Written Statement

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"Enforcing the President's Constitutional Duty to Faithfully Execute the Laws"

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Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, I am Chris Schroeder, a professor of law at Duke Law School. From 2010-2012 I served as Assistant Attorney General for the Office of Legal Policy at the United States Department of Justice. Earlier, I served as deputy assistant attorney general and acting Assistant Attorney General for the office of Legal Counsel, from 1994-97, and prior to that I was chief counsel to the Senate Judiciary Committee, 1992-93. Much of my current research and writing concentrates on questions of presidential authority.

I thank you for the invitation to testify here today on the subject of the President's constitutional duty to faithfully execute the laws.

Article II, Section 3 of the United States Constitution imposes on the President the solemn duty to "take care that the Laws be faithfully executed." In recent months, the contours of this duty have received a considerable amount of attention, stimulated by several different actions taken by the administration, including, but not limited to, the Department of Homeland Security's Deferred Action for Childhood Arrivals and decisions by the Department of the Treasury to delay full implementation of certain tax provisions enacted by the Patient Protection and Affordable Care Act.

In our constitutional democracy, taking care that the laws are executed faithfully has a number of facets. The Constitution imposes restrictions on Congress' legislative authority, so that the faithful execution of the laws may present occasions where the President declines to enforce a congressionally enacted law in order to enforce another law, the Constitution. Even when legislation raises no question of constitutionality, the laws that Congress enacts are incredibly diverse and executing them can raise a number of issues of interpretation, application or enforcement that need to be resolved before a law can be executed. Further, the "mass of legislation" that has been lawfully enacted creates problems of coordination that must be addressed in one manner or another.[1] In these remarks, I shall concentrate on the nature of federal laws and some of the most significant issues that arise in enforcing them, in situations where the Executive Branch does not face a question of the constitutionality of the laws themselves. My objective is to develop a picture of law execution that will illuminate important aspects of the President's Take Care responsibility.

The laws that Congress enacts are extremely diverse in their characteristics. For instance, they range from short and simple, such as the provision of the Omnibus Appropriations Act of 1997, PL 104-208, which amended 18 U.S.C. §922(q)(2) to make it unlawful for someone to possess a firearm that has moved in interstate commerce when that person has reason to believe he or she is within a school zone, to the long and complex, such as the Patient Protection and Affordable Care Act, PL 111-148. One characteristic that unites almost all of them, however, is that each delegates one or more discretionary decisions about how to execute them to the executive branch. By "discretion," I simply mean "an authority granted by law to act" one way or another according to one's "own considered judgment and conscience."[2]

When the Executive Branch exercises discretionary authority that has itself been granted by law, it is executing that law, notwithstanding any disagreements one might have with the particular manner in which that discretion has been exercised. There is an important proviso here: the executive's discretionary choice cannot lead to just any judgment. It must be a choice that falls within the authorities granted by the statute.

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[1] "[T]he President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to mode of execution … is a matter of practical necessity." Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579, 702 (Vinson, C.J., dissenting).

[2] Pound, "Discretion, Dispensation and Migration: The Problem of the Individual Case," 35 N.Y.U.L. Rev. 925, 926 (1960).

Accordingly, executive branch choices are "subject to check by the terms of the legislation that authorized [them]," typically either through "judicial review …or the power of Congress to modify or revoke the authority entirely." It is its adherence to law in this sense that renders legitimate "executive action under legislatively delegated authority that might [otherwise] resemble 'legislative' action in some respects."[3]

Discretionary choices are unavoidable features in executing almost all laws. Consider a law that the Environmental Protection Agency had to execute after Congress enacted the Clean Air Act Amendments of 1977, which among other things required the Administrator of EPA to set rules for the regulation of air emissions for certain stationary sources. The Act itself did not define "source," and there were reasonable arguments that source could mean either a single smokestack or a single factory or facility, which might include a number of different smokestacks, or it could mean both. Which definition was selected had consequences for both the costs that owners of stationary sources would incur and the amount by which air pollution would be reduced.

EPA had initially chosen a definition that was going to be more costly for producers. Then, when "a new administration took office and initiated a Government-wide reexamination of regulatory burdens and complexities," EPA switched course and promulgated a definition that lowered compliance costs.[4] In other words, the new administration emphasized different policy objectives than the prior administration, and the definition of source finally chosen advanced those objectives, not the objectives of the prior administration nor, necessarily, the objectives of the Congress. The selection was consequential enough that the EPA's choice was litigated up to the Supreme Court. In *Chevron v. N.R.D.C.*, the Court upheld EPA's new definition, finding that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference … Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases."[5]

For purposes of understanding what it means to faithfully execute the laws, *Chevron* makes two crucial points. First, it was impossible to execute this

[3] I.N.S. v. Chadha, 462 U.S. 919, 954 n. 16 (1983).
[4] Chevron v. N.R.D.C., 467 U.S. 837, 858 (1984).
[5] Id. at 865.

aspect of the Clean Air Act without choosing a definition of source. While the choice itself was discretionary, the exercising of discretion was not – it was an unavoidable component to executing the law. Without actually exercising the authority to make discretionary choices such as these, the overall process of statutory interpretation, application and enforcement that make up the execution of law cannot be done.

Second, the Court's discussion of the conflicting interests and policies that needed to be reconciled in selecting a definition of source leaves little doubt that the Court would have sustained the prior Administration's definition as well. The Court here was simply acknowledging the inevitably of policy objectives influencing choice, and further indicating that so long as that choice was "check[ed] by the terms of the legislation" – in its words, so long as the choice was a "permissible construction" of the statute – it was the Executive's responsibility, as part of its responsibility to execute the law, to make the choice. By necessity, the exercise of choice "requires the formulation of policy and the making of rules to fill any gap left, implicitly and explicitly, by Congress."[6] Congress did not have to leave the question for the agency. By being specific Congress could certainly have made the choice between competing definitions here. In this sense, when the EPA makes the choice, the EPA's determination of the meaning of source does indeed "resemble 'legislative' action." Nonetheless, as the *Chadha* Court said, "executive action under delegated authority" remains law execution, and does not become lawmaking or any other type of legislative action.

The gap filling activities illustrated by *Chevron* that are required to execute today's mass of legislation have grown enormously as the corpus of federal legislation and its delegations of authority have grown. Even so, the understanding that this kind of gap filling activity is essential to executing the law was well established from the earliest days of the Republic (as well as before). To cite just one example, Thomas Jefferson was steadfast in insisting that the Constitution ought to grant no lawmaking powers and no powers in the nature of royal prerogatives to its Executive. For instance, in his *1783 Draft of a Fundamental Constitution for Virginia*, he insisted that the Executive ought to be given "these powers only, which are necessary to execute the laws (and administer the government)."[7] Yet later on he wrote to Governor Cabell that "if means specified by an act are impracticable, the

[6] Morton v. Ruiz, 415 U.S. 199, 231 (1974).
[7] Thomas Jefferson, Notes on the State of Virginia 365 (1787).

constitutional [executive] power remains, and supplies them … This aptitude of means [that the act does not supply] to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one would really be verified."[8] Supplying effective means to accomplish a statutory end is clearly within the competence of the Congress in the first instance, and hence when the agency provides those means this action will once again typically "resemble 'legislative' action," but Jefferson clearly saw that this resemblance did not take the action out of the Executive's realm.

Sometimes Congress' delegation of authority concerns the question of how to construe or interpret a particular word, as was the case in *Chevron*. The delegation of discretionary authority can also relate to resolving more recurrent or more generic issues that arise in executing the laws. Two of these more generic delegations relevant to the present discussion are the discretion to set priorities and allocate resources to different work streams and the discretion not to initiate enforcement actions, the latter of which can in a number of ways be thought of as a subcategory of the first.

When it is appropriating funds for executive branch activities, Congress can fund functions within an agency at levels it considers appropriate, given its own priorities and policy choices. It can, for instance, fund the line item for OSHA inspectors at levels sufficient to support the inspection of any single workplace on average once every 131 years[9] or, to pick a different example, by passing the Senate version of an immigration reform bill and appropriating sufficient funds, it can fund 20,000 new border agents. These funding levels produce very different levels of law execution in their respective fields, but in each case the agency will still be faithfully executing the applicable law when it in good faith and conscientiously expends the funds made available for that purpose.

If it receives fewer funds than sufficient to discharge all its responsibilities, however, the agency must set priorities. At current funding levels, OSHA cannot send an inspector to visit every work site within its jurisdiction, so it must set priorities. Priority setting becomes even more important when an agency has been charged with executing multiple pieces of legislation.

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[8] Edward Corwin, the President: Offices and Powers 1787-1984 (Randall W. Bland et al. eds, 5th ed. 1984) (quoting letter from Thomas Jefferson to Governor Cabell (Aug. 7, 1807).

[9] AFL-CIO, 2013 Death on the Job Report, Exec. Summ. p. 2. Available at http://www.aflcio.org/content/download/79331/1935061/2A+Executive+Summary2013final.pdf

Congress is under no obligation to ensure that appropriated funds and the statutory delegations it has made are kept aligned such that all agency functions are funded at levels sufficient to enable each agency to execute fully all the laws over which it has been given responsibility. Such "full execution" funding as a practical matter is not possible. This kind of funding shortfall does not imply that the executive is failing in its charge to execute the laws faithfully. All legislation is passed by Congress with at least the implicit delegation of discretion to the agency to set priorities.[10] The priority setting decisions necessitated by budget constraints necessarily affect *how* the laws are being executed at any point in time, not *whether* they are being executed.

The need to set priorities was an important animating force behind the Supreme Court's ruling that agencies possess almost unreviewable discretion to decide not to enforce a statute. In *Heckler v. Chaney*, then-Associate Justice Rehnquist reasoned that

> "An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."[11]

Agency enforcement actions are often resource intensive, such that calibrating enforcement within a resource-limited environment is an important decision in any agency's execution of the laws.

Heckler recognized that agency non-enforcement decisions "share to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[12] *Heckler* also acknowledged, however, that in the agency

[10] Again, this discretion operates within the parameters remaining after Congress has been as explicit as it chooses to be in defining those priorities.
[11] Heckler v. Chaney, 470 U.S. 8321, 831 (1985).
[12] Id. at 832.

context at least, Congress can limit the exercise of non-enforcement discretion to some degree, citing *Dunlop v. Bachowski* as an example.[13] *Heckler* explained that the statute at issue in *Dunlop* "quite clearly withdrew discretion from the agency and provided guidelines for the exercise of its enforcement power."[14]

Statutes as specific as *Dunlop* are uncommon, however. While I have not myself examined all the statutes relevant to recent administration actions on this point, I am not aware of any statutory restrictions on enforcement discretion that bear on those actions. Thus, there is no need for current purposes to decide whether prosecutorial discretion is better understood as a constitutional power granted directly by the Take Care Clause of Article II, Section 3, or as a congressional delegation of authority implied by the combination of the numerous laws to execute and resource constraints. In either case, the decisions involved in exercising prosecutorial discretion are unavoidable links within the chain of decisions that have to be made in order to execute the laws.

At first blush, it may seem paradoxical to say that an agency is executing the laws when it decides not to enforce the law, but the paradox is completely eliminated once one recognizes that executing laws encompasses many activities, not all of which can be performed at any given time. Insofar as making decisions about where and when to enforce frees up resources for other activities constitutive of law execution, non-enforcement decisions are part of the overall process of executing the laws.

Whatever the ultimate provenance of prosecutorial discretion and its counterpart of agency non-enforcement, a number of different factors influence such decisions. As Wayne LaFave noted years ago, two of the most significant factors are limited enforcement resources and the need to take equitable considerations into some account.[15] More recently in the specific context of immigration law, the Supreme Court emphasized the significance of the second of these two, noting that

> "a principal feature of the removal system in the United States is the broad discretion exercised by immigration officials … Federal officials as an initial matter, must decide whether it makes sense to pursue

[13] Dunlop v. Bachowski, 412 U.S. 560 (1975).
[14] 470 U.S. at 834.
[15] Wayne R. LaFave, "The Protector's Discretion in the United States," 18 Am. J. Comp L. 532, 533-34 (1970).

> removal at all …Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children in the United States, long ties to the community, or a record of distinguished military service."[16]

When the *Heckler* court describes the need of an agency to decide whether "agency resources are best spent" on an enforcement action, that description provides room for equitable considerations as well as whatever other policy priorities the Executive, in his "considered judgment and conscience" thinks bear on the question of how – not whether – to execute the laws.

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I can now summarize some of the main lessons from this brief exploration of the nature of the laws that the executive branch must execute. Then by way of illustration I will suggest how these lessons apply to several of recent decisions, and finally will conclude with a consideration of the more general question of the meaning of the Take Care Clause.

When the Executive Branch exercises delegations of discretionary authority granted by law it is executing the law. In deciding how to exercise discretion, the Executive Branch may appropriately consider equitable consideration and policy priorities that are not specifically prescribed by the Congress. Almost all statutes grant some discretionary authority, including the discretion to set priorities and to determine not engage in all possible enforcement actions. These choices are not in tension with executing the laws; they are part and parcel of what it means to execute the laws. Some of these actions may "resemble 'legislative' action," but the test of their legality is not that kind of eye test, rather it is to "check [them against] the terms of the legislation that authorized [them]."

Both the DHS's Deferred Action for Childhood Arrivals and the Department of the Treasury's "transition relief" for several provisions of the Patient Protection and Affordable Care Act have been justified as exercises of discretionary authority. The administration is not claiming any authority to

[16] Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

suspend any law, or otherwise to refuse to enforce any law. Even assuming that it is possible to see a resemblance between these administration actions and such labels, the proper approach to them must begin by taking the administration at its word, because if they are defensible as exercises of discretion granted by law, any such resemblance is immaterial.

First, consider DHS's Deferred Action for Childhood Arrivals. While Secretary Napolitano's memorandum memorializing her Deferred Action for Childhood Arrivals is brief, it relies explicitly on scarce resources, equitable considerations and policy choices, which are classic factors influencing decisions not to enforce, and it seems to be quite in line with the Supreme Court's recent recognition of the role that "immediate human concerns" play in immigration decisions.[17] The Secretary noted that she is announcing the decision in order to "ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." As for her reasons for assigning low priority to the cases of undocumented children who were brought into this country as children and know only this country as home, she stated that

> "Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here."[18]

Not only does the deferred action seem to be well grounded in the general understanding of prosecutorial discretion, both the Department of Homeland Security and the INS prior to DHS's creation have apparently long treated deferred action as a species of prosecutorial discretion authorized by the immigration laws, with instances of exercising this authority documented at

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[17] See Arizona v. United States, note 15, above.

[18] Memorandum from Janet Napolitano, Secretary of Homeland Security, Re: "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," June 15, 2012. Available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf

least back to 1975.[19] It is fair to assume that Congress has been aware of this longstanding practice and has at least implicitly acquiesced in it.

Similarly, the Treasury defends its "transition relief" with respect to several tax-related provisions of the ACA as exercises of discretionary authority that has been granted by law. In a letter to Congressman Upton of July 9, 2013, Assistant Secretary of the Treasury for Tax Policy Mark Mazur references these authorities in explaining the basis for such decisions announced on July 2, 2013.[20] Specifically, the letter states that Section 7805(a) of the Internal Revenue Code grants discretionary authority to Treasury to provide such relief. The letter also references a number of occasions in the past in which the effective date of tax-related provisions have been extended, documenting cases going back at least to 1999, including several during the George W. Bush administration. The letter further states that because of problems in the reporting requirements noted by stakeholders as well as other impediments to the effective implementation of the these and other requirements, it is using its long-standing discretionary authority to delay them for one year.

The exercise of this discretionary authority must be compared to the terms of the Affordable Care Act. Does the presence of an effective date in the statute eliminate the Treasury Department's discretion to provide transitional relief? There are sound reasons for Treasury to have concluded that it does not. To begin with, as evidenced by all the prior uses of this authority, the very nature of the long-standing transitional relief authority under 7805(a) is to provide relief from the effective dates of new tax provisions. There is nothing in the ACA's enactment of its effective dates to distinguish those in the ACA from any of those found in earlier legislation, as to which the Treasury's discretionary authority has been applied.

I am not aware of any case law interpreting the scope of Treasury's claimed authority, but if Treasury's lawyers were looking for analogous judicial interpretations, they might have consulted the case law interpreting challenges to other agencies' failure to meet explicit statutory deadlines for taking actions such as issuing rules and regulation. This case law is quite unsettled, but the guidance that can be gleaned from the decisions of the

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[19] See Shoba Sivaprasad Wadhia, "Response: In Defense of DACA, Deferred Actin, and the Dream Act at 65-68, available at http://ssrn.com/abstract-2195735.

[20] Available at: http://www.scribd.com/doc/153011058/Treasury-Letter-To-GOP-Defending-ACA-s-Employer-Mandate-Delay .

D.C. Circuit, which are the most important for the judicial review of many administrative actions, would not have discouraged Treasury's interpretation.

The leading D.C. Circuit decision evaluating when a court can "compel agency action unlawfully withheld or unreasonably delayed,"[21] is *Telecommunications Research & Action Center v. FCC.* [22] It articulates a set of five factors courts should consider to decide whether an action is unreasonably delayed. The case arose in the context of a statute that did not contain an explicit deadline, but the D.C. Circuit continues to apply its five factors when a statutory deadline is present.[23] While the existence of a deadline is taken into account, the court continues to weigh all the factors to reach case-by-case determinations. If Treasury had applied these factors to the question of the reasonableness of delaying the ACA effective dates, it could well have thought it had discretion to proceed.[24]

It is not my intention to resolve this or any other question of discretionary authority with regard to actions that others have thought constitute breaches of the President's duty to take care that the laws be faithfully executed. What I have tried to do is to articulate the appropriate way to understand what it means to execute the laws faithfully in the context of statutes that grant discretionary authority and to emphasize that analysis of the propriety of any exercise of discretionary authority under such statutes must begin with the statutes and the authorities they grant. If the action can be squared with them, taking into account the full array of discretion that has been granted by law, then the action is faithfully executing the laws, even if it is not enforcing the law in some particulars and even if it

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[21] 5 U.S.C. §706(1).

[22] Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

[23] E.g., In Re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991)

[24] The five factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. 750 F.2d at 80.

Factors 3, 4 and 5 suggests reasons why a temporary delay to the ACA tax provisions could be considered reasonable.

resembles legislative action. The question of whether the executive branch is right or wrong in any particular instance or instances is surely an appropriate matter for discussion, but it is a discussion about statutory interpretation or construction. So far as I am aware, in no instance has the President or any of his subordinates asserted a claim to act without statutory authority, let alone to violate, suspend or dispense with a statute.

Suppose, however, that the Executive Branch has taken an action outside the boundaries of the statutes' grants of discretion. Is the President then guilty of violating his constitutional duty? In my view, not by virtue of this fact alone. The President's duty is to take care that the law is faithfully executed, not that it is flawlessly executed. With the courts as final arbiters of what the law is in many situations, and with many questions of discretionary authority being contestable by reasonable people, it would be impossible for any President to discharge such a duty. This conclusion is enforced by the fact that there are thousands of decisions on the books in which a court has vacated agency action because it was outside the authorities granted by statute, yet to my knowledge none of them has suggested that legal errors by the Executive in interpreting the scope of its discretionary statutory authority imply that the Executive has been faithless in executing the laws, or that the President is in violation of his constitutional duty to ensure that his subordinates are faithful to those laws.

Because mere legal error is consistent with faithful execution of the laws, I do not believe the avoidance of legal error goes to the heart of the President's obligation. The heart of the matter, rather, seems to have been anticipated by the earlier quotation from Roscoe Pound, even though Pound was not speaking directly to the President's duty. Exercising "considered judgment and conscience" contemplates a good faith and conscientious effort to take actions within the discretionary authority granted by law. So long as the President is taking care to ensure that this is being done, he is discharging his constitutional obligation.

I thank the members of the Committee for their time, and I look forward to answering any questions you may have.