

Question for the Record from Chairman McClintock for Steven G. Bradbury

The Border Crisis: Is the Law Being Faithfully Executed? (June 7, 2023)

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1. Is refusal to enforce the law itself a violation of the law? Why or why not?

**ANSWER:** Yes, the refusal to enforce the law by a public official charged with a mandatory duty to carry out the requirements of the law is itself a violation of law.

Where the law imposes an affirmative duty on a person and that person deliberately fails to act in compliance with that duty, the person has violated the law. That proposition is fundamental to many areas of the law. For example, securities law imposes an obligation on officers of public corporations to disclose material information to investors. The decision to omit known material information from public filings is a violation of that legal duty. The corporation and the officers who fail to disclose material information may be subject to civil liability in actions brought by investors or the Securities and Exchange Commission. And in egregious cases, the corporation may face criminal fines and other penalties, and the individual officers may be fined or sent to jail.

More broadly, common tort law imposes a duty of care on persons who interact with others in all manner of situations, and those who act negligently—that is, who fail to exercise the standard of care required by the law—will face monetary liability for damages caused by their failure to act with reasonable care. There are many situations where the failure to act will violate the duty of care and constitute negligence, giving rise to tort liability. Think of the medical doctor who negligently fails to treat a patient or fails to refer the patient for necessary surgery.

A willful refusal to enforce the law is a violation of law regardless of whether or how the violation may be redressed. In some circumstances, the failure to act may not constitute an indictable crime, and even monetary liability in the form of civil damages may not be available to redress the lapse (for example, because of judge-made doctrines of official immunity). Nevertheless, the refusal to perform the legal duty is still a violation of law.

Take the example of a police officer, charged with the duty of arresting suspected offenders, or a prosecutor, charged with the duty of prosecuting suspected crimes. The law recognizes that police officers and prosecutors are allowed some degree of discretion to decide which suspected offenders to arrest and which suspects to prosecute, and this so-called “prosecutorial discretion” can depend on practical considerations, like mitigating factors in specific cases or limitations in manpower or resources. But prosecutorial discretion typically must be exercised on a case-by-case basis, not applied categorically to entire types of crimes. If the police officer categorically refuses to make arrests for certain types of crimes, he will be subject to disciplinary action and may lose his job. And if the prosecutor, even an elected

district attorney, announces that he will follow a policy of not prosecuting whole categories of crimes, notwithstanding that the legislature has declared such crimes punishable, that refusal may provide grounds for the prosecutor to be removed from office—either by the chief executive of the state, the state’s legislature, or the voters in a recall election. The nature of the disciplinary action that may be taken against the police officer or the process available for removal of the prosecutor from office does not affect the legal conclusion that the categorical refusal to enforce the law is itself a violation of law.

Under our Constitution, the officers of the executive branch are charged with the duty of “faithfully” carrying out the requirements of the laws enacted by Congress. In framing this affirmative legal duty, the Founders of our Constitution rejected any notion that the president or the subordinate executive officers of the United States could ever exercise a general authority to suspend or refuse to enforce laws duly enacted by Congress and consistent with the Constitution. In doing so, the Founders were profoundly influenced by the Glorious Revolution and the English Bill of Rights, in which the British Parliament had rejected the claims of the Restoration kings to a royal “prerogative” to “dispense with” the enforcement of laws. Any such assertion of a “dispensing” or “suspension” power by the executive branch of our government is anathema to our constitutional republic and to the separation of powers on which it is based.

Contrary to our constitutional tradition, and in violation of his oath of office faithfully to execute the requirements of the laws he is charged with enforcing, Secretary of Homeland Security Alejandro Mayorkas has arrogated to himself a sweeping power to refuse to enforce (in other words, to suspend) key provisions of the immigration laws, and he has applied this broadly asserted suspending power to vast categories of aliens with no true case-by-case consideration. He has no legitimate basis to justify these suspensions of law on grounds of prosecutorial discretion, since (1) his suspensions of law are categorical in nature, (2) his own open-border policies have induced the crush of illegal aliens seeking to enter the U.S. that he claims makes it impracticable to carry out the requirements of the immigration laws, and (3) he has made no attempt to use all of the authorized alternatives and enforcement resources available to him to respond to this crush of illegal aliens.

Because Secretary Mayorkas is deliberately refusing to enforce the laws he is charged with upholding and has no lawful justification for doing so, there is no doubt he is violating the law. From my days as head of the Office of Legal Counsel in the U.S. Department of Justice, I have spent much of my career defending executive power and the exercise of executive discretion, including in programs that tested the bounds of the law. But I have never seen a principal officer of the executive branch act in such flagrant defiance of the law in such a sweeping and systematic manner. This is not simply a question of policy discretion. By assuming the authority to suspend provisions of the immigration laws, Secretary Mayorkas is usurping the powers of Congress.