sexual orientation" to Title VII was made by Representatives Bella Abzug and Ed Koch in 1974. H.R. 14752, 93rd Cong. (1974).

39. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

40. *See id.*



contained in Title VII of the Civil Rights Act of 1964.<sup>41</sup> The original Executive Order closely tracked the categories contained in the statute itself.<sup>42</sup> No such statute extending coverage to “sexual orientation and gender identity” has ever been adopted by Congress, however, so President Obama’s Executive Order imposed requirements not rooted in the law.

President Obama’s order also added “gender identity” to the language of Executive Order 11,478 barring discrimination in hiring by the federal government itself.<sup>43</sup> That order, originally issued in 1969 by President Richard Nixon, prohibited discrimination in federal employment based on the same grounds prohibited by Title VII of the 1964 Civil Rights Act, and added a prohibition on age discrimination, a category which had been added to federal law by the Age Discrimination in Employment Act of 1967,<sup>44</sup> thus retaining the order’s statutory mooring.<sup>45</sup> President Obama’s addition of “gender identity” had no such statutory mooring, but it did have executive branch precedent. President Bill Clinton issued Executive Order 13,087 in 1998, which added “sexual orientation” to the list of categories protected against discrimination in federal employment.<sup>46</sup> Although that addition, too, was unmoored from any statutory text, perhaps President Clinton assumed that his role as the titular head of a “unitary executive” provided sufficient authority to make hiring policy for the executive branch, but not sufficient authority to impose a similar mandate on private contractors, since he did not simultaneously add “sexual orientation” to the executive order dealing with private government contractors.<sup>47</sup> President Obama apparently had no qualms about such constitutional niceties. Indeed, one acting deputy assistant secretary for policy in his Department of Health and Human

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41. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965); *see also* Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

42. *Compare* Exec. Order No. 11,246, 3 C.F.R. at 339 (prohibiting employment discrimination “because of race, creed, color, or national origin”), *with* 42 U.S.C. § 2000e-2 (prohibiting employment discrimination “because of such individual’s race, color, religion, sex, or national origin”).

43. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

44. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

45. Exec. Order No. 11,478, 3 C.F.R. 803 (1966–1970).

46. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

47. *See id.*

Services reinterpreted Title IX's ban on "sex" discrimination in education as including a ban on "gender identity" discrimination,<sup>48</sup> thereby rendering meaningless the relatively unambiguous statutory and regulatory exemptions for intimate facilities: single-sex living quarters, restrooms, and showers.<sup>49</sup> President Obama's Justice Department defended the administrative rewrite of the statute,<sup>50</sup> bolstered by the claim that the Court's own *Auer* deference doctrine required the courts to give near-dispositive deference to the administration's interpretation of its own regulations,<sup>51</sup> a position so extreme that many Court observers believed that it would actually sound the death knell for the *Auer* doctrine.<sup>52</sup>

President Obama did a similar end-run around the legislative process with his cap-and-trade maneuver. After the President's proposal to institute a cap-and-trade program legislatively failed in 2010,<sup>53</sup> the Environmental Protection Agency, answerable to President Obama, "reinterpreted" provisions of

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48. Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, U.S. Dep't of Educ., Office for Civil Rights (Jan. 7, 2015), [http://www.bricker.com/documents/misc/transgender\\_student\\_restroom\\_access\\_1-2015.pdf](http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf) [https://perma.cc/G8WH-R5MV].

49. 20 U.S.C. § 1686 (2012) (statutory exception to allow single-sex living quarters); 40 C.F.R. § 5.410 (2016) (same for toilets, locker rooms, and shower facilities).

50. *Gloucester Cty. Sch. Bd. v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted, judgment vacated and remanded*, 137 S. Ct. 1239 (2017).

51. The case was remanded to the Fourth Circuit after the Trump administration's Departments of Justice and Education issued a letter withdrawing that regulatory interpretation. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017); Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [https://perma.cc/SYZ9-MTHT].

52. See Casey C. Sullivan, *Could the Transgender Bathroom Fight Upend Decades of Admin Law?*, FINDLAW (Aug. 23, 2016, 2:57 PM), [http://blogs.findlaw.com/supreme\\_court/2016/08/could-the-transgender-bathroom-fight-upend-decades-of-admin-law.html](http://blogs.findlaw.com/supreme_court/2016/08/could-the-transgender-bathroom-fight-upend-decades-of-admin-law.html) [https://perma.cc/2LHC-WC2K].

53. H.R. 2454, 111th Cong. (2009); Bryan Walsh, *Cap and Trade is Dead (Really, Truly, I'm Not Kidding). Who's to Blame?*, TIME (July 22, 2010), <http://science.time.com/2010/07/22/cap-and-trade-is-dead-really-truly-im-not-kidding-whos-to-blame> [https://perma.cc/8WEB-BAPL].

the Clean Air Act to achieve the very policy that President Obama had failed to get approved by Congress.<sup>54</sup>

Indeed, President Obama appears to have viewed the basic separation-of-powers principle that all legislative power is vested in Congress as merely a politically useful option to be used when approval by Congress could be obtained, but to be ignored whenever the votes in Congress were simply not there. There are numerous examples, addressing great matters as well as small ones. His Interior Secretary unilaterally renamed Mount McKinley in Alaska to Denali,<sup>55</sup> for example, despite statutory language from 35 years earlier settling a century-old dispute with Alaskan natives by renaming Mount McKinley National Park as Denali National Park without changing the designation of the mountain itself.<sup>56</sup> His Justice Department unilaterally expanded federal regulation of firearms dealers by redefining, through interpretive guidance, the statutory phrase “engaged in the business of dealing in firearms” to potentially cover anyone who sold a single firearm from their private ownership if they made a profit on the sale.<sup>57</sup> His Health and Human Services Department unilaterally issued waivers of the various mandates under the Affordable Care Act to politically

54. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

55. Sec’y of the Interior Order No. 3,337 (Aug. 28, 2015), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/press-release/Denali%20Name%20Change.pdf> [<https://perma.cc/AHD6-8V2J>]; Julie Hirschfield Davis, *Mount McKinley Will Again Be Called Denali*, N.Y. TIMES, <https://www.nytimes.com/2015/08/31/us/mount-mckinley-will-be-renamed-denali.html> [<https://perma.cc/8FQN-PDAN>].

56. 16 U.S.C. § 410hh-1(3)(a) (2012).

57. Compare U.S. DEP’T OF JUSTICE, DO I NEED A LICENSE TO BUY AND SELL FIREARMS? 5 (2016), <https://www.atf.gov/file/100871/download> [<https://perma.cc/E3YQ-Z3X4>], with 18 U.S.C. § 921(a)(21)(C) (2012) (defining “engaged in the business” of selling firearms as “[A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms . . .”), and Joseph Greenlee, *The Thin Legal Backbone Behind President Obama’s Executive Actions on Guns*, CONSERVATIVE REV. (Jan. 8, 2016), <https://www.conservativereview.com/commentary/2016/01/the-thin-legal-backbone-behind-president-obamas-executive-actions-on-guns> [<https://perma.cc/Q8KW-TZH9>], and Jonathan H. Adler, *New ATF Guidance on Gun Sales is Legally Meaningless (or Else It Would Be Unlawful)*, WASH. POST: VOLOKH CONSPIRACY (Jan. 5, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/05/new-atf-guidance-on-gun-sales-is-legally-meaningless-or-else-it-would-be-unlawful/?utm\\_term=.7177c9d69a75](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/05/new-atf-guidance-on-gun-sales-is-legally-meaningless-or-else-it-would-be-unlawful/?utm_term=.7177c9d69a75) [<https://perma.cc/4N2Q-GK77>].

well-connected interest groups<sup>58</sup> and 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 but by the federal government.<sup>59</sup> And it effectively eliminated the welfare-to-work requirement of the Gingrich-Clinton-era Temporary Assistance for Needy Families program by waiving the work requirements.<sup>60</sup> All of these things were legislative in nature, and none had statutory authority.

President Obama also ignored statutes on the books in the foreign affairs arena, though here the constitutional issues are much more complicated and much more nuanced. He committed military forces into hostilities in Libya and kept them there long after the War Powers Resolution required them to be withdrawn,<sup>61</sup> for example, contending that the War Powers Resolution did not prevent his actions.<sup>62</sup> But unlike every prior President who disputed the very constitutionality of the War Powers Resolution as an improper intrusion on the President’s Article II powers,<sup>63</sup> President Obama merely claimed that the requirements of the War Powers Resolution were not triggered because American military forces had not been introduced into hostilities.<sup>64</sup> Harold Koh, former Dean of Yale Law School and Senior Legal Advisor to Secretary of State Hillary Clinton, ignominiously offered as his ra-

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58. Mark Hemingway, *Over Half of Obamacare Waivers Given to Union Members*, WEEKLY STANDARD (May 16, 2011), <http://www.weeklystandard.com/over-half-of-all-obamacare-waivers-given-to-union-members/article/561115> [https://perma.cc/B4EY-SELJ].

59. See generally *King v. Burwell*, 135 S. Ct. 2480 (2015).

60. Memorandum from the Office of Family Assistance, Dep’t of Health & Human Servs. to States administering TANF Program (July 12, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203> [https://perma.cc/2ZDS-S6EP].

61. See 50 U.S.C. § 1544(b) (2012).

62. Memorandum from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to Eric Holder, Att’y Gen., *Re: Authority to Use Military Force in Libya* (Apr. 1, 2011), <https://fas.org/irp/agency/doj/olc/libya.pdf> [https://perma.cc/6UQM-H852] [hereinafter OLC Libya Memo]; 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> [https://perma.cc/2AVZ-8PW3].

63. See, e.g., Lori Fisher Damrosch, *The Clinton Administration and War Powers*, 63 J.L. & CONTEMPORARY PROBLEMS 125, 128 (2000).

64. OLC Libya Memo, *supra* note 62; Savage & Landler, *supra* note 62.

tionale,<sup>65</sup> essentially, that “we’re shooting at them, but they aren’t shooting back at us,” a position so preposterous that even the very pro-Obama administration editorial pages of the *New York Times* found it hard to stomach. The *Times* declared the reasoning “[l]egalistic ‘word play,’” a “contorted reading of the 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.”<sup>66</sup>

President Obama also revoked statutory sanctions against Iran in early 2016, simultaneously transferring nearly \$150 billion of frozen Iranian assets<sup>67</sup> under a laughably loose interpretation of statutory appropriations for a Treasury Department litigation judgment fund.<sup>68</sup> The difficulty with this case, though, as with the case of Libyan intervention, is that any President *does* have a plausible claim to authority even in the face of conflicting congressional statutes when the national security or foreign affairs interests of the United States are at play.<sup>69</sup> Justice Jackson’s famous “lowest ebb” category from *Youngstown Sheet & Tube Co. v. Sawyer*<sup>70</sup> is often misunderstood on this score, and most Presidents have, quite correctly, asserted that authority they have directly from Article II cannot be restricted by act of Congress.<sup>71</sup>

Thus, if President Obama had asserted authority over the Libyan enterprise based on a plausible claim of U.S. national security interests and the unconstitutionality of the War Powers Resolution, or if he had asserted authority over the Iranian negotiation based on plausible diplomatic concerns and the unconstitutionality-

65. See *Libya and War Powers, Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 12–16 (prepared statement of Harold Hongju Koh).

66. Paul Starobin, *A Moral Flip-Flop? Defining “War”*, N.Y. TIMES (Aug. 7, 2011), <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html> [<https://perma.cc/LL8R-KMR2>].

67. Julian Hattem, *US Finds Iran in Compliance with Deal, Lifts Nuclear Sanctions*, HILL (Jan. 1, 2016), <http://thehill.com/policy/national-security/266151-us-lifts-iran-sanctions> [<https://perma.cc/9237-5Z5C>].

68. Letter from Eric M. Thorson, Inspector Gen., Dep’t of the Treasury, to Sen. Orrin Hatch (Nov. 10, 2016), <https://www.treasury.gov/about/organizational-structure/ig/Audit%20Reports%20and%20Testimonies/OIG-CA-17-006%20Iran%20Payment%20Inquiry.pdf> [<https://perma.cc/7ZSD-Z9HS>].

69. See, e.g., *Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076, 2095 (2015).

70. 343 U.S. 579, 637–38 (Jackson, J., concurring).

71. See, e.g., *Zivotofsky II*, 135 S. Ct. at 2091–95.

ty of congressional mandates in the conduct of such affairs, he would have been on stronger ground. But because he and his advisors had long been defenders of the War Powers Resolution and strong opponents of claims of “inherent” executive power in the foreign policy arena,<sup>72</sup> he was relegated to the wildly implausible claims for the authority he did assert.

Even if the inherent foreign affairs power could have provided some support for President Obama’s Libya and Iran actions, however, no such authority could plausibly be claimed in support of what were perhaps the most controversial of President Obama’s unilateral executive actions, the two Department of Homeland Security guidances with respect to illegal immigration: the Deferred Action for Childhood Arrivals (“DACA”) memorandum in 2012,<sup>73</sup> and the Deferred Action for Parents of Americans (“DAPA”) memorandum in 2014.<sup>74</sup> Both flout U.S. immigration policy contained in the statute books, arguably to the point of “suspension” of the laws, and unlike the few prior examples to which the programs were often erroneously compared,<sup>75</sup> neither dealt with a particular, urgent foreign policy or

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72. See, e.g., Savage, *supra* note 33.

73. Memorandum from Janet Napolitano, Sec’y of Homeland Security, to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Servs., and John Morton, Director, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [https://perma.cc/SWR8-337A] [hereinafter DACA Memo].

74. Memorandum from Jeh C. Johnson, Sec’y of Homeland Sec. to León Rodriguez, Director, U.S. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, and R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Protection, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [https://perma.cc/U4JA-7TGX] [hereinafter DAPA Memo].

75. Much has been made, for example, of the Family Fairness Program implemented by President George H.W. Bush’s administration in February 1990. See Memorandum from Gene McNary, Comm’r, Immigration and Naturalization Servs. to Regional Comm’rs, *Family Fairness: Guidelines for Voluntary Departure* (Feb. 2, 1990), <http://www.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf> [https://perma.cc/39HJ-M2RG]. But that program, which dealt with delayed voluntary departure rather than President Obama’s deferred action, was specifi-

humanitarian crisis. A review of the legality of those executive actions is therefore in order.

On the question of who has authority to set immigration policy for the nation, the Constitution and longstanding Supreme Court precedent could not be more clear. Absent some extraordinary foreign policy crisis that would trigger the President's direct Article II powers over foreign affairs, the Constitution assigns plenary power over immigration and naturalization to the Congress, not to the President.<sup>76</sup> To be sure, the President has a

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cally authorized by statute. Section 242B 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 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 is 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 (4) to (7), (11), (12), (14) to (17), (18), or (19) of section 1251(a) of this title.*

*Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (quoting 8 U.S.C. § 1252(b) (1970 & Supp. 1987)) (emphasis added). That specific statutory authority was largely superseded by the Temporary Protected Status program established by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.), which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. 8 U.S.C. § 1254a (2012). The 1996 Illegal Immigration Reform and Immigrant Responsibility ("IIRIRI") Act, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.), subsequently limited temporary protection to 120 days. See 8 U.S.C. § 1229c. By contrast, as even the OLC opinion acknowledges, "deferred action," which is the asserted basis for the President's recent actions, "developed without express statutory authorization." *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. (Nov. 19, 2014), at 13, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/SA7Z-Y7WG>] [hereinafter OLC DAPA Opinion]; see also *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).

76. See U.S. CONST., art. I, § 8, cl. 3-4 ("The Congress shall have Power . . . To regulate Commerce with foreign nations . . . [and] To establish an uniform Rule of Naturalization"); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); *INS v.*

measure of prosecutorial discretion to determine where to place his enforcement priorities and limited resources, but as the Supreme Court has made clear, there is a line between permissible prosecutorial discretion and an unconstitutional suspension of the law.<sup>77</sup> Prosecutorial discretion that is exercised categorically (as the President's immigration actions appear clearly designed to do) rather than on a case-by-case basis crosses that line and violates the President's constitutional obligation to "take care that the laws be faithfully executed."<sup>78</sup> Indeed, the very reason there is such a clause in the Constitution was to prevent the kind of suspension of the lawmaking authority that had been done by King George III in the American colonies.<sup>79</sup>

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Chadha, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("Congress has plenary power to make rules for the admission of aliens."). Even the Supreme Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), which contains language arguably suggesting that the President himself can set immigration policy, see 132 S. Ct. at 2498 (locating the source of federal authority over immigration, in part, in the inherent foreign relations power the President holds as the "sole organ of the nation" in foreign relations (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))), was rooted in statutory language not present in the DACA and DAPA situations.

77. See, e.g., *Heckler v. Cheney*, 470 U.S. 821, 832–33 n.4 (1985) (finding 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"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."). The opinion of the Office of Legal Counsel at the Department of Justice written in defense of the DAPA program recognizes the need for individualized determinations for exercises of prosecutorial discretion to be constitutional. See OLC DAPA Opinion, *supra* note 75, at 7 ("[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, . . ." (quoting *Heckler*, 470 U.S. at 833 n.4)); *id.* ("[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." (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994))).

78. U.S. CONST., art. II, § 3, cl. 5.

79. DECLARATION OF INDEPENDENCE paras. 23–24 (U.S. 1776) (including in the bill of particulars that the King had sought to establish "an absolute Tyranny" over the states by, among other things, "abolishing our most valuable Laws," and "for suspending our own Legislatures, and declaring themselves vested with Power to legislate in all cases whatsoever");



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 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 non-justiciable political question. Justice Scalia's untimely death in February 2016, and the resulting affirmance of the lower court's more narrow ruling on Administrative Procedure Act grounds in the multi-state legal challenge to President Obama's immigration orders, has forestalled such a ruling for the time being.<sup>80</sup>

But as serious as that issue is, it masks a much more fundamental constitutional question about executive power that needs to be addressed. 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.<sup>81</sup> In other words, President Obama's administration took it upon itself to drastically rewrite our immigration policy, the terms of which, by constitutional design, are expressly set by the Congress.<sup>82</sup>

As Secretary Napolitano noted in her DACA directive: "For individuals who are granted deferred action by either ICE or USCIS," the "USCIS *shall* accept applications to determine wheth-

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United States v. Tingey, 30 U.S. 115, 122 (1831) ("The president is enjoined 'to take care that the laws be faithfully executed.' In the performance of this trust, he not only may, but he is bound to avail himself of every appropriate means not forbidden by law"). *But see* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PENN. L. REV. 1835, 1836 (2016) ("Today, at least, no one can really know why the Framers included such language or placed it where they did."); *id.* at 1850 ("At common law, the Crown had long claimed the prerogative to dispense with or suspend acts of Parliament when equity so required. By the Glorious Revolution, English law had ceased to recognize such authority." (citations omitted)).

80. *See* United States v. Texas, 136 S. Ct. 906 (2016) (mem.) (granting petition for writ of certiorari and adding to the APA questions presented an additional question: "Whether the guidance violates the Take Care Clause of the Constitution"), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

81. *See* DACA Memo, *supra* note 73; DAPA Memo, *supra* note 74.

82. U.S. CONST. art. I, § 8, cl. 3–4. *But see* *Arizona*, 132 S. Ct. at 2498 (suggesting at least one other source of the power over immigration policy not explicitly associated with Congress).

er these individuals qualify for work authorization during this period of deferred action.”<sup>83</sup> But the statute actually enacted by Congress quite unambiguously prohibits the employment of aliens who are in the country illegally, except for those who meet a couple of carefully circumscribed statutory exceptions.<sup>84</sup> Napolitano’s memorandum cited no legal authority whatsoever for its extraordinary directive to immigration officers,<sup>85</sup> 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 immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion.<sup>86</sup>

Following the issuance of the Napolitano memorandum, legal experts and academics tried to find a hook for the President’s asserted authority. Speculations centered on a particular federal regulation that allows for work authorization for designated classes of aliens.<sup>87</sup> It allows for an application for work authorization by “An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.”<sup>88</sup> But as any first year law student knows, and as the regulation itself acknowledges, those provisions allowing for work authorization must be grounded in statutory authority, and none of the statutes cited in support of the regulation provide the necessary authority.

The regulation cites three statutory provisions: 8 U.S.C. §§ 1101, 1103, and 1324A.<sup>89</sup> Section 1103 of title 8 sets out the general au-

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83. DACA Memo, *supra* note 73, at 3 (emphasis added).

84. 8 U.S.C. § 1324A (2012).

85. See DACA Memo, *supra* note 73.

86. Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigration and Naturalization Servs., for the Comm’r, *INS Exercise of Prosecutorial Discretion* 4 <http://library.niwap.org/wp-content/uploads/2015/IMM-Gov-ProsDisc-07.11.00.pdf> [<https://perma.cc/RYN2-LFSZ>].

87. See 8 C.F.R. § 274a.12 (2016).

88. *Id.* § 274a.12(c)(14).

89. *Id.* § 274a.

thority of the Secretary of Homeland Security to administer and enforce the immigration laws.<sup>90</sup> Nothing in that provision gives the Secretary the discretion to ignore those laws.

Section 1101 is the “definition” section of immigration law, but through it, many of the authorizations for legal status are made by way of definitional exemptions from the general rule.<sup>91</sup> The term “alien,” for example, is defined in subsection (a)(3) as any person not a citizen or national of the United States.<sup>92</sup> The term “immigrant” is, in turn, defined in subsection (a)(15) as every alien except an alien described in one of 22 separate statutory exemptions.<sup>93</sup> This is where the “T” visa authority resides, so named because it is found in subsection (a)(15)(T).<sup>94</sup> That provision carefully delineates the authority to give a visa for lawful residence to victims of human trafficking who are cooperating with law enforcement’s investigation or prosecuting of the trafficking crimes.<sup>95</sup> Beyond these carefully delineated exceptions, there is no authority in this statute for the Attorney General, the Secretary of Homeland Security, the President, or any other executive official to grant authorization for legal status.

Section 1324A, which deals with employment of illegal immigrants, is the final authority cited in the regulation.<sup>96</sup> Like section 1101, it provides for certain authorizations by way of exemption from the general rule that employing an unauthorized alien is illegal.<sup>97</sup> Section (a)(1) specifically makes it unlawful to hire “an unauthorized alien (as defined in subsection (h)(3) of this section).”<sup>98</sup> Subsection (h)(3) in turn defines “unauthorized alien” as any alien who is not “lawfully admitted for permanent residence” (that would be all those carefully wrought exemptions in section 1101(a)(15), such as the “T” vi-

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90. 8 U.S.C. § 1103 (2012).

91. *See id.* § 1101.

92. *Id.* § 1101(a)(3).

93. *Id.* § 1101(a)(15).

94. *Id.* § 1101(a)(15)(T).

95. *See id.*

96. 8 C.F.R. § 274a (2016).

97. 8 U.S.C. § 1324A.

98. *Id.* § 1324A(a)(1).

sa) or an alien “authorized to be so employed by this chapter *or by the Attorney General.*”<sup>99</sup>

That last phrase, “or by the Attorney General,” and by extension the Secretary of Homeland Security,<sup>100</sup> is the only statutory hook to which anyone defending the President’s actions in numerous debates I had following the issuance of the Napolitano DACA memorandum could point.<sup>101</sup> That is a pretty 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 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,<sup>102</sup> and none of the carefully circumscribed statutory grants of discretion to the Secretary to issue exemptions in other circumstances,<sup>103</sup> would be necessary. And never mind that the much more likely interpretation of that phrase is that it refers back to other specific exemptions in section 1101 or section 1324A. Those provisions specify when the Attorney General might grant a visa for temporary lawful status.<sup>104</sup> Here, then, was some text in the statute

99. *Id.* § 1324A(h)(3) (emphasis added).

100. *Id.* § 1103 (charging the Secretary of Homeland Security with enforcement of most “laws relating to the immigration and naturalization of aliens”).

101. *Cf., e.g.,* Heather Fathali, *The American Dream: Daca, Dreamers, and Comprehensive Immigration Reform*, 37 SEATTLE U. L. REV. 221, 245 & n. 167 (2013).

102. *See* 8 U.S.C. §§ 1103, 1324A.

103. *See id.* § 1324A.

104. *See, e.g., id.* § 1101(a)(15)(V) (allowing the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a nonimmigrant visa while an application for an immigrant visa is pending, or to specific statutory provisions that require or give discretion to the secretary to grant work authorization in specific circumstances); *id.* § 1158(c)(1)(B) (aliens granted asylum); *id.* § 1226(a)(3) (otherwise work-eligible alien arrested and detained pending a removal decision); *id.* § 1231(a)(7) (permitting the Secretary to grant work authorization under certain narrow circumstances to aliens who have received final orders of removal).

This view was implicitly espoused by a plurality of the Supreme Court when, in *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011), it summarized section 1324a(h)(3) as defining an “unauthorized alien” to be “an alien not ‘lawfully admitted for permanent residence’ or not otherwise authorized by federal law to be employed.” 132 S. Ct. at 1981; *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (holding that federal immigration law denies “employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.” (citing 8 U.S.C. § 1324A(h)(3)));

that, taken out of context and ignoring all the elaborate web of requirements for eligibility for lawful status and employment authorization that had been carefully constructed by Congress over decades, purports to give the President, through his Attorney General, absolute discretion to ignore the lion's share of the nation's immigration laws.

And yet it is that slim reed, and that slim reed alone, which was subsequently confirmed as the only asserted source of authority. On November 20, 2014, the same day President Obama announced his expansion of the DACA program to cover millions of additional illegal immigrants, Secretary of Homeland Security Jeh Johnson issued a memorandum of his own, stating: "Each person who applies for deferred action pursuant to the criteria above 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.*"<sup>105</sup> As the U.S. Customs and Immigration Service 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."<sup>106</sup> That is why hundreds of thousands of DACA applicants were deemed to have a "lawful presence" and able to obtain work authorization and driver's licenses.<sup>107</sup> The DAPA program expanded that number to millions more.<sup>108</sup> And both are a far cry from the exercise of "prosecutorial discretion" claimed by the President and his two Secretaries of Homeland Security.

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Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518–19 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *cert. granted, judgment vacated sub nom.* City of Hazleton v. Lozano, 563 U.S. 1030 (2011), *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

105. DAPA Memo, *supra* note 74, at 4–5 (emphasis added).

106 *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> [<https://perma.cc/8ZMT-CTKA>] (last accessed May 19, 2017).

107. See DAPA Memo, *supra* note 74.

108. See, e.g., Jens Manuel Krogstad & Ana Gonzalez-Barrera, If original DACA program is a guide, many eligible immigrants will apply for deportation relief, Pew Research Ctr.: Fact Tank (Dec. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief> [<https://perma.cc/2RC8-5KFJ>].

The section of the immigration law that includes the brief phrase on which this entire edifice has been erected was added in 1986 as part of the Immigration Reform and Control Act.<sup>109</sup> The legislative record leading to the adoption of that monumental piece of legislation is extensive, but I have located no discussion whatsoever of the clause, much less any claim that by including that clause, Congress was conferring unfettered discretion on the Attorney General to issue lawful status and work authorization to anyone illegally present in the United States he chose, contrary to the finely wrought and hotly contested<sup>110</sup> provisions providing for such lawful status only upon meeting very strict criteria.

Nevertheless, the Obama administration's reliance on those four words as authority for the work authorization aspects of the DACA and DAPA programs brings us back full circle to the discussion of the non-delegation doctrine with which this Article begins. Although this important non-delegation principle has been weakened to near death by the courts over the last three-quarters of a century,<sup>111</sup> the absolute and unfettered discretion that results from the President's interpretation of section 1324a(h)(3) runs afoul of the non-delegation doctrine even in its moribund state. Quite simply, if the phrase, "or by the Attorney General,"<sup>112</sup> means what President Obama claimed it meant, there is no principle channeling the discretion of the executive at all, much less an intelligible one.

In sum, the 2012 DACA program and its 2014 DAPA expansion were presidential usurpations of the lawmaking power that the Constitution vests in Congress. The fact that it occurred after Presidents of both political parties failed to accomplish essentially the same policy goal by legislation<sup>113</sup> makes the usurpation even more troubling. For more than a decade, illegal immigration advocates have been pushing for Congress to enact the DREAM Act, the acronym for the Development,

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109. Pub. L. No. 99-603, 100 Stat. 3445 (1986).

110. *See, e.g.*, 159 CONG. REC. S458-60 (daily ed. Feb. 4, 2013) (statement of Sen. Charles Grassley).

111. *See supra* notes 3-9 and accompanying text.

112. 8 U.S.C. § 1324A(h)(3) (2012).

113. *See* Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), <http://www.nytimes.com/2007/06/28/washington/28end-immig.html> [<https://perma.cc/U35A-3U5P>].

Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orrin Hatch in 2001.<sup>114</sup> The bill would have given lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived).<sup>115</sup> The bill or some version of it has been reintroduced in each Congress since,<sup>116</sup> but has usually kicked up such a firestorm of opposition by those who view its principal provisions as an “amnesty” for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted.<sup>117</sup> But no matter. The President (or more accurately in this case, his Secretary of Homeland Security) had a pen, and in 2012 he unilaterally gave effect to the DREAM Act as if it were law,<sup>118</sup> and then extended that “lawful” authorization to millions more.<sup>119</sup> Who knew? If the President already had the power unilaterally to impose the DREAM Act and beyond, why all the angst in Congress for over a decade of trying to get the bill passed? Heck, why did President Obama himself claim in 2011 that he had no such authority,<sup>120</sup> when just a year later he claimed to have it?

This is not how our system of government is designed. Article I, Section 1 of the Constitution makes patently clear that “All legislative powers” granted to the federal government “shall be vested in” Congress, not the executive branch.<sup>121</sup> And Article I, Section 8, Clause 4 makes clear that plenary power over naturalization is vested in Congress, not the President.<sup>122</sup> Congress cannot give that lawmaking power away. To allow otherwise, as the DACA and

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114. S. 1291, 107th Cong. (2001).

115. *Id.*

116. *See, e.g.*, S. 952, 112th Cong. (2011).

117. *See, e.g.*, Julia Preston, *After A False Dream, Anxiety for Illegal Immigrant Students*, N.Y. TIMES (Feb. 8, 2011), [http://www.nytimes.com/2011/02/09/us/09immigration.html?\\_r=0](http://www.nytimes.com/2011/02/09/us/09immigration.html?_r=0) [https://perma.cc/JC4Y-E2XW].

118. *See* DACA Memo, *supra* note 73.

119. *See* DAPA Memo, *supra* note 74.

120. *See, e.g.*, Barack Obama, Remarks by the President at Univision Town Hall, (Mar. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall> [https://perma.cc/8SR5-L7Z3].

121. U.S. CONST. art. I, § 1.

122. *See id.* art. I, § 8, cl. 4.

DAPA programs, and so many other recent executive orders, require, is to simply negate that most basic of separation of powers principles. That cannot be the right answer in a Constitution devoted to the rule of law and not the raw exercise of power by men. The President's constitutional duty is to "take Care that the Laws be faithfully executed,"<sup>123</sup> not to rewrite them as he wishes, enforce them only when he wants, and otherwise render superfluous the great legislative body of the Congress, the immediate representatives of the ultimate sovereign authority in this country, "We the People."

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123. *Id.* art. II, § 3.