Congressional Testimony

Executive Overreach in Domestic Affairs Part I – Health Care and Immigration

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Mr. Chairman, Mr. Ranking Member, Members of the Committee: My name is Elizabeth Slattery, and I am a Legal Fellow in the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. In this capacity, I research and write about the separation of powers, the rule of law, and the proper scope of the branches of government. The views I express in this testimony are my own and should not be construed as representing any official position of the Heritage Foundation.

I would like to thank the Task Force on Executive Overreach for the opportunity to discuss the imbalance of power between the Executive Branch and Congress. The matter of how Congress has lost power to the Executive Branch, either through ceding it to administrative agencies or through power grabs by the president, and whether this can be remedied present important issues regarding our system of government. Just as Congress has not always safeguarded its own authority, the president has overstepped the bounds of his constitutional powers. Unfortunately, President Barack Obama has acted unilaterally to effectively change the law, damaging the separation of powers in the process. These are challenges that will not disappear when the next president takes office, so Members of Congress should consider ways to rein in the current president and continue to do so with the next administration.

In this statement, I will address how the president's duty to faithfully execute the law and prosecutorial discretion fit within the separation of powers envisioned by the Framers of the Constitution. Next, I will discuss how the Supreme Court has treated conflicts involving presidents who have exceeded their authority. Then, I will argue that the rise of administrative agencies has exacerbated the imbalance of power between the branches of government. Finally, I will highlight instances when President Obama has exceeded his authority.

Separation of Powers, the Take Care Clause, and Prosecutorial Discretion

The rule of law is a bedrock principle of Anglo–American jurisprudence. It stands for the belief that all—including government officials—are subject to the law and not above it. America's Founding Fathers understood this principle, and the Constitution reflects it in at least three ways. First, instead of placing the legislative, executive, and judicial powers in one body, the Constitution divides federal power among three distinct but coordinate branches. Second, Article VI proclaims that the Constitution and laws passed following the Constitution are the "supreme law of the land." Third, Article VI also requires all federal officeholders to take an oath or affirmation to "support" the Constitution. Together, these provisions were intended to ensure that ours remains "a government of laws, and not of men."[1] The Framers of our Constitution also understood that, while a strong federal government was necessary, if left unchecked, it could encroach on the liberties of its citizens. To help prevent this, the Framers realized that, as James Madison wrote in *Federalist* 51, "[a]mbition must be made to counteract ambition….[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."[2]

Accordingly, they devised a system of checks and balances through the Constitution that divided the powers of the federal government among the three branches. Article I of the Constitution grants enumerated legislative powers to Congress. The Constitution assigns the Executive the duty to enforce the law, and Article II, Section 3 requires that the president "shall take Care that the Laws be faithfully executed." The president also takes an oath to "preserve,

protect and defend the Constitution." Article III vests in the courts the judicial power to resolve "Cases" or "Controversies" between adverse parties.

The scope of executive power has been debated since our nation's founding. Certainly, it is not within the president's power to create the laws; that is Congress's job. As Supreme Court Justice Joseph Story noted in his *Commentaries on the Constitution*, the president may "point out the evil, and … suggest the remedy," but he lacks the power to enact or amend laws on his own.[3] The president may "even call Congress into session, but it remains the prerogative of Congress to decide what laws will be enacted."[4] The Take Care Clause of the Constitution charges the president with a duty that includes complying with statutory mandates, enforcing laws and regulations (including prosecuting lawbreakers), and defending the validity of laws in court. This duty does not mean that he may act in such a way as to implement "laws" that have not been passed by Congress, to amend or effectively repeal existing laws, or suspend the law.

Further, all three branches of the federal government have an independent authority and duty to assess the constitutionality of laws to ensure that their actions are in accordance with the constitutional design. This means that that the president may refuse to enforce a law if he has a good-faith belief that it is unconstitutional, since the Constitution is itself the highest law that must be "faithfully executed."[5] It does not allow the president to refuse to carry out a law that he disagrees with for policy or political reasons. To allow otherwise would "[clothe] the president with a power to control the legislation of congress, and paralyze the administration of justice."[6] Thus, the president "may not decline to follow a statutory mandate or prohibition simply because of policy objections."[7] Likewise, the president cannot effectively amend a law by exempting entire categories of lawbreakers from the application of that law.[8] In order to change the law, the president must encourage Members of Congress to do so. As the Supreme Court has stated, "[o]nce a bill becomes law, it can only be repealed or amended through another, independent legislative enactment…."[9]

There is no question, however, that the president and senior Executive Branch officials who are appointed by the president have considerable discretion about what actions they take or do not take. The role of the president cannot be reduced to a catalog of "ministerial" acts.[10] Moreover, courts generally are reluctant to delineate when the president has abused his discretion or abdicated a constitutional duty. As a practical if not legal matter, the president enjoys wide discretion in how to execute the law, particularly when forced to make choices due to resource constraints. To be sure, some judgment is warranted, given the large body of regulations churned out annually by administrative agencies and the ever-growing federal code the president enforces. Furthermore, it would be impractical for the Executive Branch to prosecute every violation of every law or regulation, so administrations must prioritize law enforcement resources and may decide not to enforce a particular law against a particular individual or small category of individuals on a case-by-case basis. This is known as prosecutorial discretion. For example, the government has only passively enforced the draft, and when a draft-dodging young man challenged his conviction on selective prosecution grounds, the Supreme Court ruled in favor of the government because it "retains 'broad discretion' as to whom to prosecute."[11] Without limits, prosecutorial discretion becomes the exception that subsumes the rule, allowing the president to dispense with or suspend the law. The Constitution does not grant the president such powers. Charging the president with the faithful execution of

the laws emphasized that the Constitution does not confer a dispensing power on the executive. The Framers were familiar with this practice by British kings, and they deliberately chose to deny such a power to the president.

Past Conflicts Implicating the Scope of Executive Power

Courts generally are reluctant to get involved in disputes between the political branches that could be resolved without judicial interference. Under Article III of the Constitution, the judicial power extends to resolving "Cases" or "Controversies," which not only ensures that courts adjudicate actual disputes between adverse parties that are capable of resolution by a court, but also prevents the judiciary from intruding into matters reserved for the executive and legislative branches. Thus, it protects the courts from becoming referees in every dispute between the political branches. To satisfy this constitutional requirement, known as Article III standing, a party must establish three things: (1) an injury-in-fact that (2) is fairly traceable to the defendant's conduct and (3) is capable of being redressed by a court. This procedural requirement is the same for all lawsuits, whether they are filed by private citizens, executive branch officials, or Members of Congress. Demonstrating an injury-in-fact—an actual harm—is typically the biggest hurdle when it comes to disputes between the political branches. Most successful challenges have been filed by private parties who were demonstrably harmed by those actions, rather than Members of Congress whose institutional injuries, such as a diminution of their power as legislators, are deemed to be "abstract" and "widely dispersed."[12]

In situations when the president has exceeded his authority and encroached on congressional prerogatives, the Supreme Court has been more receptive to challenges brought by private parties. For example, in a case brought by contractors who had not been paid by the postmaster general, the Supreme Court determined that the president may not refuse to follow an act passed by Congress. In *Kendall v. United States ex rel. Stokes*, the Court held that President Martin Van Buren could not instruct his postmaster general to refuse to pay contractors when Congress had passed a law directing payment.[13] The Court noted that "[t]o contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and entirely inadmissible."[14] Allowing Executive Branch officials to choose not to comply with a statutory mandate "would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice."[15]

In *Youngstown Sheet & Tube Co. v. Sawyer*, a steel company challenged President Harry Truman's attempt to nationalize American steel mills to prevent a strike during the Korean War.[16] Congress had explicitly rejected authorizing such seizures when the Taft-Hartley Act was debated in 1947, and instead allowed the president to seek an injunction for up to 80 days to head off strikes "imperiling the national health and safety."[17] The Supreme Court found that President Truman had exceeded his authority in seizing the steel mills. Writing for the majority, Justice Hugo Black noted, "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits

his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."[18] Justice Black observed that the Constitution does not allow the president to "supervis[e] or control" Congress's lawmaking power; instead, the Framers of the Constitution "entrusted the law making power to the Congress alone in both good and bad times."[19] In a concurring opinion, Justice Robert Jackson explained that the president's duty to execute the law "gives a governmental authority that reaches so far as there is law."[20]

In the 1970s, President Richard Nixon refused to spend certain funds appropriated by Congress, claiming that a power of impoundment was inherent in his duty to faithfully execute the laws. In *Train v. City of New York*, the Supreme Court determined that Nixon's Environmental Protection Agency administrator lacked the discretion to impound funds Congress had authorized when it amended the Federal Water Pollution Control Act.[21] Indeed, while that case was pending, Congress passed the Congressional Budget and Impoundment Control Act of 1974, seeking to place restrictions on the president's "impoundment" power. In another case involving Nixon's "impoundment" power, the U.S. Court of Appeals for the D.C. Circuit stated that "historical precedent, logic, and the text of the Constitution itself obligate the [president] to continue to operate [the program] as was intended by the Congress....[N]o barrier would remain to the executive ignoring any and all Congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation."[22]

More recently, President Obama exceeded his authority by making recess appointments when the Senate was in session. Article II, Section 2 of the Constitution provides that the president may "fill up all Vacancies that may happen during the Recess of the Senate." Otherwise, the president must receive the advice and consent of the Senate in order to appoint ambassadors, judges, and higher-level executive officers. In January 2012, President Obama made four "recess" appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau, claiming that, since the Senate was conducting only periodic *pro forma* sessions, it was not available to confirm those appointees. During the time in which President Obama deemed the Senate "unavailable," it passed and the president signed into law the Temporary Payroll Tax Cut Continuation Act of 2011. The Supreme Court ruled unanimously that President Obama had violated the Constitution. The majority opinion by Justice Stephen Breyer noted that the Senate "is in session when it says that it is," and specified that a recess must last at least 10 days in order for the president to make a recess appointment.[23]

Another recent case involved the Environmental Protection Agency's regulation of stationary sources emitting greenhouse gases. In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Supreme Court held that the agency exceeded its enforcement authority by "tailoring" the Clean Air Act's specific requirements to "accommodate its greenhouse-gas-inclusive interpretation."[24] Writing for the majority, Justice Antonin Scalia reiterated the "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."[25] The agency's authority to execute the law "does not include a power to revise clear statutory terms that turn out not to work in practice."[26]

Of course, there have been instances when Congress encroached on the president's prerogatives. For example, in *Lujan v. Defenders of Wildlife*, the Supreme Court determined that Congress may not authorize individuals to sue a government official for an alleged failure to enforce the law, despite their inability to demonstrate a separate injury resulting from that failure.[27] The majority opinion by Justice Scalia noted that Congress may not "transfer from the president to the courts the chief executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[28] Likewise, Congress may not place onerous conditions upon the president's ability to remove officials for whom he is responsible,[29] although this does not always extend to quasi-legislative or quasi-judicial "independent" agencies.[30] Congress also may not seek to "control administration of the laws" by use of a post-enactment legislative veto.[31] Nor may Congress circumvent the president's role in the appointment of judges by authorizing the chief judge of a specialized court to appoint trial judges.[32] In many of these instances, the Supreme Court determined that Congress's efforts undermined the president's ability to faithfully enforce the law.

Administrative Agencies Exacerbate the Problem of Executive Overreach

Administrative agencies can exacerbate the problem of a president who seeks to expand his authority into Congress's realm. These bodies, which are generally housed within the Executive Branch, perform legislative, executive, and judicial functions by issuing, enforcing, and settling disputes involving regulations that have the force of law.[33] James Madison called such an accumulation of power in one body the "very definition of tyranny."[34] The modern administrative state, however, blurs the separation of powers and the system of checks and balances and has become an unaccountable fourth branch of government.

The Progressive Era led to the creation and strengthening of agencies like the Federal Trade Commission and the Food and Drug Administration; the New Deal brought the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission; the 1970s heralded the Environmental Protection Agency; and more recently has come the Consumer Financial Protection Bureau.[35] The result is that administrative agencies today "pok[e] into every nook and cranny of daily life."[36] Though the idea may have been to put impartial, scientific experts in charge of highly technical areas of regulation, more often than not, "political appointees, often not experts, are normally responsible for managing agencies and determining policy. And policy often reflects political, not simply 'scientific' considerations. Agency decisions will also occasionally reflect 'tunnel vision,' an agency's supreme confidence in the importance of its own mission to the point where it leaves common sense aside…."[37]

In turn, Congress enacts "vast and vaguely worded legislation…grant[ing] broad discretion to regulatory agencies."[38] This allows Members of Congress to "claim credit for 'doing something' while evading blame for specific regulations."[39] Though the nondelegation doctrine prohibits Congress from delegating legislative functions to the Executive Branch, the Supreme Court has allowed Congress to delegate regulatory authority to agencies as long as Congress specifies an "intelligible principle" to guide the agency in the exercise of its discretion. To date, the Supreme Court has struck down only two statutes—both in the 1930s—as unconstitutional delegations because of Congress's failure to provide a sufficient "intelligible principle" to guide the applicable agency. Moreover, oversight from the executive or judicial

branches is limited. The president lacks the ability to actively supervise the myriad agencies,[40] and Congress has even insulated some "independent" agencies from Executive Branch control by limiting the president's ability to remove agency heads at will. As President Truman put it, "I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing."[41] Further, the courts should act as a check on abuse by the political branches when an appropriate case or controversy is before them. Yet courts rely on deferential doctrines in reviewing agency actions in an effort to avoid encroaching on the Executive Branch's ability to administer the law. In fact, agencies prevail in the vast majority of cases involving various deference doctrines.[42]

Thus, Congress creates an agency under the assumption that the president will supervise it; the president provides guidance to an agency on broad policy goals under the assumption that the courts will rein it in if necessary; and the courts defer to judgments made by agency officials under the assumption that this was what Congress intended. As a result of this vicious cycle, administrative agencies wield massive amounts of power with little oversight and are precisely the accumulation of power that Madison feared. Many instances of power grabs and expansive "interpretations" of law throughout the Obama Administration have emanated from agencies, including the Environmental Protection Agency, the Federal Communications Commission, and many others.[43]

President Obama's Executive Overreach

President Obama is not the first—nor is he likely to be the last—to be accused of abusing his authority. Indeed, when he was a candidate for the presidency, at a town hall event, Obama said, "The biggest problems that we're facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress…."[44] The history books are filled with these disputes, such as when President Andrew Jackson declared after an unfavorable Supreme Court decision, "[Chief Justice] John Marshall has made his decision; now let him enforce it."[45] To be sure, there are examples of past presidents declining to fully enforce certain laws. It's been alleged that George W. Bush did not fully enforce various environmental regulations,[46] Bill Clinton failed to enforce certain gun-safety laws,[47] and Ronald Reagan did not enforce the Sherman Antitrust Act.[48] Presidents Reagan, George H.W. Bush, and Clinton all issued deportation deferrals in response to specific humanitarian crises, each affecting fewer than 200,000 individuals.[49] As discussed above, President Nixon attempted to assert a "power of impoundment" to avoid spending congressionally appropriated funds. Going all the way back to our nation's early years, Thomas Jefferson declined to enforce the Alien and Sedition Acts of 1798 because he believed them to be unconstitutional.[50]

President Obama has not only declined to enforce certain laws, he has circumvented Congress on a number of occasions. This damages the separation of powers that the Framers of the Constitution so carefully delineated, and has positioned Obama as a super-legislator with the power to override the law. Two of the most publicized instances of this unilateral action have been delaying implementation of the Affordable Care Act and the deferred action policies granting relief from deportation and removal proceedings, as well as government benefits and work authorizations, for an estimated four million illegal aliens. Legal challenges against both actions are currently pending in court. There are, however, many other instances when President

Obama effectively changed or waived laws through unreasonable interpretations or otherwise bypassed Congress.

Immigration Reform: In 2012, the Department of Homeland Security implemented the Deferred Action of Childhood Arrivals program, enabling 1.7 million illegal aliens under 30 years old brought to the United States as children to apply for deferred deportation and work authorization. This program was expanded by, among other things, eliminating the age cap and increasing the term of deferred action and employment authorization from two to three years. Then in 2014, the department created the Deferred Action for Parents of Americans, conferring deferred action on illegal aliens whose children are U.S. citizens or lawful permanent residents, provided no other factors make deferred action inappropriate.[51] In addition to lawful presence, deferred action recipients receive benefits such as work authorizations, driver's licenses, Social Security, and other government benefits, which is estimated to cost the states millions of dollars each year. Texas and 25 other states sued to enjoin the 2014 program. The district court granted injunctive relief on the ground that the states were likely to succeed on their claim that the implementation of this program violated the Administrative Procedure Act.[52] The appellate court agreed and now the case is pending before the Supreme Court. In addition to the statutory claims, the states argue that this program violates the president's duty to faithfully execute the law because Congress never authorized the Obama Administration to make these changes to the existing immigration laws.

Healthcare Law: The Patient Protection and Affordable Care Act has undergone dozens of "revisions" since its passage in March 2010.[53] The U.S. House of Representatives filed suit challenging two of these changes in court. First, the House challenged the Obama Administration's delay of the employer mandate,[54] which generally required businesses employing 50 or more full-time employees to provide health insurance or pay a fine per each uncovered employee.[55] Section 1513(d) of the law provided that this employer mandate provision "shall apply to months beginning after December 31, 2013." Second, the House challenged the Obama Administration's payment of subsidies to insurance providers for providing cost-sharing reductions to certain policyholders, even though Congress never appropriated funds for these subsidies. Section 1402 of the law "requires insurers to reduce the cost of insurance to certain, eligible statutory beneficiaries" and the "federal government then offsets the added costs to insurance companies by reimbursing them with funds from the Treasury."[56] This section stated that cost-sharing offsets must be funded by annual appropriations. The House maintained that since it has not appropriated funds for Section 1402, the Administration violated Article I, Section 9, Clause 7 of the Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." A district court ruled last September that the House has standing to challenge the spending of funds not appropriated by Congress, but not the delay of the employer mandate.

Labor Law: The Obama Administration invented a labor law exemption that flatly contradicts a 1988 law. The Worker Adjustment and Retraining Notification (WARN) Act prohibits large employers from initiating statutorily defined mass layoffs unless they give 60-day advance notification to employees.[57] The Department of Labor (DOL) is responsible for issuing guidance to employers related to their WARN Act obligations. On July 30, 2012, the DOL issued a guidance letter telling employers that it was not necessary to issue notice to employees before

making layoffs resulting from the anticipated federal budget cuts commonly known as sequestration.[58] Further, the Office of Management and Budget (OMB) informed government contractors that the government would compensate them for legal costs, as determined by a court, if and when employees laid off during sequestration sued those contractors for lack of WARN Act notice.[59] Thus, not only did the DOL encourage employers to withhold notices that the WARN act would require if sequestration were to occur—an outcome all reasonable observers should have anticipated—but OMB also offered to reimburse those employers at the taxpayers' expense if challenged for failure to give that notice. The WARN Act notices would have gone out days before the 2012 election, and some have suggested that the DOL guidance was drafted so that workers would not receive notice of impending layoffs because they might blame President Obama, thereby imperiling his re-election efforts.[60]

Welfare Reform: In another instance of "creative" interpretation, the Obama Administration waived a key part of the 1996 welfare reform law. In 1996, Congress passed and President Bill Clinton signed into law a comprehensive welfare reform bill that conditioned receipt of welfare benefits on working or preparing for work under Section 407 of the Temporary Assistance for Needy Families program. This requirement was a huge success, reducing welfare rolls by 50 percent and the poverty rate for minority children dropped to the lowest levels in history. On July 12, 2012, however, the Department of Health and Human Services notified states of Secretary Kathleen Sebelius's "willingness to exercise her waiver authority" so states could eliminate Section 407's work participation requirement.[61] This announcement contradicted the law, which unambiguously provided that waivers granted under other sections of the law "shall not affect the applicability of section 407 to the State."[62] As a result, in most states today, more than half of able-bodied welfare recipients are not working or preparing for work and state welfare agencies engage "less than [one] fifth of recipients in activities intended to increase employment and reduce dependence."[63]

Voting Rights: In advance of the 2012 election, Florida began an effort to clean up its voter rolls. In an attempt to remove non-citizens from the voter rolls, state officials compared the list of registered voters with state motor vehicle databases. A Justice Department attorney, however, sent a letter to Florida's secretary of state saying that, pursuant to Section 5 of the Voting Rights Act, Florida must seek preclearance from the Department or a federal court in Washington, D.C., and that purging the voter rolls within 90 days of a primary or general election violates Section 8 the National Voter Registration Act (NVRA).[64] The Florida secretary of state responded that the state had already obtained preclearance for the relevant laws.[65] Pursuing its NVRA claim, the Justice Department sued Florida in federal court, seeking to enjoin the state from continuing its program. By the time the court issued its decision, Florida had voluntarily halted the program, but the judge commented that the NVRA "simply does not apply to an improperly registered noncitizen" and "does not prohibit a state from systematically removing improperly registered noncitizens" during the 90-day period before an election.[66] The law "does not require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance."[67] In another related suit, the court noted that "the NVRA does not require the State to idle on the sidelines until a non-citizen violates the law before the State can act."[68] Such a reading of Section 8 would "produce an absurd result" in preventing states from removing "minors, fictitious individuals…and noncitizens" from its voter rolls.[69]

Pro-Union Policies: As discussed above, President Obama made several recess appointments to National Labor Relations Board in January 2012, when the Senate was in session. The constitutional deficiency of these appointments was only the beginning of the problem. Once on the Board, the new appointees implemented a number of questionable policies that had been rejected by Congress, including requiring employers to post a list of "worker rights," snap elections for union representations, and unionization by "card check."[70]

Federal Drug Law: The Obama Administration announced in 2009 that it would relax the enforcement of certain federal drug laws. On October 19, 2009, Deputy Attorney General David Ogden instructed the United States Attorneys in select states not to prosecute "individuals whose actions are in clear and unambiguous compliance with existing state laws" that legalize the use and possession of marijuana for medicinal purposes.[71] The Controlled Substances Act bans the sale, possession, and use of Schedule I drugs, and even after years of lobbying, marijuana is still classified as a Schedule I drug.[72] Regardless of the divergent views that people have about our nation's drug laws and despite the fact that some states have passed laws legalizing the use and possession of marijuana, federal law is still the controlling law, which the president has an obligation to enforce. Further, the Supreme Court upheld the Controlled Substances Act as a valid regulation of interstate commerce and acknowledged that it prevails over state laws to the contrary.[73] Claiming prosecutorial discretion and acting under the guise of resource allocation, the Obama Administration chipped away at federal drug laws by refusing to enforce them in states where doing so might prove to be politically unpopular. Congress subsequently acquiesced to this change in the law in its 2014 and 2015 fiscal year appropriations, forbidding the Justice Department from seeking to undercut states that have passed laws legalizing the use and distribution of medical marijuana.[74]

Refusing to Defend Federal Laws in Court: When President Obama took office, the Department of Justice initially followed the long-standing policy of defending the constitutionality of the Defense of Marriage Act (DOMA), which was being challenged in several courts. Historically, the Justice Department would defend all laws against constitutional challenges as long as reasonable arguments could be made in their defense. This was to "ensure[] the government speaks with one voice" and "prevent[ ] the Executive Branch from using litigation as a form of post-enactment veto of legislation that the current administration dislikes."[75] In *Smelt v. United States* in 2009, the Obama Administration argued that "DOMA is rationally related to legitimate government interests and cannot fairly be described as born of animosity.…"[76] Two years later, however, the Administration announced that it would no longer defend the constitutionality of DOMA, implying that there were no reasonable arguments in favor of DOMA's constitutionality. Attorney General Eric Holder stated that the Administration would continue to enforce DOMA, while not defending it and later affirmatively attacking it in court. When *United States v. Windsor*, challenging the constitutionality of DOMA's definition of marriage for purposes of federal law and benefits, reached the Supreme Court, the Bipartisan Legal Advisory Group of the U.S. House of Representatives defended the challenged provision. The Court found this provision unconstitutional, but the majority opinion by Justice Anthony Kennedy noted that it "poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative."[77]

Conclusion

Chief Justice John Marshall wrote in *McCulloch v. Maryland*, "[T]he question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise, as long as our system shall exist."[78] It is inevitable in our constitutional system that each branch of government will seek to expand its authority. That is why checks and balances were built into the design—making "ambition…counteract ambition." While courts may adjudicate some disputes between the political branches, Congress should not rely on the courts to resolve every dispute with the president over the scope of their powers. Congress has the tools to resist the president's intrusion into its sphere through appropriations, oversight hearings, and impeachment proceedings. The Senate has the additional tool of providing advice and consent on judicial and Executive Branch nominations, and this can include refusing to confirm nominees.

Congress also should think twice before making broad delegations of lawmaking authority to administrative agencies, since they often are insulated from oversight, and should find ways to increase agencies' accountability and transparency, such as using the Congressional Review Act[79] or reforms like the perennially proposed Regulations from the Executive in Need of Scrutiny Act.[80] Regardless of who is elected as our next president, Members of Congress must work to reclaim their authority from the Executive Branch and administrative agencies. With any luck, the next president will take seriously the duty to faithfully execute the laws Congress has chosen to pass, and work with Congress to repair the damage to the separation of powers and the Constitution that has been done over these last seven years. It may be difficult to resist the temptation to copy President Obama's actions. But for the sake of our liberties, Members of Congress should encourage the next president to comply with the limits the Constitution places on executive power.

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
[2] THE FEDERALIST No. 51 at 268 (James Madison) (Carey and McClellan ed., 2001).
[3] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1555, at 413 (1833)
[4] *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (Dec. 3, 2013) (statement of Professor Jonathan Turley), *available at* http://judiciary.house.gov/hearings/113th/hear_12032013.html.
[5] This is the long-held view of the Office of Legal Counsel in the U.S. Department of Justice, which provides advice to the President on constitutional matters. *See* 14 U.S. Op. Off. Legal Counsel 37, 1990 WL 488469 (Feb. 16, 1990);

"[T]he bedrock principle was not legislative supremacy but popular sovereignty. The higher law of the Constitution might sometimes allow, and in very clear cases of congressional usurpation might even oblige, a president to stand firm against a congressional statute in order to defend the Constitution itself." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005)

[6] Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 612 (1838).

[7] *In re* Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013).

[8] *See* Robert Delahunty & John Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L.R. 781, 792–94 (2013).

[9] Clinton v. City of New York, 524 U.S. 417, 428, n. 12 (1998).

[10] *See Marbury*, 5 U.S. (1 Cranch) at 137.

[11] Wayte v. United States, 470 U.S. 598, 607 (1985).

[12] Raines v. Byrd, 521 U.S. 811, 829 (1997).

[13] *Kendall*, 37 U.S. at 524.

[14] *Id.* at 613.

[15] *Id.* at 612.

[16] 343 U.S. 579 (1952).

[17] *Id.* at 704 (Vinson, C.J. dissenting).

[18] *Id.* at 587.

[19] *Id.* at 589.

[20] *Id.* at 647.

[21] 420 U.S. 35 (1975).

[22] Local 2677, Am. Fed'n. of Gov't. Emp. v. Phillips, 358 F. Supp. 60, 76-77 (D.D.C. 1973).

[23] NLRB v. Noel Canning, 134 S.Ct. 2550, 2574 (2014).

[24] Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427, 2446 (2014).

[25] *Id.*

[26] *Id.*

[27] 504 U.S. 555 (1992).

[28] *Id.* at 577.

[29] Myers v. United States, 272 U.S. 52, 163-64 (1926) ("Our conclusion on the merits, sustained by the arguments before stated, is that Article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers-a conclusion confirmed by his obligation to take care that the laws be faithfully executed.").

[30] Humphrey's Executor v. United States, 295 U.S. 602 (1935); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

[31] INS v. Chadha, 462 U.S. 919, 953 n. 16 (1983) ("Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto.").

[32] Freytag v. CIR, 501 U.S. 868 (1991).

[33] *See* Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and* Chevron *Deference*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 153 (May 7, 2015), *available at* http://www.heritage.org/research/reports/2015/05/who-will-regulate-the-regulators-administrative-agencies-the-separation-of-powers-and-chevron-deference.

[34] THE FEDERALIST No. 47, at 298 (Clinton Rossiter, ed. 2003).

[35] *See* Joseph Postell, *From Administrative State to Constitutional Government*, HERITAGE FOUNDATION SPECIAL REPORT No. 116 (Dec. 14, 2012), *available at* http://www.heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government (history of administrative and independent agencies).

[36] City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

[37] Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–91 (2011).

[38] James Gattuso & Diane Katz, *Red Tape Rising: Five Years of Regulatory Expansion*, HERITAGE FOUNDATION BACKGROUNDER No. 2895 (Mar. 26, 2014), *available at* http://www.heritage.org/research/reports/2014/03/red-tape-rising-five-years-of-regulatory-expansion.

[39] *Id.*

[40] The Office of Management and Budget provides oversight of agencies and reports directly to the President. Likewise, most agencies have an inspector general that is tasked with identifying abuses.

[41] *City of Arlington*, 133 S. Ct. at 1878.
[42] *See* William Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1129 (2008) (Looking at cases invoking *Chevron* deference since its inception in 1984 through 2006, agencies prevailed in 76 percent of cases.).
[43] *See, e.g.*, Commissioner Ajit Pai, The FCC and Internet Regulation: A First-Year Report Card, Remarks at the Heritage Foundation (Feb. 26, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0226/DOC-337930A1.pdf.
[44] *Obama 2008: "I Intend To Reverse" Bush Bringing "More And More Power Into the Executive*," REAL CLEAR POLITICS (Feb. 13, 2014), http://www.realclearpolitics.com/video/2014/02/13/obama_2008_i_intend_to_reverse_bush_bringing_more_and_more_power_into_the_executive.html.
[45] Supreme Court History: The First Hundred Years, pbs.org, http://www.pbs.org/wnet/supremecourt/antebellum/history2.html
[46] *See* John Solomon & Juliet Eilperin, *Bush's EPA Is Pursuing Fewer Polluters*, WASH. POST (Sept. 30, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092901759.html
[47] Americans for Gun Safety Foundation, *The Enforcement Gap: Federal Gun Law Ignored* (May 2003), http://content.thirdway.org/publications/10/AGS_Report_-_The_Enforcement_Gap_-_Federal_Gun_Laws_Ignored.pdf.
[48] Mark Roszkowski, *The True Reagan Antitrust Legacy: The End of Intrabrand Competition*, ANTITRUSTSOURCE.COM (Mar. 2005), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/05_mar05_roszkowski323.authcheckdam.pdf.
[49] Drew Desilver, *Executive actions on immigration have long history*, PEW RESEARCH CENTER (Nov. 21, 2014), http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/.
[50] Letter from Thomas Jefferson to William Duane (May 23, 1801), *available at* http://founders.archives.gov/documents/Jefferson/01-34-02-0130.
[51] Memorandum from Jeh Johnson, Sec'y, U.S. Department of Homeland Security, to Leon Rodriguez, Director, USCIS, et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.
[52] Texas v. United States, 86 F.Supp.3d 591 (S.D. Texas Feb. 16, 2015).
[53] Grace-Marie Turner, *Seventy Changes to Obamare…So Far*, GALEN INSTITUTE (Jan. 26, 2016), http://galen.org/assets/70-changes-so-far-to-ObamaCare-1.pdf.
[54] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T. OF THE TREASURY, TREASURY NOTES (Jul. 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.
[55] 26 U.S.C. § 4980H (2015).
[56] U.S. House of Representatives v. Burwell, -- F.3d. --, 2015 WL 5294762, *3 (D.D.C. 2015); 42 U.S.C. § 18071(a)(2)(2010).
[57] 20 U.S.C. § 2102(a)(2012).
[58] Letter from Jane Oates, Ass't Sec'y, U.S. Dep't. of Labor, to State Workforce Agencies, Administrators, and Liaisons (July 30, 2012).
[59] Memorandum from Daniel Werfel, Controller, Office of Fed. Financial Mgmt., to Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies (September 28, 2012). Employers are under no statutory obligation to send out these notices; if they do not, however, they are prohibited by law from ordering plant closings or issuing mass layoffs.
[60] Kedar Pavgi, *Employees Sue Contractor Over Sequestration Layoffs*, GOVERNMENT EXECUTIVE (June 20, 2013), http://www.govexec.com/contracting/2013/06/employees-sue-contractor-over-sequestration-layoffs/65249/.
[61] Memorandum from the Office of Family Assistance, Dep't.of Health & Human Serv. to States administering TANF Program (July 12, 2012), *available at* http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203.
[62] 42 U.S.C. § 615(a)(2)(B)(2012).
[63] Robert Rector & Rachel Sheffield, *Setting Priorities for Welfare Reform*, HERITAGE FOUNDATION ISSUE BRIEF No. 4520 (Feb. 24, 2016), *available at* http://www.heritage.org/research/reports/2016/02/setting-priorities-for-welfare-reform.

[64] Letter from T. Christian Herren, Chief of the Voting Section, U.S. Dep't. of Justice, to Ken Detzner, Florida Sec'y of State (May 31, 2012); The NVRA is codified at 42 U.S.C. § 1973gg-6(c)(2(A)(2012).
[65] Letter from Ken Detzner, Florida Sec'y of State, to T. Christian Herren, Chief of the Voting Section, U.S. Dep't. of Justice (June 6, 2012). The Supreme Court struck down the coverage formula of Sec. 5 of the Voting Rights Act, Shelby County v. Holder, 133 S.Ct. 2612 (2013).
[66] United States v. Florida, 870 F.Supp.2d 1346, 1350 (N.D. Fla. 2012).
[67] *Id*.
[68] Arcia v. Detzner, 908 F.Supp.2d 1276, 1283 (S.D. Fla. 2012).
[69] *Id*. at 1282.
[70] Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (invalidating the poster rule); Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013) (invalidating the poster rule); Chamber of Commerce v. NLRB, No. 12-5250 (D.C. Cir. 2013) (appeal pending from lower court decision striking down snap elections rule; subsequently dismissed); *see* Sean Higgins, *NLRB Nominee: Agency Could Not Enact Card Check on Its Own*, WASH. EXAMINER, July 23, 2013. Pro-union groups have long lobbied Congress to mandate unionization by card check, which would allow unions to avoid election by secret ballot and instead unionize by having employees publicly sign membership cards. In 2007, the NLRB ruled that employees who recently used card check had the right to immediately force a secret vote on whether they really wanted to join that union. Dana Corp., 351 NLRB 434 (2007). Once President Obama packed the NLRB, it promptly overturned Dana Corp.
[71] Memorandum from David Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), http://www.justice.gov/opa/documents/medical-marijuana.pdf.
[72] 21 U.S.C. § 812(b)(1)(2012).
[73] Gonzalez v. Raich, 545 U.S. 1 (2005). Many scholars have criticized the Court's broad reading of the Commerce Clause to reach what they agree is wholly local conduct, but it remains binding precedent.
[74] Steph Sherer, *Congress Extends 'Ceasefire' on Medical Marijuana, but Can They Clear the Smoke?* HUFFINGTON POST (Dec. 21, 2015), http://www.huffingtonpost.com/steph-sherer/congress-extends-ceasefir_b_8853606.html.
[75] Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 K.Y.L.J. 485, 502 (1995).
[76] Defendant's Motion to Dismiss at 25, Smelt v. United States, Case No. SACV09-00286 DOC (C.D. Cal. 2009) (internal quotation omitted)
[77] United States v. Windsor, 133 S.Ct. 2675, 2688 (2013).
[78] 17 U.S. 316, 405 (1819).
[79] 5 U.S.C. § 801-808 (1996).
[80] H.R. 427 114th Cong. (2015). The most recent version of this bill passed the House on July 28, 2015 and was placed on the Senate Legislative Calendar on December 21, 2015.