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Trump's Presidency And Executive Encroachment Through Inaction

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by

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Abstract

Scholarly research on the executive usurpation of legislative power often focuses on Presidents and executive branch officials acting beyond their statutory authority through executive action. I believe it is likewise important, however, to address how Presidents have acted unconstitutionally through the under-enforcement of policies. In this paper, I investigate and analyze the encroachment on legislative power through executive refusal to defend, enforce, or implement the law, with specific focus on the presidency of Donald Trump. The Take-Care Clause is recognized as a guard against the suspension and dispensation of Congressional Acts by requiring the President to execute all constitutionally valid Acts of Congress. However, there continues to be deliberate decisions taken by Presidents either to not enforce or selectively under-enforce laws to further a political agenda; the Controlled Substances Act and the Immigration and Naturalization Act represent two such case studies which I will explore in detail.

Introduction

The President shall "take Care that the Laws be faithfully executed."

- Article II, Section 3 of the Constitution

The words above are often referred to as the "Take-Care Clause," and serve as the guiding force behind executive power. They reflect some of the American legal system's oldest roots in English common law, where structure is derived from a long history of customary and judicial precedents instead of a codified constitution or written bill of rights. It is undeniable that the Framers' own experiences with their British rulers influenced and shaped their perception of executive power; much like other parts of the US Constitution, Article II Section 3 exemplifies this by being derived from the "long struggle between Parliament and the Crown over the extent of prerogative powers—that is, the monarch's asserted powers to create laws or otherwise to act unilaterally."[1] When constructing the US Constitution, the Framers reflected on English fear and sentiment against an absolute monarchy, and allocated executive power in a way that expressed a similar concern; this inspired a dramatically stripped down vision of America's executive, where many of the powers formerly held by the King were either instead transferred to Congress or explicitly prohibited to the President.[2]

But what does a faithful execution of the law consist of, and what would characterize a violation of this provision? This is the question I seek to explore in this

[1] Michael McConnell, "Obama's Unconstitutional Immigration Order," *The Hoover Institution*, 13 April 2016, at www.hoover.org/research/obamas-unconstitutional-immigration-order.
[2] Robert J. Reinstein, *The Limits of Executive Power*, 59 American University Law Review 259, (2009).

paper. Let me begin by emphasizing what I am not talking about: the exercise of powers improperly delegated by Congress[3] or a proactive executive action in which the President undertakes some policy prohibited to him or her by the Constitution, such as the unilateral bombing of Syria,[4] an act of war, without a Declaration of War from Congress.[5] Executive non-enforcement, although often overlooked, plays a crucial and highly impactful role in the expansion the executive office; if left unchecked, it can grow to introduce a significant imbalance to the separation of powers framework. In the words of one presidential scholar, allowing Presidents the unrestricted enforcement discretion that nonenforcement due to policy reasons would entail, could be providing "Presidents with a sort of second veto, an authority to remake the law on the ground without asking Congress to revise the law on the books."[6]

In this essay, I will delve deeper into this unconstitutional act, first by examining the origins of the Take-Care Clause in English history through its involvement in the construction of the US Constitution to help establish the original understanding of executive enforcement obligations. I then will present several examples of executive non-action under the presidency of Barack Obama that have stood in direct violation of the text and original meaning of Article II, Section 3 of the US Constitution. Lastly, I examine Donald Trump's presidency; while his administration has taken some steps towards the enforcement of previously ignored Congressional Acts, their future execution

[3] Philip Hamburger, Is Administrative Law Unlawful, (Chicago and London: The University of Chicago Press, 2014).
[4] Charlie Savage, "Was Trump's Syria Strike Illegal? Explaining Presidential War Powers," *The New York Times*, 7 April 2017, at www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html.
[5] Louis Fisher, *Presidential War Power Third Edition, Revised*, (Lawrence: University Press of Kansa, 2013).
[6] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 674.

is largely uncertain. I believe this integral step toward defending our modern governmental structure involves analyzing not only aspects of Donald Trump's presidency that have violated the Constitution, but also actions that take potential steps towards being in accordance with its text. Such an analysis will bring a more realistic critique beyond just where our government stands, and lay the groundwork to propose appropriate steps toward where we would like it to go.

Part 1: The Origin Against the Power to Suspend and Dispense Law

1.1 The Stuart Kings and The English Monarchy

"The law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them."

- Sir Edward Coke

The powers and duties granted to the executive under the US Constitution were largely influenced and framed by the colonists' perspective and reflection on the English monarchy, and the Take-Care Clause within the US Constitution is no exception. The colonists were reacting to the King's arbitrary suspension of parliamentary statutes after reading and analyzing the works of British thinkers and scholars that spoke of the horrors and against the ever expansive prerogative powers of the King.[7] These powers enabled monarchs to create laws or otherwise to act unilaterally, often in direct contradiction to the statutes enacted by Parliament.

It is important to note that the English monarch, as described by Montesquieu, could be more appropriately categorized in behavior as a republic, "disguised under the form of monarchy."[8] Even under a monarchical system, the English highly valued the principle of common law, or that law exists in the hearts and minds of people and is manifested in both statute and precedential court decisions.[9] However, after the Stuarts

[7] E. S. Creasy, *The Rise and Progress of the English Constitution, (*New York: D. Appleton And Company, 1853).
[8] Baron de Montesquieu, *Spirits of the Laws*, Thomas Nugent trans., (New York: Hafner Publishing Company, 1949).
[9] "Common Law," Oxford University Press, found at en.oxforddictionaries.com/definition/common_law.

Kings took to the throne, they made numerous efforts to expand royal prerogatives, infuriating Parliament and the English people alike. It was, in the words of law professor Michael McConnell, this struggle between "parliamentarians and judges to curtail the powers of an oftentimes arbitrary and grasping royal monarch that became transposed not only in the English Bill of Right, but also in the US Constitution."[10]

James I, the first Stuart monarch, was of Scottish origin. When James I claimed the throne of England in 1603, his rule was inevitably influenced by his reign as King in Scotland, holding a very clearly defined idea of what the monarchy should look like; he believe that he was only accountable to God, never to man or law.[11] It should thus come at no surprise that he had great difficulty understanding the principle of common law and became infuriated by the limits on his power. During his reign, he tried expanding royal prerogative with a number of unsuccessful acts, such as "prohibiting new buildings in and around London and the making of starch of wheat."[12] James I's son, Charles I, continued these efforts to expand royal prerogatives and unilateral lawmaking after his father's death, going as far as forcing his subjects to make loans to the crown and expanding taxation without Parliament's approval.[13] However such expansive powers did not go unchallenged; in 1640, Parliament attempted to restrain the Stuart Kings' abuses of royal prerogatives with the Petition of Right. It stated that:

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[10] Michael McConnell, "Obama's Unconstitutional Immigration Order," *The Hoover Institution*, 13 April 2016, at www.hoover.org/research/obamas-unconstitutional-immigration-order.
[11] Pauline Croft, *King James*, (New York: Palgrave, 2003). The Political Works of James I: Reprinted from the Edition of 1616, Charles Howard McIlwain, ed., (Cambridge: Harvard University Press, 1918).
[12] Philip Hamburger, *Law and Judicial Duty*, (Cambridge: Harvard University Press, 2008), at 201.
[13] Arthur J. Cockfield and Jonah Mayles, *The Influence of Historical Tax Law Developments on Anglo-American Laws and Politics*, 5 Columbia Journal of Tax Law, (2013), at 53-55.

"... [the King's] subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament… the statute called 'The Great Charter of the Liberties of England' declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited nor put to death without being brought to answer by due process of law."[14]

The Petition of Right then concludes:

"All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honor of your Majesty, and the prosperity of this kingdom."[15]

[14] Petition of Right (1627), reprinted in W. McElreath, at 196-99.
[15] Ibid.

While the Petition of Right aimed to prohibit a number of the most contentious unilateral abuses of royal prerogatives, it saw little success in practice; the Stuart Kings continued their abuses largely undeterred, further raising tensions between the monarchy and the Parliament. [16]

Much like his predecessors, Charles II acted in ways that greatly expanded the royal prerogative and angered Parliament. For example, in his Declaration of Indulgence of 1672, Charles II attempted to use those prerogatives to suspend statutes penalizing Catholics,[17] stating that:

> "*We do in the next place declare our will and pleasure to be, that the execution of all, and all manner of penal laws in matters ecclesiastical, against whatsoever sort of nonconformists, or recusants, be immediately suspended, and they are hereby suspended; and all judges, judges of assize and gaol delivery, sheriffs, justices of the peace, mayors, bailiffs, and other officers whatsoever, whether ecclesiastical or civil, are to take notice of it and pay due obedience thereunto*."[18]

The result was an enraged Parliament who reasserted their power by rescinding the Declaration, and in its place enacting the Test Act of 1673.[19] The Test Act "required all persons holding any public office to take an oath declaring a belief against transubstantiation in Holy Communion and to receive the sacrament according to the rites

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[16] Linda Levy Peck, *Court Patronage and Corruption in Early Stuart England*, (Boston: Unwin Hyman Ltd, 1990).
[17] A. M. Chambers, *A Constitutional History of England*, (New York: The MacMillan Company, 1909), at 332.
[18] R. Tudur Jones, Arthur Long, and Rosemary Moore, ed., *Protestant Nonconformist Texts Volume 1: 1550 - 1700, Volume 1*, (Eugene: Wipf and Stock Publishers, 2007), at 260.
[19] Ronald H. Fritze, William B. Robison, and William Robison, *Historical Dictionary of Stuart England, 1603-1689*, (WestPort: Greenwood Publishing Group, 1996), at 252.

of the Church of England within three months of admittance to office."[20] However following Charles II's death in 1685, his brother James II assumed the throne with an agenda that would target and attack the Test Act.[21] Critical parliamentarians claimed James II had one goal, the restoration of Catholicism as the established religion, and to accomplish this issued a Declaration of Indulgence that suspended the "ecclesiastical laws."[22] He also granted dispensations from the Test Act to a large number of Catholics, allowing them to hold public office despite the act explicitly only granting that right to conformist Protestants.[23] He decreed:

> *"We do likewise declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the Sacrament, or for any other nonconformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.*[24]

It is important to note that England, prior to the reign of James II, did not find problem with the power to dispense with a law: the granting of a royal warrant exempting

[20] Byron York, *The No Religious Test Clause*, 120 Harvard Law Review 1649, (2007), at 1651.
[21] Ronald H. Fritze, William B. Robison, and William Robison, *Historical Dictionary of Stuart England, 1603-1689*, (WestPort: Greenwood Publishing Group, 1996), at 252-254.
[22] James A. Reichley, *Religion in American Public Life*, (Washington DC: The Brooking Institution, 1985), at 77.
[23] Ronald H. Fritze, William B. Robison, William Robison, *Historical Dictionary of Stuart England, 1603-1689*, (WestPort: Greenwood Publishing Group, 1996), at 253.
[24] Andrew Browning, ed., *English Historical Documents, 1660-1714*, (London: Eyre & Spottiswoode, 1953), at 399-400.

certain persons from 'the Obligation of a Law'.[25] Parliaments had historically met infrequently and were consequently inexperienced when drafting law, so in practice these powers equipped the monarch the with the capability to react to emerging conditions and worked in line with the Parliaments' interests.[26] However, this changed with the actions of James II, which went beyond the mere dispensation of the law by making lawful what statutory law had previously declared unlawful; as historian Dennis Dixon explained, James II "used [his power] to systematically dispense with a vast array of religious legislation and rules governing the universities. There was no 'emerging inconvenience' to justify the use of the power. . . ."[27] His actions led to Godden v. Hales, a court case that tried the King's use dispensing power.[28] And although King James II was found not guilty by the court, the social and political climate became particularly hostile towards the King and his rule; disapproval and discontent grew, and with it so did a public feeling to overthrow him.[29] King James II's broad use of power would end up transforming England for years to come; no other English monarch would attempt to expand their prerogative powers by suspension and dispensation of law.

1.2 William of Orange and the Glorious Revolution

William of Orange, a Dutch and Protestant son-in-law to James II, was urged through a letter signed by seven prominent politicians on June 30, 1688 to claim the

[25] Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597-1689*, 29 The American Journal of Legal History 197, (Oxford University Press, 1985).
[26] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 805.
[27] Dennis Dixon, *Godden v Hales revisited – James II and the dispensing power*, 27 The Journal of Legal History 129, (2006).
[28] Ibid.
[29] Richard S. Kay, *The Glorious Revolution and the Continuity of Law*, (Catholic University of America Press: 2014), at 41.

throne and dispose of James II.[30] The letter stressed the deep sentiment felt towards King James II regarding the suspension and dispensation of the law:

> *"As to the first, the people are so generally dissatisfied with the present conduct of the government in relation to their religion, liberties and properties (all which have been greatly invaded), and they are in such expectation of their prospects being daily worse, that Your Highness may be assured there are nineteen parts of twenty of the people throughout the kingdom who are desirous of a change and who, we believe, would willingly contribute to it, if they had such a protection to countenance their rising as would secure them from being destroyed before they could get to be in a posture to defend themselves."*[31]

William of Orange not only accepted the invitation, but engaged in his own war against the king—not simply on the battlefield but in the press-- by publishing the *Declarations of Reasons* in which he justified his armed intervention in England's affairs.[32] In this declaration, William of Orange stated:

> *"It is both certain and evident to all men, that the public peace and happiness of any state or kingdom cannot be preserved where the law, liberties, and customs, established by the lawful authority in it, are openly transgressed and annulled; more especially, where the alteration of religion is endeavoured, and that a religion, which is contrary to law, is endeavoured to be introduced; upon which those who are most immediately concerned in it are indispensably bound to*

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[30] "The Glorious Revolution," House of Commons Information Office, (Parliamentary Copyright (House of Commons): 2010), found at www.parliament.uk/documents/commons-information-office/g04.pdf

[31] Andrew Browning, ed., *English Historical Documents, 1660-1714*, (London: Eyre & Spottiswoode, 1953), at 120-122.

[32] Tony Claydon, "William III's Declaration of Reasons and the Glorious Revolution," 39 The Historical Journal 87, (Cambridge University Press, 1996).

endeavour to preserve and maintain the established laws, liberties, and customs, and above all the religion and worship of God that is established among them, and to take such an effectual care, that the inhabitants of the said state or kingdom may neither be deprived of their religion, nor of their civil rights; which is so much the more necessary, being the greatness and security both of kings, royal families, and of all such as are in authority, as well as the happiness of their subjects and people, depend in a most especial manner upon the exact observations and maintenance of these their laws, liberties, and customs."[33]

This, William declared, had not been done; instead, he noted James II's lack of fidelity when implementing parliamentary statutes:

"[James II's evil Counsellors] with some plausible pretexts, did invent and set on foot the King's dispensing power, by virtue of which they pretend that, according to law, he can suspend and dispense with the execution of laws, that have been enacted by the authority of the King and Parliament for the security and happiness of the subjects, and so have rendered those laws of no effect; though there is nothing more certain than that as no laws can be made, but by the joint concurrence of King and Parliament, so likewise laws, so enacted, which secure the public peace and safety of the nation, and the lives and liberties of every subject in it, cannot be repealed or suspended but by the same authority."[34]

This propaganda effort was quite successful; not only was William able to make the King's dispensing power the central target of its attack, but he was also able to discredit James II and lay the groundwork to ultimately bring both himself and his wife, Mary, to

[33] Robert Beddard, ed., *A Kingdom without a King: The Journal of the Provisional Government in the Revolution of 1688,* (Oxford: Phaidon Press, 1988), at 124-128 and 145-149.
[34] Ibid.

the throne.[35] William's military and political victory over James II and his ascension to the crown became known as the Glorious Revolution. The Glorious Revolution led to a radical transformation of the English monarchy and fundamental constitutional changes in English law, most remarkably the "shattering of royal claims to absolute power in England and the establishing of legal supremacy of Parliament."[36]

As part of a parliamentary agreement, William and Mary were to reign as a joint monarchy. They followed their coronation with numerous complaints about James II, and a call to action aimed toward Parliament. These very complaints and demands were later codified into the English Declaration of Rights in February 12, 1689.[37] In sum, the bill defined concrete limits on the monarch's power and the duties expected of a monarch - a radical codification of rules that made it clear that the monarchy would never be the same again.

1.2 The Aftermath

Although England did ultimately resort back to monarchy, the Glorious Revolution would leave lasting effects on the country that would be most profoundly felt by subsequent monarchs. Parliament's struggle with the unilateral actions of the Stuart Kings served as a catalyst for the prohibition of royal discretionary power to disregard statutes.[38] Following William of Orange's military and political victory over James II,

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[35] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 807.
[36] Robert J. Reinstein, *The Limits of Executive Power*, 59 American University Law Review 259, (2009), at 287. Ibid.
[37] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 807.
[38] Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 The Georgetown Law Journal 1613, (2008).

there were fundamental constitutional changes in English law; the King of England was barred from suspending statutes, authorizing individuals to violate statutes, and most importantly, declaring lawful that which statutes had declared unlawful. This inspired another shift in the royal prerogative back to its earlier form, where the executive was under the law - not above it. These ideas were ultimately immortalized in the English Bill of Rights in 1689. What is perhaps most important is how early in its text it abolished the suspending and dispensing powers by declaring:

> *"... the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."*[39]

This way of viewing and thinking about the power to suspend and dispense inevitably permeated America's own constitutional history alongside the works of Chief Justice Coke, which held that the King could not lawfully "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[40]

[39] *English Bill of Rights 1689*. (New Haven: Lillian Goldman Law Library, 2008), found at avalon.law.yale.edu/17th_century/england.asp.
[40] Case of Proclamations, 77 Eng. Rep. at 1353. John Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest Till the Death of Lord Mansfield,* (London: John Murray, Albemarle Street, 1849), at 275.

Part 2: The Constitution and the Vision for the Executive

2.1 The Framers Vision

"[I]t is the particular duty of the Executive 'to take care that the laws be faithfully Executed."[41]

- President George Washington

Article II Section 3 of the US Constitution expressly requires the President to take care that the laws be faithfully executed, but how was it that the delegates arrived at this text when constructing the US Constitution? John Dickinson, politician from Philadelphia at the time, famously told his fellow delegates that in drafting the new constitution, "[e]xperience must be our only guide. Reason may mislead us."[42] The colonists, having no other experience of a strong and effective executive power, turned to the English monarchy as a source of their inspiration.[43] And as such, the English Bill of Rights soon became a template for American constitutional drafting.[44]

When it came to the dispensing and suspending power, the colonists, similar to the English, insisted that America's executive likewise would have no such authority. This understanding was reflected in numerous state constitution provisions drafted prior to the drafting of the US Constitution, with each employing this same basic definition of

[41] Jared Sparks, *The Writings of George Washington*, (Boston: American Stationers' Company, 1837), at 532.
[42] Madison Debates August 13, (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/debates_813.asp.
[43] Michael W. McConnell, *The Logical Structure Of Article Two*, Northwestern School of Law, (2016).
[44] Robert J. Reinstein, *The Limits of Executive Power*, 59 American University Law Review 259, (2009), at 281.

executive power along with a clause indicating a duty to execute the law to the best of its abilities. For example, "with minor variations, this provision was part of the various Pennsylvania Frames of Government from 1682 to 1776."[45] The 1776 Pennsylvania Constitution contained the following provision: "The president, and in his absence the vice-president, with the council… take care that the laws be faithfully executed."[46] Similarly, the New York Constitution drafted in 1777 laid out a comparable executive tasked "to take care that the laws are faithfully executed to the best of his ability."[47] And the Virginia Constitution of 1776 "roundly declared that the executive was to exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretense, exercise any power or prerogative, by virtue of any law, statute or custom of England."[48] But these constitutional provisions were not merely for show; the people of New York, Virginia, and Pennsylvania were adamant about seeing to it that the executive did not stray too far from the text. For example, when the Pennsylvania Assembly charged special commissioners to draw money from the treasury and conduct the state's defense, the Pennsylvania Executive Council objected that the statute, stating that it: "Plainly encroaches on the rights of the people, who have elected you for the

[45] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 802.
[46] "Constitution of Pennsylvania - September 28, 1776", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/pa08.asp. Sai Prakash, "Take Care Clause", *In The Heritage Guide To The Constitution*, (D.C: The Heritage Foundation, 2007).
[47] "The Constitution of New York : April 20, 1777", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/ny01.asp.
[48] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 802-803.

purpose of devising measures, and us for that of executing them; and so far as we attempt to legislate or you to execute... the Pennsylvania Constitution is violated."[49]

Even in their early stages, numerous states observed that the job of the executive was to execute the law and not legislate. Fearful of an executive that could disregard and act beyond the law, they codified provisions in their Constitutions establishing a duty of the executive to execute the law to the best of their abilities; provisions that themselves would help to influence the future drafting of the country's own Constitution.

2.2 Drafting and Ratifying the U.S Constitution

In a manner that seemed to mirror the feeling and reasoning of the state constitutions, the Constitutional Convention established that the duty of the executive branch is to see the execution of the laws. The Framers of the U.S. Constitution carefully reflected on the many prerogative powers exercised by the English King and selectively granted, denied, or limited those powers when creating Article II Section 3 of the US Constitution. One of the powers that the Framers of the US Constitution "took pains to ensure that the President lacked" was the authority to "make, or alter, or dispense with the laws."[50]

In the Constitutional Convention, when Pierce Butler asked whether "the National Executive [would] have a power to suspend any legislative act for a term of [time],"[51] Elbridge Gerry, one of many delegates, expressed his worry stating that "a power of suspending might do all the mischief dreaded from the [veto] of useful laws; without

[49] Pennsylvania. Supreme Executive Council, *Minutes of the Supreme Executive Council of Pennsylvania: From Its Organization to the Termination of the Revolution*, (Harrisburg: Pennsylvania, 1853).
[50] Zachary C. Bolitho, *The U.S. Constitution, The U.S. Department Of Justice, And State Efforts To Legalize Marijuana*, 4 Lincoln Memorial University Law Review 42, (2017), at 77.
[51] Max Farrand, ed.,*The Records Of The Federal Convention Of 1787*, (New Haven: Yale University Press, 1911).

answering the salutary purpose of checking unjust or unwise ones."[52] The results, as Madison reported, "On question 'for giving this suspending power' all the States ... were no."[53] In fact, the idea was so unpopular that it was never seriously considered again, and in the end the delegates of the Constitutional Convention ultimately approved the Executive Power Clause with language that closely resembled the New York Constitution's Faithful Execution for its governor[54]:

> *"The president shall take Care to the best of his Ability, that the Laws . . . of the United States be faithfully executed."*[55]

The language choice may have largely been the result of one of the delegates: James Wilson of Pennsylvania, well-known champion of an energetic executive, was the only member of the Committee of Detail from New York or Pennsylvania. Wilson's draft stated that: "It shall be his duty to provide for the due & faithful exec—of the laws."[56] He believed in a very restrictive version of the executive office, whose "only powers he conceived strictly executive were those of executing the laws, and appointing officers," and certainly would not have proposed language or idly allowed attempts to undermine the executive's exclusive yet restricted function.[57] Years after the Convention, Wilson explained that the Clause meant that the President has "authority, not to make, or alter, or

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[52] Ibid.
[53] "Madison Debates June 4", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/debates_604.asp.
[54] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 804.
[55] The US Constitution Article II, Section 3.
[56] David K. Nichols, *The Myth of the Modern Presidency*, (University Park: The Pennsylvania State University Press, 1994), at 56.
[57] Saikrishna Prakash, *The Essential Meaning Of Executive Power*, University of Illinois Law Review 701, (2003), at 724.

dispense with the laws, but to execute and act the laws, which [are] established."[58] Thus, although the Committee eventually eliminated the redundant "to the best of his ability" and used language which merely provided that the President "shall take care that the laws . . . be duly and faithfully executed," it is clear that the Framers came to understand suspending and dispensing the law as the exact opposite of executing the law.

Thoughts consistent with this interpretation could also be found within the critiques of the Anti Federalists, a coalition whose members were largely opposed to the passage of the US Constitution on grounds it centralized power. The Anti Federalist, "Cato" warned against the presidency stating that:

> *"Great power connected with ambition, luxury and flattery, will as readily produce a Caesar, Caligula, Nero, and Domitain in America, as the same causes did in the Roman Empire."*[59]

What was significant about the Anti Federalist movement for these purposes was not what they mentioned, but what they failed to mention; there seem to be no records of the Anti Federalists having ever mentioned or made the claim that the President would hold suspending and dispensing powers, even though they had great reason to do so. This is particularly telling in its own right, as the common Anti Federalist argument centered around the presidency resembling a kingship in everything but name; their seemingly

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[58] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 802.
[59] Herbert J. Storing, ed., *The Complete Anti-Federalist*, (Chicago: The University of Chicago Press, 1981), at 104-106.

overwhelming historical silence with regard to suspension and dispensation is indicative that these were not among the "king-like" powers given to the President.[60]

Alexander Hamilton's response to the Anti Federalist also helped to confirm the position that the suspending and dispensing the law were not powers held by the executive. In the Federalist Papers, a series of anonymous essays written in support for the Constitution, Hamilton reaffirmed the executive's duty to execute the law. To ease the worries and fears surrounding the presidency, Hamilton argued that the "powers vested in the President were much less than the prerogatives held by the King,"[61] and that the "Constitution makes the President, in numerous ways, the constitutional inferior of the English Crown."[62] He stated:

> *"The one [the President] would have a qualified negative [veto] upon the acts of the legislative body: The other [the King] has an absolute negative. The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority. The one would have a concurrent power with a branch of the Legislature in the formation of treaties: The other is the sole possessor of the power of making treaties. The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments. . . . The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of*

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[60] Zachary C. Bolitho, *The U.S. Constitution, The U.S. Department Of Justice, And State Efforts To Legalize Marijuana*, 4 Lincoln Memorial University Law Review 44, (2017), at 694.
[61] Robert J. Reinstein, *The Limits of Executive Power*, 59 American University Law Review 259, (2009), at 267.
[62] Saikrishna Prakash, *The Executive's Duty To Disregard*, 96 The Georgetown Law Journal 1613, (2008), at 1649.

commerce . . . . What answer shall we give to those who would persuade us that things so unlike resemble each other?"[63]

This vision of the executive is also seen in Federalist 47, where James Madison examined "the particular structure of this government, and the distribution of this mass of power among its constituent parts."[64] Madison argued that:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system… In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct… From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.' "[65]

Thus, to be a good executive is to exclusively execute the law. In Federalist No. 70 Hamilton famously describes "Energy in the executive [as] a leading character in the

[63] "The Federalist Papers: No. 69", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/fed69.asp.
[64] "The Federalist Papers: No. 47", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/fed47.asp.
[65] Ibid.

definition of good government."[66] However, the words "energy in the executive" should be viewed within the context of "constitutional history that were well known to the Framers [which warned of the] danger of an uncontrolled Executive that regularly 'dispensed with' or 'suspended' the law."[67] This, taken along with Federalist No. 77, in which Hamilton observed, alluding to the Anti-Federalists' silence, that "one wholly unobjectionable power of the executive lay in faithfully executing the laws" points to what is meant by "energy in the executive," is the energetic execution of the law.[68] In sum, both Hamilton and Madison, like state constitutions and English conditional understanding, were adamant that the executive's responsibilities be restricted to execution as neatly as possible; each of the three branches has a separate and unique role, and it borders on tyrannical for any one branch to adopt the role of another.

2.3 The Constitution and the Take-Care Clause

The final text determining the power that would be delegated to the executive as decided by the Constitutional Convention was as follows:

> *"The executive Power shall be vested in a President of the United States of America.… Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best*

[66] "The Federalist Papers: No. 70", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/fed70.asp.
[67] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 797.
[68] "The Federalist Papers : No. 77", (New Haven: Lillian Goldman Law Library, 2008), at avalon.law.yale.edu/18th_century/fed77.asp.

of my Ability, preserve, protect and defend the Constitution of the United States."[69]

The Constitution requires the President to "Take Care that the Laws be faithfully executed." The purpose of the oath of affirmation was to require the President to "employ his executive power to ensure a conscientious execution of Congress's laws."[70] It is important to note that the Constitution differentiates between presidential powers and presidential duties, and thus, implies that powers are the tools and processes through which a President may execute their duties. This is supported by first examining the ways in which the Framers distinguished between the words and the "drafting history of the Take-Care Clause at the Philadelphia Convention which supports the natural reading that the text imposes a duty and a constraint."[71]

The Take-Care Clause was created for the purpose of preventing "the executive from resorting to any of the panoply of devices employed by English Kings to evade the will of Parliament."[72] The emphasis on "faithful execution" of the law establishes a President's duty to "honor and enforce statutes that were enacted with their consent or over their veto,"[73] and as such it can be reasoned that the Take Care Clause was created to deny the President the powers for suspending or dispensing law.

2.4 Conclusion

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[69] US Constitution, Article II, Section 3.
[70] Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 Journal Of Constitutional Law 1283, (2015).
[71] Joseph M. Bessette, *The Imperial Executive in Constitutional Democracy: Exploring the Powers - Duties Distinction,* (Lanham : Rowman & Littlefield, 2017).
[72] Gregory F. Zoeller, *Duty To Defend And The Rule Of Law,* 90 Indiana Law Journal 513, (2015), at 520.
[73] Roger Pilon, ed.,"The Rule of Law in the Wake of Clinton," (Washington DC; Cato Institute, 2000), at 47.

The exact scope of executive power has been a persistent point of debate and disagreement ever since the Constitution's ratification in 1789.[74] It is clear, however, that since its inception executive power has encompassed the power to execute the laws, which differs from the power to legislate. The power of the presidency then was envisioned to be "vested with this authority [to] execute any federal law by himself, whatever a federal statute might provide."[75] However, it is also evident that the Framers feared the expansion of executive power into the other branches of government and tried to guard against this. In the end, "the text of the Constitution settles no more than that the President is to be the overseer of executive government."[76] From this, it is clear that the very text of the Constitution imposes a law enforcement duty, not an affirmative authority to suspend or dispense congressional statutes.[77]

[74] Robert D. Sloane, *The Scope Of Executive Power In The Twenty-First Century: An Introduction*, 88 Boston University Law Review 341, (2008), at 341.
[75] Saikrishna Prakash, *The Essential Meaning Of Executive Power*, University of Illinois Law Review 701, (2003), at 704.
[76] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Columbia Law Review 573, (1984), at 600-602.
[77] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 694.

Part 3: The Present Day American Presidency and Nonenforcement

"The Administration's preferred tool for domestic policy, however, is new: using prosecutorial discretion" not to enforce statutes with which the President disagrees."

- John C. Yoo, Professor of Law

Despite the Constitution's Take-Care Clause imposing on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases, there continue to be deliberate decisions taken by Presidents either to not enforce or selectively under enforce law simply for political reasons. However, such a stance should be viewed as a breach of the Take-Care Clause and as a violation the US Constitution; failure to enforce on a categorical basis for the purpose of furthering a political agenda not only lacks constitutional footing, but violates the core principles that were embedded when the founders decided on and drafted executive power. Although I do not deny the constitutional nature of a President's refusal to enforce in cases where an act of Congress is unconstitutional, resources are limited, or when taking equitable consideration on an individual basis,[78] this should not be viewed as an equivalent to categorical nonenforcement. Granting the executive the power to categorically decide whether or not to enforce acts of Congress understood to be consistent with the Constitution would be the equivalent of granting the executive the power of suspension and dispensation, the very power the Framers feared and spoke out against. As law professor Zachary Price observed, "by permitting Presidents to read laws, both old and new, out of the Code for

[78] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 865.

the duration of their presidencies, unrestricted enforcement discretion could provide Presidents with a sort of second veto an authority to remake the law on the ground without asking Congress to revise the law on the books."[79]

It is truly alarming how little overall scrutiny is given to a presidential decision not to execute an act of Congress. Under the Obama administration, there have been instances that show a blatant disregard for the enforcement acts of Congress; the administration's refusal to enforce certain federal marijuana crimes as well as its removal of statutes against certain undocumented immigrants are two such examples that will be explored in detail. In both of these cases, the administration failed to effectively argue for or establish the constitutionality of their selective enforcement of the law. This represents a strong disregard for departmentalism, the principle where each branch of government individually may serve as a check on the constitutionality of a matter; instead, the executive exercised its discretion without challenging its constitutional nature.[80]

The Obama administration appealed to an alleged lack of resources that necessitated the use of prosecutorial discretion to categorically enforce the law as a means of better and more effectively enforcing these statutes. However, the administration failed to prove both that they indeed lacked the resources to carry out a specific act, and how not enforcing the law toward a certain category of people would lead to more effective or better enforcement of the act. More recently, the Trump administration has made moves towards the faithful execution of previously ignored

[79] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 674.
[80] Richard H. Fallon, *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 Texas Law Review 487, (2018).

Congressional Acts in some aspects, but whether such actions will continue has largely been left in the air.

This uncertainty is troubling; not only does it signal a troubling state for the rule of law, but also for the the very structure that lays the foundation for our republic. The lackadaisical scrutiny given to President's decision not to enforce a law to further a political goal has greatly expanded the power of the presidency beyond anything that could have possibly been envisioned by the Framers of the US Constitution. Categorical enforcement of Congressional Acts is decidedly unconstitutional; it opens a pathway by which Presidents can greatly abuse their power and be placed in a position of choosing legal "winners" and "losers". In allowing a President to suspend and dispense of the law, we have created a King-like figure who is above law.

3.1: The Enforcement of Marijuana Federal Policy

The Control Substance Act

In 1970 Congress passed, at President Richard Nixon's demand, the Comprehensive Drug Abuse Prevention and Control Act of 1970 for the purposes of "consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking."[81] Under Title II of the Act, to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" was deemed a federal crime.[82] More specifically, Title II created five Schedules (classifications), with various qualifications for all controlled substances based on "their

[81] Gonzales v. Raich, 545 U.S. 1 (2015).
[82] Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 401 (1970).

accepted medical uses, their potential for abuse, and their psychological and physical effects on the body."[83] The Act classified marijuana as a Schedule I substance, alongside heroin and LSD, based on its "high potential for abuse, no currently accepted medical use in treatment in the United States, and ... a lack accepted safety for use under medical supervision."[84]

This classification, Schedule I, classified the manufacturing, distribution, or possession of marijuana as a criminal offense despite the public opinion's growing movement in favor of marijuana legalization.[85] Marijuana's classification can change, however; the Attorney General has the authority under Title II, better known as Control Substance Act (CSA), to "add to such a schedule or transfer between such schedules any drug or other substance" or " remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule" following formal rulemaking procedures and a scientific and medical evaluation and recommendation from the Secretary of Health and Human Services.[86]

States and the Controlled Substance Act

Following the passing of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and its CSA subsection, many states "enacted uniform drug control laws or similar provisions that mirrored the CSA with respect to their treatment of marijuana and made the possession, cultivation, and distribution of marijuana a state criminal offense. With such overlapping statutory authorities, the federal government and the states

[83] Gonzales v. Raich, 545 U.S. 1 (2015).
[84] Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 202 (1970).
[85] German Lopez, "The Spread of Marijuana Legalization, Explained," *Vox,* 20 April 2018, at www.vox.com/cards/marijuana-legalization.
[86] Zachary C. Bolitho, *The U.S. Constitution, The U.S. Department Of Justice, And State Efforts To Legalize Marijuana*, 4 Lincoln Memorial University Law Review 44, (2017), at 52.

traditionally worked as partners in the field of drug enforcement."[87] However, this changed starting in 1996; numerous states passed Acts aimed at the legalization and the decriminalization of marijuana use for medical purposes.[88] In 1996, for example, California passed the Compassionate Use Act "to ensure that seriously ill Californians have the right to obtain and use marijuana for where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment [...], to ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction, and to encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."[89] In short, the Compassionate Use Act exempted from prosecution those patients who possessed medical marijuana under the recommendation of a physician.[90]

Many states have since followed California's lead towards the legalization and decriminalization of medical marijuana. In 1998, the states of Alaska, Oregon, and Washington legalized medical marijuana with Hawaii, Colorado, and Nevada following in 2000.[91] In 2005, the US Supreme Court established that "Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in

[87] Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 American Criminal Law Review 215, (2016), at 215.
[88] Ibid.
[89] Compassionate Use Act, California Health & Safety Code § 11362.5 (1996).
[90] "Deputy Attorney General James M. Cole Testifies Before the Senate Committee on the Judiciary," *The United States Department of Justice*, 10 September 2013.
[91] Erwin Chemerinsky, Jolene Forman, Allen Hopper, and Sam Kamin, *Cooperative Federalism and Marijuana*, 62 UCLA Law Review 62, (2015), at 85.

compliance with California law."[92] Unfortunately this case, Gonzales v. Raich, did not put an end to the tension, as states continued to pass laws in favor of the decriminalization and legalization of medical marijuana and even more recently recreational marijuana as well. Since 2012, several states have moved to legalize recreational marijuana, with Colorado and Washington state becoming the first states to vote to on the issue. Since then, six additional states have legalized the recreational use of marijuana, with many more looking to legalize in the future. These states "so far have landed on a commercialization model, where for-profit, private businesses sell the drug."[93] Further, state officials also "enforce some limits on sales, including an age requirement (21 and older), how much a person can buy and possess at once, the packaging of the product, and taxes."[94] Colorado in particular took steps beyond mere legalization by "establishing legal frameworks and taxing and regulatory regimes to deal with the state's marijuana market."[95]

As this discrepancy between the state and federal stances on marijuana became deeper and more hotly debated, tension inevitability grew. The ruling remained largely missing from the dialog surrounding marijuana's legalization, and often seemed to have been forgotten from the public sphere entirely.

Under Barack Obama's Presidency

During his presidential campaign, Barack Obama hinted at the nonenforcement of federal marijuana laws if elected by stating that he was "not going to be using Justice

[92] Gonzales v. Raich, 545 U.S. 1 (2015).
[93] German Lopez, "The Spread Of Marijuana Legalization, Explained," *Vox,* 20 April 2018, at www.vox.com/cards/marijuana-legalization/where-is-marijuana-legal.
[94] Ibid.
[95] Sean Beienburg, *Prohibition, States' Rights, and the Constitution, 1918-1933,* (unpublished manuscript).

Department resources to try to circumvent state laws,"[96] and such ended up being the case when his administration took office. While many have contended Gonzales v. Raich was wrongly decided in rejecting states' rights protections of in-state marijuana policies, such were not the grounds that the Obama administration appealed to in declining to enforce the CSA in states that legalized marijuana.[97] Instead, the Obama administration took a "relaxed" approach to the enforcement of marijuana federal law; the Justice Department issued a series of memoranda encouraging U.S. Attorneys "to exercise prosecutorial discretion to target specified federal marijuana enforcement priorities, including preventing the use of marijuana by minors, ensuring state authorized marijuana sales do not intersect with other illegal activity, preventing driving under the influence of marijuana, and precluding marijuana use on public and federal land."[98] This decision was made despite that on numerous occasions, Congress had both declined to pass legislation that would end federal enforcement of the prohibition of marijuana in states that had already halted enforcement on the state level and "refused to pass amendments to appropriations bills that would prohibit the use of appropriated funds to obstruct state legalization of medical marijuana on several occasions."[99]

In a series of memoranda, the Obama administration established a legal framework that effectively ended most of the enforcement of the CSA in the states that had legalized marijuana. On October 19, 2009, the Justice Department issued a

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[96] Byron Tau, "Obama's pot promise a pipe dream?" *Politico*, 12 March 2012, at www.politico.com/story/2012/04/obamas-pot-promise-a-pipe-dream-075421.
[97] Sean Beienburg, *Prohibition, States' Rights, and the Constitution, 1918-1933*, (unpublished manuscript).
[98] Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 American Criminal Law Review 215, (2016), at 215.
[99] Bradley E. Markano, *Enabling State Deregulation Of Marijuana Through Executive Branch Nonenforcement*, 90 New York University Law Review 289, (2015), at 297.

memorandum directed at U.S. Attorneys urging them not to focus federal resources on the prosecution of "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[100] Furthermore, the memorandum stated that although the "United States Attorneys are invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority [that this] authority should, of course, be exercised consistent with Department priorities and guidance."[101] On June 29, 2011 the Justice Department clarified the 2009 directive stating that it "was never intended to shield large scale growing operations from federal enforcement" and that "persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law."[102] The August 29, 2013 memorandum announced updates on guidance stating that "it will not prioritize the enforcement of federal marijuana laws in states with their own robust marijuana regulations and specified eight federal enforcement priorities to help guide state lawmaking," noting that "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property."[103] And in February 14, 2014, the memorandum addressed the "application of prosecutorial discretion in cases or investigations involving financial institutions providing services to marijuana

[100] "Deputy Attorney General David W. Ogden, Memorandum For Selected United States Attorneys," *The United States Department of Justice*, 19 October 2009.
[101] Ibid.
[102] "Deputy Attorney General James M. Cole, Memorandum For Selected United States Attorneys," *The United States Department of Justice*, 29 June 2011.
[103] "Deputy Attorney General James M. Cole, Memorandum For Selected United States Attorneys," *The United States Department of Justice*, 29 August 2013.

businesses."[104] Furthermore, it "indicated that prosecutors should focus prosecutorial efforts on financial institutions working with marijuana businesses suspected of violating these enforcement priorities."[105]

What is problematic about the series of memorandums under Deputy Attorney General James Cole was that federal law was being suspended: the decision of whether to prosecute was not being made on a case by case basis, in which a federal prosecutor "consider[s] the evidence, look[s] at the circumstances, apply[s] the factors set forth in the U.S. Attorney's Manual, and decide[s] whether a prosecution is warranted against a particular suspect. Rather, there is an articulated nonenforcement policy that effectively exempts the residents of twenty-six states from federal marijuana law."[106] Deputy Attorney General Cole attempted to justify the administration's selective nonenforcement tactics by stating that "given scarce resources for enforcement, federal prosecutors must set priorities for enforcement."[107] For example, the 2009 memorandum states that the Department was "committed to making efficient and rational use of its limited investigative and prosecutorial resources."[108] However, the Obama administration has provided no evidence to prove the validity of such a claim; it has failed to provide "estimates of what the cost savings from its initiative would be… [And] even more importantly, the administration has not explained why, if enforcement priorities and cost

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[104] "Deputy Attorney General James M. Cole, Memorandum For Selected United States Attorneys," *The United States Department of Justice*, 14 February 2014.
[105] Rosalie Winn, *Hazy Future: The Impact of Federal and State Legal Dissonance on Marijuana Businesses*, 53 American Criminal Law Review 215, (2016).
[106] Zachary C. Bolitho, *The U.S. Constitution, The U.S. Department Of Justice, And State Efforts To Legalize Marijuana*, 4 Lincoln Memorial University Law Review 42, (2017), at 84.
[107] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 758.
[108] "Deputy Attorney General David W. Ogden, Memorandum For Selected United States Attorneys," T*he United States Department of Justice*, 19 October 2009.

savings dictated its nonenforcement decision," it chose to waive enforcement on states that have legalized marijuana while Congress had explicitly decided against this.[109]

There is a lack of evidence that the Obama administration's decision to categorically enforce the CSA was based on limited resources; since it failed to justify the CSA's categorical enforcement on constitutional grounds, it appears that perhaps a political reason was a driving motivator for the decision not to enforce federal law to certain categories of people. But an Attorney General cannot simply use the "doctrine of prosecutorial discretion to justify the creation of a policy against enforcing a particular provision of federal law;"[110] prosecutorial discretion is not a tool by which the executive can simply disregard Congressional Acts, as such an action would be in direct violation of the Faithfully Execute Clause. The deregulation of marijuana could have been executed through legal means as described by Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970; the administration could have pushed for the reclassification of marijuana. However, President Obama himself has pushed back against the efforts by Democratic governors from both Rhode Island and Washington to adjust the classification of marijuana and how federal law enforcement treats it, denying bids to reclassify the schedule of marijuana and ignoring Congress's typical protocol, instead contributing the overexpansion of the executive's reach.[111]

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[109] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 848.
[110] Zachary C. Bolitho, *The U.S. Constitution, The U.S. Department Of Justice, And State Efforts To Legalize Marijuana*, 4 Lincoln Memorial University Law Review 42, (2017), at 41.
[111] Carrie Johnson, "DEA Rejects Attempt To Loosen Federal Restrictions On Marijuana," *NPR*, 10 August 2016, at www.npr.org/2016/08/10/489509471/dea-rejects-attempt-to-loosen-federal-restrictions -on-marijuana.

The Obama administration, "unable or unwilling to change federal policy in these areas through legislation… sought to use its enforcement discretion to achieve its preferred policy outcomes."[112] It utilized selective nonenforcement to further a political agenda, and with it completely rewrote the Comprehensive Drug Abuse Prevention and Control Act of 1970. While the President's veto power authorizes him to intervene in the legislative process in certain defined situations, the US Constitution's meaning and original intent of executive power dictate that there can be no "commensurate power to unilaterally nullify laws that have already passed through the requisite legislative channels,"[113] as doing so would be to grant the President with the power of suspension and dispensation. In this case, the Obama administration turned to using "prosecutorial discretion" to not enforce statutes with which the President disagrees.[114] However, when a policy ceases to apply on a case-by-case basis and becomes a "pattern of non enforcement," the result is the expansion of executive power beyond the scope granted to the President under Article II and the violation and departure from the President's duty to faithfully execute the law.

The Trump Administration

The Trump administration, at least in the beginning, took a hard-line approach, allowing federal prosecutors to crack down on marijuana even in states that have ruled in

[112] Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 Ohio State Journal of Criminal Law 183, (2016), at 182.
[113] Bradley E. Markano, *Enabling State Deregulation Of Marijuana Through Executive Branch Nonenforcement*, 90 New York University Law Review 289, (2015), at 298.
[114] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 783.

favor of its legality, turning away from the guidance of the Obama administration.[115] In a January 4, 2018 memorandum, Attorney General Jeff Sessions stated that prosecutors should use their "discretion in weighing whether charges were warranted, rather than abiding by the Obama-era guidance." The memorandum states:

> *"It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission… Therefore, today's memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."*[116]

At this point, it appeared as through a previous neglected Congressional Act, the Drug Abuse Prevention and Control Act, would be enforced under the new administration. This potentially changed, however, in a phone call that took place only a couple of months later. On April 11, 2018, Trump told Senator Cory Gardner over the phone that "despite the Department of Justice, the marijuana industry in Colorado will not be targeted" in exchange for Gardner backing down from his months-long hold on new Justice Department nominees.[117] The deal with Colorado is particularly troublesome because as

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[115] Seung Min Kim, "Trump, Gardner Strike Deal On Legalized Marijuana, Ending Standoff Over Justice Nominees," *The Washington Post*, 13 April 2018, at www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html.
[116] "Justice Department Issues Memo on Marijuana Enforcement," *The United States Department of Justice*, 4 January 2018.
[117] Seung Min Kim, "Trump, Gardner Strike Deal On Legalized Marijuana, Ending Standoff Over Justice Nominees," *The Washington Post*, 13 April 2018, at

previously mentioned, Colorado state law does not simply decriminalize marijuana, but it "establishe[d] [a] legal framework and taxing and regulatory regimes to deal with the state's marijuana market."[118]

Although the exact implications of Trump's promise not to target Colorado, which is nothing more than mere words at this point, are currently unknown, they exemplify the problematic nature of allowing a President to selectively and deliberately choose not to enforce law to further a political agenda. It is apparent that a deal was reached between President Trump and Senator Gardner; Trump claimed that he would not target Colorado for the enforcement of Controlled Substances Act and in exchange, Senator Gardner claimed that he would support several of Trump's nominees he had been blocking. In this particular case, the decision to execute a law is being used as a tool of coercion, allowing the President to further a political agenda that is not directly related to the CSA itself. However, what is most worrisome about this particular scenario is that, based on the massive expansion of executive power and the little scrutiny given to a President's decision not to execute a Congressional Act, Trump could very much decide to categorically deem the state of Colorado as being of "low priority" for enforcing the CSA along with any other states with which he strikes a deal. The justification could be, as seen by previous administrations, considered the use prosecutorial discretion as the result of limited resources.

Although in the past Trump has claimed his support for states rights when it comes to marijuana legalization stating that "[he] think[s] that should be a state issue,

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www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?utm_term=.eb2aecac9be4.

[118]"Justice Department Issues Memo on Marijuana Enforcement," *The United States Department of Justice,* 4 January 2018.

state by state,"[119] I am doubtful that if a decision is made to not enforce CSA in "certain states" it would be due to its constitutionality or lack thereof. The current presidential level debate surrounding the disparity between state and federal marijuana legislation lacks constitutional basis; there is no debate that begins to question the Supreme Court decision, Gonzales v Raich. Allowing the President to selectively and categorically enforce a law not on constitutional grounds, but for furthering a policy agenda, greatly expands the power of the presidency and stands in direct violation of Article II of the US Constitution.

It becomes clear now that the President, exercising selective nonenforcement, is exercising unauthorized and unwarranted power that is in violation of the Faithfully Execute Clause. Permitting Trump to use the loose interpretation of "prosecutorial discretion" to choose where to enforce Congressional Acts would essentially be to allow him to engage in picking "winners" and "losers". Not only would the scope of a certain law be completely altered, but the power of the executive would grow to levels feared and argued against by the Framers; there would now be a coercive "incentive for members of Congress to bypass each other in fashioning legislation and to deal directly with the Executive instead."[120] The President would be acting like a King, ignoring the legislative branch altogether.

The job of the President is to execute law, which is the distinct from the law-making power granted to the legislative branch. The Supreme Court has ruled that the

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[119] Jenna Johnson, "Trump Softens Position On Marijuana Legalization," *The Washington Post*, 29 October 2015, at www.washingtonpost.com/news/post-politics/wp/2015/10/29/trump-wants-marijuana-legalization-decided-at-the-state-level/?utm_term=.7bc95500bcde.
[120] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 795.

law, “like the beneficent author of our existence, is no respecter of persons it is inflexible and even handed, and should not be subservient to any improper consideration or views. Granting the President discretion to exempt particular individuals from general statutory prohibitions, in other words, would conflict with the basic commitment to the rule of law in the United States, ´which we have been always led to consider as a government not of men, but of laws, of which the constitution is the basis.”[121] As the President continues to selectively and categorically enforce the CSA, he is no doubt exercising the powers of dispensing and suspending of the law: the very powers that were to be implicitly denied by the US Constitution.

[121] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 695.

3:2 The Enforcement of Immigration Policy

The Immigration and Naturalization Act

In 1952, Congress passed the Immigration and Naturalization Act (INA), or the McCarran-Walter Act, which created a "comprehensive immigration policy for the United States [that] set forth categories of foreign nationals who are not permitted to enter the United States and of persons who, if present in the United States, are subject to removal (formerly deportation)."[122] Originally the Immigration and Naturalization Service (INS) was in charge of many immigration service and enforcement functions. However, after the 9/11 terrorist attacks, the Homeland Security Act of 2002 created the Department of Homeland Security (DHS) to take over many of these functions. More specifically, the Immigration and Custom Enforcement (ICE), a department within the Department of Homeland Security, is charged with the enforcement of the INA and has the primary responsibility for implementing its provisions.[123]

The Immigration and Nationality Act as amended defines under Section 212(a)(9)(B)(ii) of the Act, "that an alien is deemed to be unlawfully present in the United States, if the alien is: present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or present without being admitted or paroled."[124]

The Immigration and Naturalization Act consists of the following provisions: "In general, any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined

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[122] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 788.
[123] "A Day in the Life of Ice Enforcement and Removal Operation," *U.S. Immigration and Customs Enforcement*, at www.ice.gov/about/offices/ enforcement-removal-operations/.
[124] Immigration and Nationality Act, 8 U.S.C. § 1182 (1968).

and certified to the Secretary of State and the Attorney General that— (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed."[125]

The Obama Administration and Immigration Reform

"I am president, I am not king. I can't do these things just by myself."

- President Barack Obama

Even during his 2008 presidential campaign, Barack Obama made it clear that immigration reform was among his key platforms; and when in office, it became one of his key legislative priorities.[126] However, time and time again, Congress failed to pass any of the administration's proposed initiative on immigration,[127] one of which being the Development, Relief, and Education for Alien Minors Act. As noted by Professor John C. Yoo, the DREAM Act has a storied history that is wrought with a lack of congressional approval; despite having been taken up by Congress each year from 2006 through 2011,

[125] Ibid.
[126] Andrew Soergel, "How Has Obama Changed Immigration Policy?" *US News and World Report*, 12 January 2016, at www.usnews.com/news/the-report/articles/2016/01/12/ask-an-analyst-how-has- obama-changed-immigration-policy.
[127] David A. Graham, "Immigration Advocates Place Their Faith in Obama," *The Atlantic*, 1 June 2015, at www.theatlantic.com/politics/archive/2015/06/immigration-advocates-place-their-faith-in-obama/394388.

the bill's journey saw challenges at each step of the way.[128] The DREAM Act proposed the following:

> "*[To authorize] the Secretary of Homeland Security to cancel the removal of, and adjust to conditional permanent resident status, an alien who: (1) entered the United States before his or her 16th birthday and has been present in the United States for at least five years immediately preceding enactment of this Act; (2) is a person of good moral character; (3) is not inadmissible or deportable under specified grounds of the Immigration and Nationality Act; (4) at the time of application, has been admitted to an institution of higher education or has earned a high school or equivalent diploma; (5) from the age of 16 and older, has never been under a final order of exclusion, deportation, or removal; and (6) was under age 35 on the date of this Act's enactment."*

Further, the Act goes on to state that it authorized "*an alien who has satisfied the appropriate requirements prior to enactment of this Act to petition the Secretary for conditional permanent resident status."*[129]

The fact that Congress failed to pass the DREAM Act did not stop the Obama administration from pursuing its enforcement. Although he was aware of the process to accomplish it legislatively, Obama because frustrated by his inability to pass the DREAM Act into a law. And thus, upon failing to pass the DREAM Act through legislative means, the Obama administration turned to "pursue major immigration goals by administrative

[128] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 789.
[129] The DREAM Act of 2009, S.729 — 111th Congress (2009-2010).

means alone."[130] Using the NIA, President Barack Obama used a broad and unwarranted use of prosecutorial discretion to further his political agenda. This becomes apparent when analyzing the requirements for non enforcement of the NIA, which are very similar to those seen the in the DREAM Act.

On June 5, 2012, Janet Napolitano, Secretary of Homeland Security, released a memorandum to David V. Aguilar Acting Commissioner, U.S. Customs and Border Protection stating that:

> *"The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum: (1) came to the United States under the age of sixteen; (2) has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum; (3) is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and (5) is not above the age of thirty. "*[131]

Ten days later on June 15, 2012, Secretary Napolitano issued a memorandum establishing Deferred Action for Childhood Arrivals, or DACA. The memorandum states that:

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[130] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 789.

[131] "Secretary of Homeland Security Janet Napolitano to David V. Aguilar, Memorandum from Acting Comm'r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," *The United States Department of Homeland Security*, 5 June 2012.

> *"I [Napolitano] am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them."*[132]

Under DACA, a young immigrant would be able to apply for deferred action on their immigration status in two-year, renewable intervals so long as they satisfied the following criteria:[133] "(1) came to the United States under the age of sixteen; (2) has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum; (3) is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and (5) is not above the age of thirty."[134]

On the same date that DACA was established, the 15th of June 2012, President Obama addressed a new policy from the Department of Homeland Security allegedly

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[132] "Memorandum from Janet Napolitano," *The United States Department of Homeland Security,* 15 June 2012.
[133] The Regents of the University of California v. U.S. Department of Homeland Security, F. Supp. 3d 1 (N.D.Cal. 2018).
[134] "Memorandum from Janet Napolitano," *The United States Department of Homeland Security,* 15 June 2012.

aimed at "making the nation's immigration policy more fair and more efficient."[135] President Obama announced:

> *"This morning, Secretary Napolitano announced new actions my administration will take to mend our nation's immigration policy, to make it more fair, more efficient, and more just -- specifically for certain young people sometimes called "Dreamers"... I have said time and time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away .... In the absence of any immigration action from Congress to fix our broken immigration system, what we've tried to do is focus our immigration enforcement resources in the right places... the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization."*[136]

The effects of DACA were profound; as reported by the U.S. Citizenship and Immigration Services, there are approximately 689,800 active DACA recipients as of Sept. 4, 2017.[137]

DAPA

The Obama administration did not stop at DACA, however. On November 20, 2014, it imposed yet another aggressive immigration agenda that sought to expand on

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[135] "Transcript of Obama's Speech on Immigration," *New York Times*, 15 June 2012, at www.nytimes.com/2012/06/16/us/transcript-of-obamas-speech-on-immigration-policy.html.
[136] Rose Garden, "Remarks by the President on Immigration," *The White House*, 15 June 2012, at obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration.
[137] "DACA," *U.S. Citizenship and Immigration Services*, at www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_population_data.pdf.

DACA; the program became later know as DAPA or Deferred Action for Parents of Americans. DAPA was established in a memorandum by Secretary Jeh Charles Johnson which starts by stating that "... due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law."[138] Then, it proceeds to summarize the changes that DAPA bring: 1) DACA will apply to all otherwise eligible immigrants regardless of how old they were in June 2012 or are today, 2) The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments, 3) and the date-of-entry requirement will be adjusted from June 15, 2007 to January 1, 2010. More controversially, the memorandum also established an expansion of the concept and categorization of "Deferred Action."[139]

Secretary Jeh Charles Johnson directed the United States Citizenship and Immigration Services "to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident; have continuously resided in the United States since before January 1, 2010; are physically present in the United States on the date of this memorandum, and at the time of making a request for consideration of deferred action with USCIS; have no lawful status on the date of this memorandum; are not an

[138] "Memorandum, Secretary Jeh Charles Johnson," *The United States Department of Homeland Security,* 20 November 2014.
[139] "Memorandum, Secretary Jeh Charles Johnson," *The United States Department of Homeland Security,* 20 November 2014.

enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."[140]

To put it short, DAPA expanded DACA by allowing for deferred action toward parents who entered the US illegally, but who have children who were either born in the United States or have a lawful permanent status. Similarly, people who meet the eligibility criteria under DAPA are eligible to apply for "work authorization for the period of deferred action" and for certain benefits.[141]

Only a month after its establishment, DAPA was challenged in court by Texas and 25 other states who claimed that the program violated both the Take-Care Clause of the US Constitution and the "substantive and procedural requirements" of the Administrative Procedures Act (APA)[142], a law enacted in 1946 with the purpose to regulate administrative agencies.[143] The Fifth Circuit rightfully ruled against DAPA, noting that "DAPA is foreclosed by Congress's careful plan; the program is 'manifestly contrary to the statute' and therefore was properly enjoined."[144] The case, U.S. v. Texas, later came before the Supreme Court, who on June 23, 2016 announced in a one sentence

[140] Ibid.
[141] Ibid.
[142] Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle,* 14 Ohio State Journal Of Criminal Law 183, (2016), at 195.
[143] Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 Fordham Environmental Law Review 207, (2016).
[144] Texas v. United States, 809 F.3d 134, 134 (5th Cir. 2015).

decision that "The judgement is affirmed by an equally divided court."[145] Due to the 4 to 4 split in the justices' opinions, the ruling set no precedent.

Suspension and Dispensation of INA

"The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."[146]

- *Justice Antonin Scalia*

The problem with both DACA and DAPA is that they serve as mechanisms through which the Obama administration effectively suspend and dispense with the law. Both programs go beyond lacking the proper statutory authority; they undermine the INA and the ruling of Congress. As mentioned previously, Congress did not pass the DREAM Act, despite it being brought before them on numerous occasions. Due to the strong parallels between the DREAM Act and the DACA memorandum that followed its rejection, unilatery enforcing DACA would be a similar equivalent to enforcing the DREAM Act. The resemblance between the criteria in order to be granted deferred status under both DACA and the DREAM Act is undeniable; both include aliens who came to the United States under the age of sixteen, have continuously resided here for at least five years and are currently present, are a student, high school graduate, GED certificate holder, or veteran; have not had a significant criminal record or otherwise pose a threat to

[145] United States v. Texas, 579 U.S. (2016).
[146] Utility Air Regulatory Group v. EPA 573 U.S. __ (2014).

national security or public safety; and are thirty years old or younger. Further, it is worth pointing out that those students who would meet the eligibility criteria under the DREAM Act would have also been eligible to apply to the Department of Homeland Security for deferred action under DACA.[147] It is also impossible to ignore Obama's own words when he asserted that he would be using the DHS to "mend" the INA as the result of an "absence of any immigration action from Congress to fix our broken immigration system."[148] Thus, the selective nonenforcement of the INA was a method by which the Obama administration could accomplish a political agenda all while bypassing Congress.

To justify their decision to not enforce the INA to certain categories of people, the Obama administration claimed to be using prosecutorial discretion to "more efficient[ly]"[149] enforce the INA. And although I do not argue against the premise that prosecutorial discretion lies within the powers given to the President, I do not believe that the method by which the INA failed to be enforced equates to prosecutorial discretion. The Obama administration, within the many memorandums allegedly guiding enforcement through prioritization, turned to prosecutorial discretion as the result of limited resources to justify selective nonenforcement of the INA. For example, the June 15, 2014 memorandum states that "... additional measures are necessary 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."[150] Similarly, the

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[147] Jeanne Batalova and Michelle Mittelstadt, "Relief From Deportation: Demographic Profile Of The Dreamers Potentially Eligible Under The Deferred Action Policy," Migration Policy Institute, 1 August 2012.
[148] Rose Garden, "Remarks by the President on Immigration," *The White House*, 15 June 2012.
[149] "Transcript of Obama's Speech on Immigration," *New York Times*, 15 June 2012, at www.nytimes.com/2012/06/16/us/transcript-of-obamas-speech-on-immigration-policy.html.
[150] "Memorandum, Janet Secretary Napolitano," *The United States Department of Homeland Security*, 15 June 2014.

June 20, 2014 memorandum which established DAPA states that: "Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law."[151] However, the Obama administration at no time provided any evidence to substantiate the claim of limited resources or seeked supplemental appropriations from Congress to cover the cost of full enforcement; instead it only considered an allegedly cost-saving solution in the discretionary nonenforcement of the same selection of people that had previously been decided not to receive such relief by Congress.[152]

Not only has the Obama administration failed to prove how the DACA and DAPA programs would be the best use of the alleged limited resources, but to carry out the background checks required by both the DACA and DAPA programs would call for an increase of resources not found within the DHS and its components. In his dissent in Arizona v. United States, Justice Scalia commented on the Obama administration's immigration policy stating that[153] "The husbanding of scarce enforcement resources can hardly be the justification for this, since those resources will be eaten up by the considerable administrative cost of conducting the nonenforcement program, which will require as many as 1.4 million background checks and biennial rulings on requests for

[151] "Memorandum, Jen Charles Johnson," *The United States Department of Homeland Security,* 20 June 2014.
[152] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause,* 91 Texas Law Review 781, (2013), at 848.
[153] Robert Barnes, "Supreme Court upholds key part of Arizona law for now, strikes down other provisions," *The Washington Post*, 25 June 2012, at www.washingtonpost.com/politics/supreme-court-rules-on-arizona-immigration-law/2012/06/25/gJQA0Nrm1V_story.html.

dispensation."[154] Justice Scalia's claim appears to be substantiated by a Wall Street Journal Article, in which reporter Miriam Jordan states that as a result of the programs, "The Department of Homeland Security expects to receive 3,000 applications a day and will need to hire more than 1,400 full-time workers, as well as contract labor, according to sources familiar with the situation."[155] If it is true that DACA and DAPA resulted in an a need for more resources, as is apparent was the case, the Obama administration's decision to not enforce INA cannot be said to be the result of economic prioritization.

However, the problematic nature of DACA and DAPA does not stop at an unjustified claim of limited resources defending prosecutorial inaction. Through DACA and DAPA, eligible aliens could receive benefits that not only altered the scope of the Immigration and Naturalization Act, but stand in direct violation of it. Under DAPA, certain people who entered the country illegally would be "permitted a lawful presence"[156], which is contrary to their designated "unlawful presence" under the INA.[157] Furthermore, anyone granted deferred action under DACA and DAPA would also be entitled to apply for work authorization, a right that is explicitly illegal under the INA which states that "in general, any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible."[158] And as a product of receiving work permits, DAPA and DACA recipients could be eligible for Social

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[154] Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).
[155] Miriam Jordan, "Immigration-Policy Details Emerge," *The Wall Street Journal*, 3 August 2012, at www.wsj.com/articles/SB10000872396390443545504577567441019730890.
[156] "Memorandum, Secretary Jen Charles Johnson," *The United States Homeland Security*, 20 November 2014.
[157] Josh Blackman. "DACA, unlike DAPA, does not Confer Lawful Presence," J*osh Blackman Blog*. 14, Mar 2017, at joshblackman.com/blog/2017/0/page/16/.
[158] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 791.

Security, tax credits, and Medicare.[159] It is important to note that outside a few statutory exceptions, these rights are denied in absolute to every person in this country unlawfully, unlike deportation which involves enforcement discretion.[160] The work authorization for an unauthorized person, for example is impermissible "unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that— (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed."[161]

In order to grant these benefits to immigrants with unlawful presence, the Obama administration had to suspend the law or grant dispensations from the INA, effcictly making legal that which is illegal; in ignoring both the decisions of Congress and a statutory act, the administration grants certain categories of people the very benefit that Congress has denied them.[162] The New York Times estimated that "just under half of the nation's unauthorized immigrant population – estimated currently at about 11 million – could have potentially benefited from programs President Obama announced in

[159] "DACA and DAPA Access to Federal Health and Economic Support Programs. National Immigration Law Center," *National Immigration Law Center*, January 2015, at www.nilc.org.
[160] James D. Blacklock, Andrew S. Oldham, Arthur C. D'andrea, Texas v. United States 579 U.S. (2016).
Arizona v. United States 567 U.S. 387 (2012): "[a] principal feature of the removal system is the broad discretion exercised by immigration officials."
[161] Immigration and Nationality Act, 8 U.S.C. § 1182 (1968).
[162] James D. Blacklock, Andrew S. Oldham, Arthur C. D'andrea, Texas v. United States 579 U.S. (2016).

November 2014."[163] Both DACA and DAPA would completely alter the scope of the INA, undermining the Act altogether. Similar to King James II, who accomplished the goal of restoring Catholicism as the established religion by issuing a Declaration of Indulgence that suspended the "ecclesiastical laws" and granting dispensations that "exempted large numbers of Catholics from the Test Act," the Obama administration suspended the INA and granted dispensions to large numbers of people to accomplish a policy agenda. However, it is crucial to the original meaning and intent of the US Constitution not to allow the executive to suspend statutes, authorize individuals to violate statutes, or declare lawful the conduct that statutes declare unlawful.[164] To do so would be to effectively allow the executive branch to be above the law, standing in direct violation of the Take-Care Clause.

The Trump Administration

Following the 2016 presidential election, DACA seemed to be coming to an end as a new administration vocal against the program took office. Even from the beginning of his 2016 presidential campaign, Donald Trump has been adamant about cracking down on illegal immigration, going as far as proposing the construction of a wall along the US-Mexico border. Emphasizing an America-first rhetoric, Trump promised to "immediately terminate" DACA if elected.[165] At this point he defined DACA "an illegal executive

[163] Haeyoun Park and Alicia Parlapiano, "Supreme Court's Decision on Immigration Case Affects Millions of Unauthorized Immigrants," *The New York Times*, 23 June 2016, at www.nytimes.com/interactive/2016/06/22/us/who-is-affected-by-supreme-court-decision-on-immigration.html.
[164] James D. Blacklock, Andrew S. Oldham, Arthur C. D'andrea, Texas v. United States 579 U.S. (2016).
[165] Katie Reilly. "Here's What President Trump Has Said About Daca In The Past." *Time*, 5 September 2017, at time.com/4927100/donald-trump-daca-past-statements/.

order" which "defied federal law and the Constitution."[166] When Trump took office on the 20th of January 2017, however, his stance on the issue began to change; he began to voice a more empathic stance to both DACA and the immigrants protected by it.[167] In an January interview with ABC for example, Trump stated that "[Dreamers] shouldn't be very worried."[168] This direction did not last long, however; on January 25, 2017, President Trump issued an executive order in which he directed executive departments and agencies to "ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed" and established new "enforcement priorities."[169] And on February 20, 2017, John F. Kelly, Secretary of Homeland Security, issued a memorandum implementing Trump's executive order stating that "effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens."[170] Although Kelly's memorandum did not formally withdraw Napolitano's DACA, it reinforced a position against DACA and the enforcement priorities of the Obama administration.

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[166] "Full text: Donald Trump Immigration Speech in Arizona," *POLITICO*, 31 August 2016, at www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614.
[167] Katie Reilly, "Here's What President Trump Has Said About DACA in the Past," *TIME*, 5 September 2017, at time.com/4927100/donald-trump-daca-past-statements/.
[168] "TRANSCRIPT: ABC News anchor David Muir interviews President Trump," *ABC News*, 25 January 2017, at abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story? id=45047602.
[169] Donald Trump, "Executive Order: Enhancing Public Safety in the Interior of the United States," *The White House*, 25 January 2017, at www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.
[170] "Memorandum, Secretary John Kelly Memorandum," *The United States Department of Homeland Security*, 20 February 2017.

Donald Trump continued to go back and forth on his DACA stance during his first months in office, leaving the future of DACA and its recipients ultimately uncertain.[171] But this changed on September 5, 2017, when Jeff Session wrote a letter to Secretary of Homeland Security, Elaine Duke, advising the rescinding of DACA, making a vague reference to its constitutionality.[172] This letter was than followed by a memorandum by Secretary Elaine Duke the same day that terminated the June 2012 memorandum issued by Secretary Janet Napolitano which had established DACA.[173] In the memorandum, Duke stated that after careful consideration by the Department of Justice, they had "evaluated the program's Constitutionality and determined it conflicts with our existing immigration laws" and therefore will begin the winding down of the program "in an orderly fashion that protects beneficiaries in the near-term while working with Congress to pass legislation." It laid out that the Department of Homeland Security:

> *"Will adjudicate—on an individual, case-by-case basis—properly filed pending DACA initial requests and associated applications for Employment Authorization Documents that have been accepted by the Department as of the date of this memorandum; Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum; Will adjudicate—on an individual, case by case basis—properly filed pending DACA renewal requests and associated applications for*

[171] Carolyn McAtee Cerbin, "Another Federal Judge Rules Against Trump Move To End Daca," *USA Today*, 24 April 2018, at www.usatoday.com/story/news/politics/2018/04/24/third-judge-rules- daca/548631002/.
[172] "Memorandum to Secretary Duke from Jeff Sessions," *The United States Department of Homeland Security,* 5 September 2017.
[173] "From Acting Secretary Elaine C. Duke, Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA)," *The United States Department of Homeland Security,* 5 September 2017.

Employment Authorization Documents from current beneficiaries that have been accepted by the Department as of the date of this memorandum, and from current beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017; Will reject all DACA renewal requests and associated applications for Employment Authorization Documents filed outside of the parameters specified above; Will not approve any new Form I-131 applications for advance parole under standards associated with the DACA program, although it will generally honor the stated validity period for previously approved applications for advance parole; Will continue to exercise its discretionary authority to terminate or deny deferred action at any time when immigration officials determine termination or denial of deferred action is appropriate."[174]

In sum, the September 5, 2017 memorandum was a move towards rescinding DACA with officials at the "Department of Homeland Security no longer accepting new applications for DACA other than those submitted before Tuesday."[175] In a tweet on September 5, 2017, Trump stated that "Congress now has 6 months to legalize DACA... If they can't, [he] will revisit this issue!"[176] In ending DACA, Trump promised that he would "treat the program's beneficiaries with 'great heart' and that he would 'revisit this issue' should Congress fail to strike a deal by his self-imposed deadline."[177] The "orderly

[174] Ibid.
[175] Miriam Jordan, "U.S. Must Keep DACA and Accept New Applications, Federal Judge Rules," *The New York Times*, 24 April 2018, at www.nytimes.com/2018/04/24/us/daca-dreamers-trump.html.
[176] Donald J Trump (realDonaldTrump), Tweet, 5 September 2017.
[177] Louis Nelson, "Trump: 'This will be our last chance' to fix DACA," *Politico*, 13 February 2018, at www.politico.com/story/2018/02/13/trump-daca-dreamers-tweet-407248.

wind down" of DACA did not go uncontested however; following the Trump administration's announcement to terminate DACA, many states challenged the decision.

The first lawsuit was filed on January 9, 2018 in the Northern District of California. District Court Judge William Alsup started the case by stating: "One question presented in these related actions is whether the new administration terminated DACA based on a mistake of law rather than in compliance with the law."[178] However in doings so, Judge Alsup turned exclusively on the statutory question as opposed to the much needed constitutional justification for the termination of DACA.[179] Judge Alsup then proceeds to examined the Trump administration's case pointing out that:

> "*The government filed an administrative record on October 6. It was merely, however, fourteen documents comprising 256 pages of which 187 consisted of published opinions from the DAPA litigation, and all of which already resided in the public domain.... Although government counsel further indicated, upon inquiry by the district judge, that the decision maker had also likely received verbal input, nothing was included in the administrative record to capture this input. Nor were there any materials regarding the agency's earlier, recent decisions to leave DACA in place.*"[180]

Judge Alsup then concludes that "DACA fell within the agency's enforcement authority. The contrary conclusion was flawed and should be set aside." [181]

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[178] The Regents of the University of California v. U.S. Department of Homeland Security, F. Supp. 3d 1 (N.D.Cal. 2018).
[179] Josh Blackman, "Judge Alsup's 'Flawed Legal Premise'," *Lawfare*, 11 January 2018, at joshblackman.com/blog/2018/01/11/judge-alsups-flawed-legal-premise/.
[180] The Regents of the University of California v. U.S. Department of Homeland Security, F. Supp. 3d 1 (N.D.Cal. 2018).
[181] Ibid.

The second of the lawsuits was filed on February 13, 2018 in the Eastern District of New York. District Court Judge Nicholas Garaufis ruled that:

> "*The question before the court is thus not whether Defendants could end the DACA program, but whether they offered legally adequate reasons for doing so. Based on its review of the record before it, the court concludes that Defendants have not done so. First, the decision to end the DACA program appears to rest exclusively on a legal conclusion that the program was unconstitutional and violated the APA and INA. Because that conclusion was erroneous, the decision to end the DACA program cannot stand. Second, this erroneous conclusion appears to have relied in part on the plainly incorrect factual premise that courts have recognized constitutional defects in the somewhat analogous Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Third, Defendants' decision appears to be internally contradictory, as the means by which Defendants chose to wind down the program(namely, by continuing to adjudicate certain DACA renewal applications) cannot be reconciled with their stated rationale for ending the program (namely, that DACA as unconstitutional).*"[182]

Further, Judge Garaufis rightly points out the invalidity of the Trump administration's attempt to reframe the motivation for the decision to end the DACA on the "litigation risk" from Texas and several other states who would seek to challenge DACA.[183] Thus, Judge Garaufis concludes that the Trump administration "must continue processing both

[182] State of New York v. Donald Trump, Martin Jonathan Batalla Vidal v. Elaine C Duke, F. Supp. 3d 1 (E.D.N.Y. 2018).
[183] Ibid.

initial DACA applications and DACA renewal requests under the same terms and conditions that applied before September 5, 2017."

Up until this point, both the Judge Garaufis and Judge Alsup had "each issued injunctions ordering that the program remain in place. But neither of those decisions required the government to accept new applications."[184] This changed, however, in the most recent lawsuit against the Trump administration's decision to rescind DACA, which was filed on March 24, 2018 in the District of Columbia. In his ruling, Judge Bates scrutinized the Trump administration's decision to rescind DACA on weak constitutional grounds. He stated:

> *"The Department's explanation for its conclusion that DACA was unconstitutional was equally opaque. The Sessions Letter made a fleeting reference to the Attorney General's 'duty to … faithfully execute the laws passed by Congress,' which could be read to invoke the President's constitutional duty to 'take Care that the Laws be faithfully executed.' But the letter made no attempt to explain why DACA breached that duty. This failure was particularly acute in light of a thirty-three page memorandum prepared in 2014 by the Office of Legal Counsel ("OLC"), which deduced 'from the nature of the Take Care duty' no fewer than 'four general … principles governing the permissible scope of enforcement discretion' and concluded that DAPA, a similar deferred-action program, was consistent with all of them."*[185]

[184] Miriam Jordan, "U.S. Must Keep DACA and Accept New Applications, Federal Judge Rules," *New York Times.* 24 April 2018, at www.nytimes.com/2018/04/24/us/daca-dreamers-trump.html.
[185] NAACP v. Donald Trump, Trustee of Princeton University v. U.S., F. Supp. 3d 1 (D.D.C. 2018).

Judge Bates described the Trump administration's decision to rescind DACA as "arbitrary and capricious because the Department failed adequately to explain its conclusion that the program was unlawful."[186] Similar to Judge Garaufis, Judge Bates then proceeds to argue the inadequate merit of the Trump administration's decision to end DACA on the fear of litigation from Texas and other states threatening to sue. Judge Garaufis states that "neither the meager legal reasoning nor the assessment of litigation risk provided by DHS to support its rescission decision is sufficient to sustain termination of the DACA program."[187] Further, Judge Bates expressed the tension between the decision to rescind DACA by saying it was unconstitutional while still ostensibly upholding the 2014 Obama OLC defense of DACA, thus inspiring the need for the Trump administration to reconcile the two.

Judge Bates concludes his ruling stating that "... the decision to rescind DACA will be vacated and remanded to DHS. Vacatur of DACA's rescission will mean that DHS must accept and process new as well as renewal DACA applications."[188] In his conclusion, Judge Bates provides an ultimatum, "the Court will stay its order of vacatur for ninety days, however, to allow the agency an opportunity to better explain its rescission decision."[189]

Analysis of the Decision to Rescind DACA

[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.

"Without providing any more explanation, the Justice Department is trying to have its cake and eat it too in trying to change policy without actually restricting executive power."

- *Josh Blackman, Professor of Law*

On February 13, 2018, Trump tweeted that "Negotiations on DACA have begun. Republicans want to make a deal and Democrats say they want to make a deal. Wouldn't it be great if we could finally, after so many years, solve the DACA puzzle. This will be our last chance, there will never be another opportunity! March 5th."[190] Although this move appeared to be a positive step towards the dismantling of an executive action that involved non-enforcement of the INA, the Trump administration lacked thoroughness when it came to explaining why DACA was unconstitutional and defining why a decision to rescind DACA should stand. The Trump administration made claims that only began to scratch the surface of the DACA program's constitutionality. In the memorandum to Secretary Elaine Duke, for example, Jeff Sessions argues that "such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch,"[191] however he fails to explain how and with what regard DACA is unconstitutional. Further, Secessions wrongfully appeals to litigation risk as a motivation for his decision to rescind DACA; he argues that since "the DACA policy has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."[192]

[190] Donald J Trump (realDonaldTrump), Tweet, 13 February 2018.
[191] "Memorandum to Secretary Duke from Jeff Sessions," *The United States Department of Homeland Security*, September 5, 2017.
[192] Ibid.

More importantly, the administration has failed to withdraw the 2014 Office of Legal Counsel opinion contending that DACA is lawful. And thus, I concur with the court that the explanation for rescinding DACA in this memorandum was an insufficient and unsubstantiated reference to its constitutionality.

Where the Trump administration's claims currently stand, it would be hard to label them anything less than "arbitrary and capricious." However if the Trump administration is serious about terminating DACA, it needs to bring forward substantive constitutional arguments before the Court. Professor Josh Blackman states that the Trump administration should view Judge Bate's decision as a blessing since the decision "actually gives Trump a chance to clean it up and issue a new memo that will stand up on appeal."[193] Professor Blackman recommend that Attorney General Jeff Session "withdraw the 2014 Office of Legal Counsel (OLC) opinion contending that DACA is lawful and explain why the policy runs afoul of the "take care" clause as well as the nondelegation doctrine."[194] The unwillingness of the Trump administration to fully challenge the constitutionality of DACA appeared to be a move by the administration to rid itself of unfavorable policy without actually committing to restricting executive power.

[193] Josh Blackman, *The Constitutionality Of Dapa Part Ii: Faithfully Executing The Law*, 19 Texas Review of Law and Politics 215, (2015). Josh Blackman, "DACA Rescission 2.0," *LawFare*, 27 April 2018, at www.lawfareblog.com/daca-rescission-20.
[194] Ibid.

Part 4: Afterthoughts and Recommendations

4.1: Concluding Statements

Congress was constructed and envisioned by the Framers to be the most important branch of government; it is not by coincidence that the Constitution begins with Congress. The legislative branch was purpose-built to be the "foundation stone upon which the rest of the governmental edifice would be constructed"[195] Congress possesses limited and enumerated powers of law making, the process of which was purposely made slow to reinforce "the cool and deliberate sense of the community."[196] However, presidency after presidency we continue to see Congress became ever more ineffective, while simultaneously the executive continues to overreach and expand its power. This executive overreach on the legislative branch, however, has occurred with the complicity of Congress itself, who have become ineffective due to the heightened polarization and fear of accountability.[197] The creeping expansion of executive power is troubling because it leads to a disbalance in the constitutional system; it creates incentives for Presidents to bypass Congress and further expands both presidential power and the public's expectation of it.

Article II Section 3 of the US Constitution represents a storied history of America's apprehensiveness against the overextension and abuse of executive authority that can be traced back to the English monarchy. Much like their English counterparts, the colonists worried about an executive who was above the law and possessed the power

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[195] Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 Harvard Journal of Law & Public Policy 571, (2017).
[196] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, Clinton Rossiter, ed., (New York: Penguin, 1961).
[197] Gary J. Schmitt, Joseph M. Bessette, and Andrew E. Busch, ed., *The Imperial Presidency and the Constitution*, (Lanham: Rowman & Littlefield Publishers, 2017).

of suspension and dispensation. Although the US Constitution does not explicitly ban the President from suspending and dispensing of the law, there is a general consensus among the Framers that the President would not hold such power. This is exemplified by the Take-Care Clause, which is recognized as a guard against suspension and dispensation of Congressional Acts by requiring the President to execute all constitutionally valid Acts of Congress in all situations and cases. The Take-Care Clause places a limit on the discretion of the President, and protects against presidential inaction or overreach; outside of congressional decisions or the delegation of lawmaking power, the President bears a responsibility to execute the law and is deprived of the ability to make it.[198]

However, there continue to be deliberate decisions taken by Presidents either to not enforce or selectively under-enforce laws to further a political agenda. Both the Controlled Substances Act (CSA) and the Immigration and Naturalization Act (INA) are examples of Congressional Acts that were subject to categorical nonenforcement. In both cases, the executive justified their selective nonenforcement as prosecutorial discretion due to a lack of resources. With regard to the enforcement of the CSA, it appears highly possible that the Trump administration will continue down the path laid by the Obama administration, exempting states that have legalized marijuana from it. The enforcement of the INA, however is a bit more complicated; the Trump administration has made steps to terminate DACA, but has failed to provide an adequate constitutional argument against the Obama program. Thus, as it currently stands, both the INA and the CSA regrettably continue down a path of executive nonenforcement.

[198] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vanderbilt Law Review 671, (2014), at 769.

Executive categorical nonenforcement stands in direct violation of the US Constitution: not only does it violate the congressional primacy in lawmaking, but it also violates the Take-Care Clause. Allowing the President to hold such power would place him above the law, not under it. Executive categorical nonenforcement does not equate to prosecutorial discretion, and acts beyond the scope of executive authority. As Justice Brandeis writes:

> *"Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose. Or, because Congress, having created the office, declines to make the indispensable appropriation. Or, because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted."*[199]

By drastically loosening the scrutiny we give a President's claim to prosecutorial discretion, we have transformed the executive into a king-like figure. Let us never forget that the role envisioned for the executive was to execute the law, not to mend or create the law to further their own political agenda. If Congress passes a law that directs a certain kind of enforcement action, the President must execute that action to the best of

[199] Myers v. United States, 272 U.S. 52 (1926).

their ability: this is a fundamental basis of our entire governmental structure.[200] It is not the president's role to fix unfavorable legislation. We must hold Congress accountable for unfavorable policies and restore Congress's role as an effective check on the President. With every free pass we grant a President to not execute the law, we create the very thing the Framers warned about; an unrestrained executive who is above the law. Thus, it is crucial to our democracy to act upon and argue against this categorical nonenforcement of the rules of law, lest we find our government inching closer to its roots in monarchy with each change in leadership.

[200] Robert J. Delahunty and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Texas Law Review 781, (2013), at 841.

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Vita
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EDUCATION

LEHIGH UNIVERSITY — August 2018
College of Arts and Sciences,
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College of Arts and Sciences,
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ACADEMIC EMPLOYMENT

Graduate Teaching Assistant for the Department of Political Science at Lehigh University. Responsibilities included helping professors with grading, reviewing assignments, and keeping record of attendance.

EXPERIENCE

"DEFINING THE DISSOLUTION OF THE FOURTH AMENDMENT"

Honors Thesis - Date of Completion: December 2016

Researched, analyzed, and intensively discussed the historic dissolution of the Fourth Amendment, from its roots in English common law to its modern form; a complete departure from the original intent