

Written Statement

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

**Committee on the Judiciary
United States House of Representatives**

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Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Jonathan Turley and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the constitutional concerns raised by recent nonenforcement policies and the President's duty to faithfully execute the law of the United States.

The issue before the Committee is clearly a difficult one. It is often difficult to separate the merits of the underlying policies from the means used to achieve them. It so happens that I agree with many of the goals of the Administration in the various areas where the President has circumvented Congress. However, in the Madisonian system, it is often more important how you do things than what you do. We have long benefited from a system designed to channel and transform factional interests in the political system. When any branch encroaches upon the authority of another, it not only introduces instability into the system but leaves political issues raw and unresolved. However, to paraphrase one of Benjamin Franklin's favorite sayings, the Constitution helps those branches that help themselves. Each branch is given the tools to defend itself and the Framers assumed that they would have the ambition and institutional self-interest to use them. That assumption is now being put to the test as many members remain silent in the face of open executive encroachment by the Executive Branch.

While I believe that the White House has clearly "exceeded its brief" in these areas, this question of presidential nonenforcement has arisen periodically in our history. In the current controversy, the White House has suggested an array of arguments, citing the interpretation of statutory text, agency discretion, or other rationales to mask what is clearly a circumvention of Congress. It also appears to be relying on the expectation that no one will be able to secure standing to challenge such decisions in court. Finally, there is no question that the President as Chief Executive is allowed to set priorities of the administration and to determine the best way to enforce the law. People of good faith can clearly disagree on where the line is drawn over the failure to fully enforce federal laws. There is ample room given to a president in setting priorities in the enforcement of laws. A president is not required to enforce all laws equally or dedicate the same resources to every federal program. Even with this ample allowance, however, I believe that

President Barack Obama has crossed the constitutional line between discretionary enforcement and defiance of federal law. Congress is given the defining function of creating and amending federal law. This is more than a turf fight between politicians. The division of governmental powers is designed to protect liberty by preventing the abusive concentration of power. All citizens – Democratic or Republican or Independent – should consider the inherent danger presented by a President who can unilaterally suspend laws as a matter of presidential license.

In recent years, I have testified and written about the shift of power within our tripartite government toward a more Imperial Presidential model. Indeed, I last testified before this Committee on the assertion of President Obama that he could use the recess appointment power to circumvent the Senate during a brief intrasession recess.¹ While I viewed those appointments to be facially unconstitutional under the language of Article I and II (a view later shared by two federal circuits), I was equally concerned about the overall expansion of unchecked presidential authority and the relative decline of legislative power in the modern American system. The recent nonenforcement policies add a particularly menacing element to this pattern. They effectively reduce the legislative process to a series of options for presidential selection ranging from negation to full enforcement. The Framers warned us of such a system and we accept it – either by acclaim or acquiescence – at our peril.

The current claims of executive power will outlast this president and members must consider the implications of the precedent that they are now creating through inaction and silence. What if a future president decided that he or she did not like some environmental laws or anti-discrimination laws? Indeed, as discussed below, the nonenforcement policy is rarely analyzed to its natural conclusion, which leads to a fundamental shift in constitutional principles going back to *Marbury v. Madison*.² The separation of powers is the very foundation for our system; the original covenant reached by the Founding Generation and passed on to successive generations. It is that system that produces laws that can be truly said to represent the wishes of the majority of Americans. It is also the very thing that gives a president the authority to govern in the name of all Americans. Despite the fact that I once voted for President Obama, personal admiration is no substitute for the constitutional principles at stake in this controversy. When a president claims the inherent power of both legislation and enforcement, he becomes a virtual government unto himself. He is not simply posing a danger to the

¹ I testified before Congress last year on the controversy surrounding these recess appointments. See *Executive Overreach: The President's Unprecedented "Recess" Appointments Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School) [hereinafter *Executive Overreach*]. I also address the controversy at length in two forthcoming law review articles. See Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523 (2013); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. (forthcoming fall 2013); see also Jonathan Turley, Op-Ed., *Recess Appointments: President as Ruler*, USA TODAY, Feb. 15, 2012, at 7A.

² 5 U.S. (1 Cranch) 137, 177 (1803).

constitutional system; he becomes the very danger that the Constitution was designed to avoid.

I. THE SEPARATION OF POWERS WITHIN THE TRIPARTITE SYSTEM

A. Factions and the Legislative Process.

One of the greatest dangers of nonenforcement orders is not what it introduces to the tripartite system but what it takes away. The Framers created three “equal” branches but the legislative branch is the thumping heart of the Madisonian system. It is the bicameral system of Congress that serves to convert disparate factional interests into majoritarian compromises. In this sense, Congress is meant to be a transformative institution where raw, often competing interests are converted by compromise and consensus. One of the most striking aspects of the recent controversies involving presidential nonenforcement is that they involved matters that were either previously before Congress or actually under consideration when President Obama acted unilaterally.

The role of the legislative process in stabilizing the political system is key to the success of the American system. Madison saw the vulnerability of past governmental systems in the failure to address the corrosive effects of factions within a population. The factional pressures in a pluralistic nation like the United States would be unparalleled and Madison understood that these factions were the expression of important political, and social, and economic interests. As Madison explained, “liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”³ Congress is where these factional interests coalesce and convert in an open and deliberative process.

The point of this background discussion is that the loss caused by the circumvention of the legislative branch is not simply one branch usurping another. Rather, it is the loss of the most important function of the tripartite system in channeling factional interests and reaching resolutions on matters of great public importance.

The importance of this central function of Congress is magnified when the country faces questions upon which there is great division. Ironically, these are the same areas where presidents are most likely to issue nonenforcement orders due to opposition to the underlying legislation. Consider illegal immigration. There are few issues that are more divisive today. The immigration laws are the product of prolonged debates and deliberations over provisions ranging from public services to driver’s licenses to ICE proceedings to deportations. Many of these issues are considered in combination in comprehensive statutes where the final legislation is a multivariable compromise by legislators. Severity in one area can at times be a trade-off for leniency in another area. Regardless of such trade-offs, the end result is by definition a majoritarian compromise that is either signed into law by a president or enacted through a veto override. The use of executive orders to circumvent federal legislation increases the shift toward the concentration of executive power in our system and the diminishment of the role of the

³ THE FEDERALIST NO. 10, 78 (James Madison) (Clinton Rossiter ed., 1961).

legislative process itself. It is precisely what the Framers sought to avoid in establishing the tripartite system.

B. The Royal Prerogative and the Faithful Execution of Federal Law.

Juxtaposed against this legislative power is the Chief Executive. The Framers created a Chief Executive with a relatively short term of four years and clearly defined powers to fit within this system of shared government. Despite the recent emergence of an uber-presidency of increasingly unchecked powers, the Framers were clear that they saw such concentration of power to be a danger to liberty. Indeed, the separation of powers is first and foremost a protection of liberty from the dangers inherent in the aggregation or aggrandizement of power.⁴ The Constitutional Convention and subsequent ratification conventions are replete with statements on the need to carefully confine the Chief Executive to enumerated powers and to specifically safeguard the powers of the legislative branch in the control of the purse and the creation of new laws.

At issue in today's hearing is in many ways the first issue that arose in the creation of the office of a president. The Framers were intimately familiar with English history and law. The suggestion of a president immediately produced objections over the dangers of abuse and unilateral action. This debate occurred against the backdrop of over 150 years of tension with the English monarchy that can be traced to the confrontation of Sir Edward Coke and James I. That confrontation had some interesting parallels to the current debate. At issue was not the circumvention of the legislative but the judicial branch. James claimed the right to remove cases from the court for his own judgment. When various people objected, James noted "I thought law was founded upon reason, and I and others have reason as well as the judges."⁵ Modern presidents in nonenforcement policies claim that same basis in reason – adjusting legal authority to a more equitable or more efficient reality. However, in the case of James I, Coke objected that "natural reason" does not make for good laws or legal analysis. Rather, law is a form of "artificial reason and judgment" or "an art which required long study and experience before that a man can attain to the cognizance of it."⁶ Even in the face of a treason charge, Coke maintained that, "the king ought not to be under any man, but he is under God and the law."⁷

The principle articulated by Coke drew the distinction between the King and the law – the latter which is made separate from the King and governs the King. It was the rejection of what has been called the "royal prerogative."⁸ This rejection was first seen in the state constitutions in crafting the powers of Governors and later manifested in the drafting of the new federal Constitution. For example, Thomas Jefferson wrote in 1783 with regard to the Virginia Constitution that "By Executive powers, we mean no

⁴ See generally, Turley, *Age of Regulation*, *supra*.

⁵ 7 Sir Edward Coke, Reports 65, quoted in Roscoe Pound, *The Spirit of the Common Law* 5 (1921) at 61.

⁶ *Id.*

⁷ *Id.*

⁸ See Julius Goebel, Jr., *Ex Parte Clio*, 54 Colum. L. Rev. 450, 474 (1954); David Gray Adler, *The Steel Seizure Case And Inherent Presidential Power*, 19 Const. Commentary 155, 164 (2002).

reference to the powers exercised under our former government by the Crown as of its prerogative ... We give them these powers only, which are necessary to execute the laws (and administer the government).”⁹ Jefferson’s statement reflects the same Cokean distinction – now a mantra for American framers in defining the new concept of executive power.

The earliest references to executive power or the presidency in the Constitutional Convention refer to the execution of federal law – affirming the idea that the executive must enforce the law established by the legislative process. Indeed, it was the introduction of the Virginia Plan that most clearly cast this executive model.¹⁰ Roger Sherman stated this most clearly in describing “the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.”¹¹ Likewise, James Wilson defended the model of an American president by assuring his colleagues that “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature.”¹²

Reflecting these views, and the view of Framers like Madison that the chief executive must only be given power that is “confined and defined,”¹³ the first draft of the Take Care Clause read “it shall be his duty to provide for the due and faithful execution of the Laws.”¹⁴ That language then became, with the report of the Committee of Detail, “he shall take care that the laws of the United States be duly and faithfully executed.” The final language of the Committee of Style was refined further into “The executive power shall be vested in a president of the United States of America ... He shall take care that the laws be faithfully executed.” What is most striking about this process is how little the language actually changed – reflecting a general consensus on limiting the office to the execution– as opposed to the creation– of laws.

While the line between legislation and enforcement can become blurred, this view is generally reflective of the functions defined in Article I and Article II. The Take Care Clause is one of the most direct articulations of this division. The Clause states “[*The President*] shall take Care that the Laws be faithfully executed . . .” U.S. Const. art. II, § 3, cl. 4. It is one of the clearest and most important mandates in the Constitution. The Framers not only draw the distinction between making and enforcing laws, but, with the enforcement of the law, the Framers stressed that the execution of the laws created by Congress must be faithfully administered. The language combines a mandate of the execution of laws with the qualifying obligation of their faithful execution.

The constitutional obligation contained in the Take Care Clause is amplified by

⁹ This quote is from Jefferson’s Draft of a Fundamental Constitution for Virginia. Adler, *supra*, at 164 (citing Charles Warren, *The Making of the Constitution* 177 (Harvard U. Press, 1947)).

¹⁰ Max Farrand, 1 *The Records of the Federal Convention of 1787* at 62-63 (Yale U. Press, 1911) (Edmund Randolph describing a “national executive ... with power to carry into execution the national laws ... [and] to appoint to offices in cases not otherwise provided for.”); *see also* Adler, *supra*, at 164.

¹¹ Farrand, *supra*, at 65; Adler, *supra*, at 164-65.

¹² Farrand, 1 *Records* at 62-70; Adler, *supra*, at 165.

¹³ *Id.* at 70.

¹⁴ *Id.* at 171; Adler, *supra*, at 165.

the oath that a president takes as a pre-condition for assuming power as Chief Executive under Section 1 of Article II. Indeed, the order of these references is interesting. In order to assume office, a president must “solemnly swear (or affirm) that [he] will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, §1, cl. 7. The Take Care Clause appears later in Section 3. This section happens to refer to the legislative function of Congress in stating that “from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient.” *Id.* Notably, the section affirms the right of a President to ask Congress for legislative action that he deems to be necessary. The clause then affirms the obligation of the President to faithfully execute those laws created by Congress. It is equally significant that the clause following the obligation to faithfully execute the laws is the clause allowing for the impeachment and removal of presidents.

The import of these clauses is that the President can seek legislative changes and even call Congress into session, but it remains the prerogative of Congress to decide what laws will be enacted (subject to presidential signature or veto override).

The most obvious meaning of faithful execution is that the President must apply the laws equally and without favoritism. Favoritism is clearly shown in the failure to enforce the laws against friends or political cronies. However, it can also apply more widely to favored groups or political allies. Merriam-Webster defines “faithful” as “having or showing true and constant support or loyalty.” In this controversy, this true and constant support is to the laws themselves. It is worth noting that this is not loyalty tied to the “law” in general – possibly inviting a more nuanced interpretive response to what specific laws serve or disserve the law in general. The use of the plural form encompasses the laws referenced in Article I as the product of Congress. It is those laws that the President is bound to execute faithfully under Article II.

C. Nonenforcement Orders and the Rise of the Fourth Branch.

The current controversy over the nonenforcement of federal law transcends the insular issues of particular statutes or regulations. The American governmental system is being fundamentally transformed into something vastly different from the intentions of the Framers or, for that matter, the assumptions underlying the constitutional structure. As I recently discussed in print,¹⁵ we are shifting from a tripartite to a quadripartite system in this age of regulation. The Administrative State that is credited with so many advances in public welfare has also served to shift the center of gravity in our system to a fourth branch of federal agencies. As a result, our carefully constructed system of checks and balances is being negated by the rise of the sprawling departments and agencies that govern with increasing autonomy and decreasing transparency. At the same time, we have seen a rapid growth of executive power, particularly since 9-11, where the President is asserting largely unchecked authority in many areas.

When the Framers created the tripartite system, our federal government was quite small. In 1790, it had just 1,000 nonmilitary workers. In 1962, there were 2,515,000

¹⁵ Jonathan Turley, Op-Ed., *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), at C1; see also Turley, *supra*, *Age of Regulation*, at 1542-61.

federal employees. Today, we have 2,840,000 federal workers in 15 departments, 69 agencies and 383 nonmilitary sub-agencies.¹⁶ Indeed, these numbers can be themselves misleading since much federal work is now done by contractors as part of "downsizing", but the work of the agencies has continued to expand. Moreover, technological advances have increased the reach of this workforce. With the expansion of the government has come a shift in the source of governing rules for society. Today, the vast majority of "laws" governing the United States are not passed by Congress but are issued as regulations, crafted largely by thousands of unnamed, unreachable bureaucrats. To give one comparative measure, one study found that in 2007, Congress enacted 138 public laws, while federal agencies finalized 2,926 rules, including 61 major regulations.¹⁷ Adding to this dominance are judicial rulings giving agencies heavy deference in their interpretations of laws under cases like *Chevron*. In the last term, this Supreme Court added to this insulation and authority with a ruling that agencies can determine their own jurisdictions — a power that was previously believed to rest with Congress. In his dissent in *Arlington v. FCC*, Chief Justice John Roberts warned: "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."

With agencies increasingly performing traditionally legislative and judicial functions,¹⁸ the nonenforcement of federal law exacerbates the shift away from the original calibration of the tripartite system. Federal agencies are becoming practically independent in their operations in assuming new forms of regulatory law and adjudications. The refusal to execute those laws enacted by Congress would serve to marginalize the legislative branch further and make the federal government even less dependent on or responsive to that branch.

¹⁶ Turley, *supra*, *Age of Regulation*, at 1533; WALTER E. VOLKOMER, AMERICAN GOVERNMENT 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4837 employees. Deanna Malatesta, *Evolution of the Federal Bureaucracy*, in 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

¹⁷ Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009).

¹⁸ As the number of federal regulations has increased, Congress has shifted the adjudication of many disputes between citizens and their government to administrative courts tied to individual agencies. The result is that a citizen is 10 times more likely to be tried by an agency than by an actual court. In a given year, federal judges conduct roughly 95,000 adjudicatory proceedings, including trials, while federal agencies complete more than 939,000. Turley, *supra*, *Age of Regulation*, at 1533; Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. Cal. L. Rev. 913, 936 (2009).

II. NONDEFENSE ORDERS, PRESIDENTIAL PRIORITIZATION POLICIES, AND SIGNING STATEMENTS

It is important to distinguish between the various ways that presidents can oppose laws, which can blur the line between nonenforcement and inadequate enforcement. While a president does not have authority to negate or amend laws, there is overlap between the branches in different functions. Clearly, for example, the President is allowed to set goals in the execution of laws that place certain public programs above others in priority. No area of the law has one-hundred percent enforcement. There are discretionary actions that can include staffing and resource allocations with impacts on the level of enforcement in a given area. Before delving further into the constitutionality of nonenforcement, three types of executive decisions are important to distinguish.

A. Nondefense Orders.

The nondefense orders arise when presidents decide that their administrations will not defend a challenged law in court. These decisions are relatively rare and highly controversial. Even defenders acknowledge that such a decision should only be considered in circumstances where a president feels that enforcement of a law would conflict with his duty to uphold the Constitution. Indeed, one study showed that between 1974 and 1996, presidents objected to the constitutionality of roughly 250 laws but did not refuse to defend them.¹⁹ Despite these reservations, Presidents Ford, Carter, Reagan, George H.W. Bush, and Clinton did not refuse to defend such laws.²⁰

While the duty to defend would seem to be naturally subsumed under the duty to enforce, the Obama Administration draws a distinction between the two duties. Thus, it stated an intent to enforce the law while refusing to defend it. It was a curious distinction for many since continued enforcement would require that the law be defended in challenges.²¹ The Justice Department previously adopted a narrow exception to the rule that the "courts, and not the Executive, finally to decide whether a law is constitutional" and that the nondefense of a law would impermissibly create a barrier to judicial review.²² Unless the law impedes executive power, the Justice Department stated that it would defend laws so long as are not "clearly unconstitutional." That would seem to demand more than simple disagreement with lower courts or adherence to a new or unestablished interpretation of the Constitution.

¹⁹ Christopher N. May, Presidential Defiance of "Unconstitutional" Laws xiv (1998).

²⁰ In many cases, presidents used signing statements to interpret the laws compatible with their view of constitutional limits.

²¹ Indeed, some have argued that the Administration got it wrong and that there is no duty to enforce or to defend. See Neal Devins and Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 Colum. L. Rev. 507, 508-509 (2012) ("Given President Obama's belief that the DOMA is unconstitutional, he should neither enforce nor defend it.").

²² Recommendation that Dep't of Justice Not Defend Constitutionality of Certain Provisions of Bankr. Amendments and Fed. Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984).

In light of the foregoing, the Administration's decision that it would not defend the Defense of Marriage Act (DOMA) was a classic example of a nondefense policy. The timing of the decision, however, was curious given the Administration's defense of the law for years and the President's own public ambivalence over same-sex marriage. Thus, this was not a statute that was treated as facially invalid by this president, and it was supported (and signed into law) by another Democrat, Bill Clinton. Nevertheless, while belated, the Obama Administration announced that it could no longer in good faith support a law that it deemed unconstitutional. It notably took this position after previously enforcing the law, leading many to question a decision to abandon the law "mid-stream" without any clear advocate with standing to argue the law's merits.²³

The decision of the Administration was equally notable in basing its nondefense decision on a position that had never been embraced by the Supreme Court. The Administration stated that "the President and [the Attorney General] have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law then, from that perspective, there is no reasonable defense of DOMA."²⁴ While the Administration acknowledged that a lower standard of review had been applied in prior cases, it insisted that "neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard."²⁵

While I take the same view as to gay rights, it is not a view that had ever secured a majority of the Supreme Court or even most lower courts. Thus, the Administration was refusing to defend a law based on an interpretation that had thus far remained unsupported by direct precedent. Indeed, the ultimate decision in *Windsor* was a close one with a 5-4 opinion, and the basis for the decision was more nuanced than the one indicated by the Administration. In adopting a nondefense position, the Obama Administration was establishing precedent that Presidents could refuse to defend laws based on unaccepted legal interpretations. This would lead to the question of whether a president could maintain a nondefense postures even with a legal position rejected by lower courts but never rejected by the Supreme Court.

²³ Indeed, advocates of this presidential power insist that courts cannot be deemed as supreme in the interpretation of laws since "[f]ederal courts only have jurisdiction over cases or controversies, meaning that they cannot issue Article III judgments or opinions when they are not deciding cases or controversies. Yet there will be many situations, many questions, where federal courts cannot opine because there will be no case or controversy." Devins & Prakash, *supra*, 112 Colum. L. Rev. at 530. Indeed, it is true that the executive branch must engage in interpretations as part of its enforcement of laws and, particularly with the narrowing of standing in federal cases, many of these decisions go unchallenged. However, for those of us concerned about the rise of the Fourth Branch, this only increases the concentration of power in the Executive Branch and further undermines the balance in the tripartite system.

²⁴ <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

²⁵ *Id.*

My strongest objection was the failure of the Administration to avoid the untenable position of leaving a federal law without an advocate. That produced a standing dilemma that should never have been allowed to arise. The fact is that there are strong arguments on both sides of this litigation. While I have long been a supporter of same-sex marriage, I felt that the standing barriers created in the recent *Hollingsworth*²⁶ and *Windsor*²⁷ cases were grossly unfair to the critics of same-sex marriage and equally inimical to the legal system.²⁸ It is particularly troubling when this law was signed by a prior president who clearly viewed it (as did Congress) to be a constitutional act. The Court clearly saw the Administration's actions as undermining both the Judicial and Legislative branches:

“if the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff who has brought a justiciable legal claim would become only secondary to the President's. This would undermine the clear dictate of the separation-of-powers principle that “when an Act of Congress is alleged to conflict with the Constitution, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” . . . Similarly, with respect to the legislative power, when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative and without any determination from the Court.”²⁹

While the Supreme Court resolved the standing problems in *Windsor* on prudential grounds, the untenable position created by the Administration should have been avoided by the selection of outside counsel to assume the burden of defending the law. While obviously this would have been an action taken in furtherance of the statute by the Administration, it would have allowed the Administration to convey its opposition to the statute while, in the interests of both Congress and the rule of law, ensuring that both sides were adequately represented.

Putting aside the timing and status of the DOMA defense, there remains a principled reason why a President, as well as an Attorney General, may feel that the defense of a statute is fundamentally at odds with his duty toward the Constitution. For

²⁶ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

²⁸ I have repeatedly argued to Congress that the narrow rules concerning standing are increasingly preventing worthy constitutional challenges from being heard. I have the honor of representing both Democratic and Republican members of Congress who challenged President Obama's unilateral decision to attack Libya's capitol and armed forces. Jonathan Turley, *Members of Congress Challenge Libyan War in Federal Court*, JONATHAN TURLEY (June 15, 2011), <http://jonathanturley.org/2011/06/15/members-of-congress-challenge-libyan-war-in-federal-court/>.

²⁹ *Windsor*, 133 S. Ct. at 2688.

example, if Congress passed a new Sedition Act or a law establishing an official religion, a president could claim a good-faith basis for viewing the law as conflicting with his constitutional duties. While (as noted above) the law should be defended in the interests of all sides being presented for judicial review, a president can decline to directly defend the law. In such cases, the president is caught on the horns of a constitutional dilemma, and the appointment of outside counsel is appropriate to allow the presentation of arguments in favor of the law. After all, the Executive Branch has consistently opposed efforts of Congress to defend laws in court as a usurpation of Executive authority. It should not fight to both bar Congress from such arguments while declining to perform that role to the detriment of these laws.

B. Prioritization Policies.

Every President has faced accusations of slow-walking or under-enforcing laws that he has opposed. Ronald Reagan was accused of undermining a host of environmental laws through the appointment of officials like James Watt and Anne Gorsuch. Likewise, Syracuse University recently found a sharp reduction of prosecutions for financial institution fraud from over 3,000 in 1991 to just 1,365 in 2011.³⁰ That reduction in the Obama Administration is not deemed a constitutional violation since such cases are heavily imbued with prosecutorial discretion. Indeed, members of Congress often suggest that presidents should not “waste time” on enforcing some laws.³¹

Immigration is again an excellent example of such controversies. Modern presidents have long made deportation a lower priority for enforcement than prosecuting violent illegal immigrants and other provisions. The numbers of such deportations have varied dramatically with George W. Bush deporting a total of 2,012,539 or 251,567 per year, while Bill Clinton deported with an average annual rate of 108,705.³² During the same period of time, Obama (with 395,774 per year) has actually deported more individuals per year than his predecessor.³³ The level of deportations, however, remains a discretionary decision of an Administration and courts tend to leave disagreements on the level of enforcement as a political question for the legislative and executive branches to resolve. As discussed below, this is in contrast to orders effectively suspending portions of federal immigration law as part of a policy change of the Administration.

C. Signing Statements.

There has already been much discussion of signing statements, particularly during the Administration of George W. Bush.³⁴ The majority of signing statements are

³⁰ See Criminal Prosecutions for Financial Institution Fraud Continue to Fall, TRAC Reports, Syracuse University, available at <http://trac.syr.edu/tracreports/crim/267/>.

³¹ See, e.g., Andrew Cohen, *Sen. Leahy: Fed Shouldn't 'Waste Time' on State Marijuana Laws*, Atlantic, Sept. 3, 2013.

³² 2011 Yearbook of Immigration Statistics, published by the Office of Immigration Statistics under the Department of Homeland Security (table 39).

³³ *Id.*

³⁴ See generally *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?*: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 7, 9 (2007).

uncontroversial in that they amplify policies or celebrate accomplishments or reaffirm objectives connected to the legislation. However, some signing statements have been used to inform agencies of an interpretation that seems at odds with the language and intent of Congress – often after an Administration has failed to get its way with the legislative branch. Signing statements may merge with nonenforcement orders when a president claims a provision is unconstitutional and unenforceable.

James Monroe is generally credited with the first signing statement.³⁵ Like many controversial practices, it started in a rather routine and harmless fashion with Monroe stressing how the law was to be administered.³⁶ Given his confrontational and at times imperial approach to the presidency, it is not surprising that the first defiant signing statement came with Andrew Jackson who did not want a road built from Detroit to Chicago. Jackson instructed his Administration to build the road but to stop before Chicago. Such statements were condemned at the time on the grounds that they violated the separation of powers and usurped the authority of the legislative branch. One of the most interesting early confrontations occurred between President John Tyler and Speaker of the House, John Quincy Adams. When Tyler wrote a signing statement rejecting certain provisions of a political apportionment bill, Adams rejected the signing statement as an "extraneous document" that constituted a "defacement of the public records and archives."³⁷ Indeed, Adams was right. Such statements are extraneous and do not constitute "law." They, however, have such an effect when a president uses them to order the disregard or effective line veto of a duly enacted law.

The most significant transformation of these statements came with Ronald Reagan. Then Attorney General Ed Meese sought to make such statements integral rather than extraneous by ensuring the West Publishing Company would print such statements with these laws as if they were a binding amendment or interpretation of the laws. The Supreme Court was viewed as undermining the authority of Congress further in *INS v. Chadha* and later cases by referring to signing statements and casually noting that the president will use such statements to decline to enforce certain objectionable provisions in laws.³⁸ Soon, presidents were adding hundreds of such statements to "Executive legislative history" accounts as if they were an addendum to legislation.

To the extent that signing statements order the nonenforcement of legislation, it raises serious constitutional questions. Some signing statements have led to later reversals as in Reagan's dispute over the Competition in Contracting Act of 1984 or congressional reversals as in the HIV-positive personnel provision of the National Defense Authorization Act for Fiscal Year 1996 in the Clinton Administration. To the

³⁵ T.J. Halstead, Cong. Research Serv. Report for Cong., Presidential Signing Statements: Constitutional and Institutional Implications 2 (2007), <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

³⁶ Christopher N. May, Presidential Defiance of "Unconstitutional" Laws 73 (1998).

³⁷ Am. Bar Ass'n, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine 7 (2006).

³⁸ In striking down the legislative veto in *Chadha*, the Court noted that "11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional." 462 U.S. 919, 942 fn. 13 (1983).

extent that these disputes are not resolved through inter-branch compromise, they should be resolved through judicial review (though, again, the dysfunctionally narrow standing rules can inhibit such review). Where the signing statements establish nonenforcement orders, we are left with a fundamental challenge to legislative authority. These confrontations can be made worse by the perfect constitutional storm of a signing statement that imposes a nonenforcement order, which in turn results in a nondefense order in litigation.

George Bush most dramatically diverted from his predecessors by issuing signing statements that “interpreted” statutes in ways that effectively amended or negated provisions. Ironically, one of the greatest critics of such statements was Barack Obama, who pledged to end the practice as unconstitutional. Yet, Obama would be criticized for not only continuing such statements but actually barring enforcement by agencies.

D. Nonenforcement Orders.

The three branches are set in a tripartite system designed to hold each in a type of Newtonian orbit. Under this system, no branch ideally has enough power to govern alone – they are forced into cooperative agreements and coexistence. Nonenforcement orders challenge this arrangement by imposing a type of presidential veto extrinsic to the legislative process. The legitimacy of such orders has long been challenged as an extraconstitutional measure.

Yet, since Thomas Jefferson, Presidents have asserted the discretion not to enforce laws that they deemed unconstitutional. Jefferson took a stand against the Sedition Act that was used for many blatant abuses against political enemies in the early Republic. Jefferson cited his oath to protect the Constitution compelling him to act to “arrest [the] execution” of the law at “every stage.”³⁹ Jefferson’s stand represented the strongest basis for nonenforcement in a law that was used against political opponents and free speech. However, many presidents object to the constitutionality of a law, often in defense of expansive views of executive power. Those presidential arguments have resulted in rejection before the Supreme Court – reaffirming objections that presidents are negating legislative authority in violation of the separation of powers.

Other presidents would follow suit, particularly in resisting claimed intrusions on executive authority. President Wilson refused to comply with a law barring his removal of postmasters without Senate approval. While three justices (including Brandeis and Holmes) dissented, the Administration prevailed in *Myers v. United States*.⁴⁰ However, presidents have also been wrong in such judgments. This was the case with Gerald Ford, who refused to enforce the 1974 amendment to the Federal Election Campaign Act of 1971, which placed legal limits on the campaign contributions. Ford vetoed the law on first amendment grounds, but Congress overrode the veto. Ford then refused to enforce

³⁹ Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 1 THE ADAMS-JEFFERSON LETTERS 274, 275-76 (Lester J. Cappon ed., 1959); see also Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613 (2008).

⁴⁰ 272 U.S. 52 (1926).

those provisions⁴¹ and then Robert Bork argued against the FECA provisions before the Court. However, the Court rejected Ford's arguments on that part of the law.⁴²

Likewise, Ronald Reagan refused to execute the Independent Counsel law on the grounds of separation of powers – an ironic position given his own refusal to respect a duly enacted law of Congress. The Supreme Court ruled 7-1 that Reagan was wrong in *Morrison v. Olson*.⁴³ In the same fashion, George H. W. Bush opposed affirmative action policies of the FCC only to be rejected in *Metro Broadcasting v. FCC*.⁴⁴ While this was in turn overruled in *Adarand Constructors, Inc. v. Peña*,⁴⁵ it was clearly a close constitutional question. For presidents to block enforcement of a law creates uncertainty as to the legitimacy and finality of enactments.

I cannot agree with Abner Mikva who claimed as White House Counsel for Clinton that it is “uncontroversial” that “the President may appropriately decline to enforce a statute that he views as unconstitutional.”⁴⁶ Mikva cites virtually nothing in terms of the text or intent of the Framers. Rather, he cites first and foremost the silence of the Court in cases like *Myers* where “the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute.”⁴⁷ This “implicit[] vindication” is cited by Mikva as proof of the authority to block the enforcement of federal statutes.⁴⁸

There has of course been obvious controversy over the right of a president to refuse to execute federal laws in light of express language requiring his faithful enforcement of such laws. Moreover, the allowance for nonenforcement orders undermines the express process of legislation detailed in Article I and Article II. Thus, a president like Clinton can sign the National Defense Authorization Act for Fiscal Year 1996, forego a constitutional veto, and then declare a constructive post-enactment veto in a signing statement. While I happened to agree with Clinton on his opposition of the mandatory discharge of HIV-positive service members, a conscious decision was made to sign the legislation under the expectation that he could achieve the same effect of a veto through a nonenforcement order. Of course, it did not have the same effect

⁴¹ Gerald Ford, Statement on the Federal Election Campaign Act Amendments of 1974 (Oct. 15, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4464#axzz2gIvcVm5z>.

⁴² *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴³ 487 U.S. 654 (1988).

⁴⁴ 497 U.S. 547 (1990).

⁴⁵ 515 U.S. 200 (1995).

⁴⁶ Memorandum for the Honorable Abner J. Mikva, Counsel to the President, Nov. 2, 1994 (found at <http://www.justice.gov/olc/nonexecut.htm>).

⁴⁷ *Id.*

⁴⁸ Not surprisingly, there has been a series of opinions out of the Executive Branch supporting a president's right to refuse to execute laws. For example, Attorney General Civiletti insisted that "*Myers* holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55, 59 (1980).

constitutionally. An actual veto would have resulted in additional congressional debate and a separate vote to override the veto. The nonenforcement order made the legislative process meaningless by negating the provisions in a post-enactment order.

III. NONENFORCEMENT POLICIES UNDER THE OBAMA ADMINISTRATION

From Internet gambling to educational waivers to immigration deportations to health care decisions, the Obama Administration has been unilaterally ordering major changes in federal law with the notable exclusion of Congress. Many of these changes have been defended as discretionary acts or mere interpretations of existing law. However, they fit an undeniable pattern of circumventing Congress in the creation of new major standards, exceptions, or outright nullifications. What is most striking about these areas is that they are precisely the type of controversial questions designed for the open and deliberative legislative process. The unilateral imposition of new rules robs the system of its stabilizing characteristics in dealing with factional divisions. While Attorney General Eric Holder has recognized that the judicial branch is “the final arbiter of ... constitutional claims,”⁴⁹ he appears less committed to the concept of the legislative branch’s inherent authority. The classic circumvention of the Faithful Executive Clause is to say that it necessarily is limited to only constitutional laws. However, this argument only begs the question of who determines the unconstitutionality of a law. If it is left to a President, any such law could be claimed as presumptively unconstitutional. Indeed, if a President views a law as unconstitutional, it is not clear why the President could not still refuse to enforce it. This inherent power is often reinforced by reference to the President’s oath to “preserve, protect, and defend” the Constitution – making the enforcement of a law deemed unconstitutional a violation of his oath – the Jeffersonian position on the Sedition Act.

Some academics posit that each branch has an interpretive function and that the President need not yield to the rivaling interpretation of Congress or even courts. As was recently argued in one law review, “the Constitution nowhere anoints any entity or branch as the final arbiter of the meaning of the laws or the Constitution.”⁵⁰ This view, however, challenges the stability achieved after *Marbury v. Madison*⁵¹ since it necessarily leads to a position that “[t]he Constitution never marks the Supreme Court supreme in its exposition of the Constitution over Presidents, Congress, the states, or the people.”⁵² This is a long-standing debate that is not without support given the absence of a clear statement in Article III making the Supreme Court the final arbiter in such disputes.⁵³ However, regardless of the debate over Chief Justice Marshall’s basis for his

⁴⁹ Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to Hon. John H. Boehner, Speaker of the House (Feb. 23, 2011) at 5.

⁵⁰ Devins & Prakash, *supra*, 112 Colum. L. Rev. at 526.

⁵¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁵² *Id.* at 529.

⁵³ *Id.* (“In sum, to imagine that the Constitution marks the Supreme Court as supreme in its exposition of the Constitution and laws of the United States, one has to believe two implausible propositions. One has to presume that a Constitution that never

holding, *Marbury* established a key stabilizing element by bringing finality to interpretive debates, particularly over controversies over the separation of powers. While the Administration avoids acknowledging the implications of its policy, it does inevitably challenge this foundational principle of judicial authority. The result is a view that not only allows the circumvention of the legislative powers but the negation of judicial review. That leaves such disputes to a matter of political strength and reduces the tripartite system to something akin to a continual game of chicken between branches.

While political divisions would normally be a reason to leave a matter to the legislative process to resolve, it is increasingly being cited as a rationale for circumventing Congress. Thus, citing gridlock and the failure to correct the law, President Obama has granted widespread waivers to states under the No Child Left Behind Act, effectively nullifying the law in the view of critics.⁵⁴ This has been denounced as a circumvention of Congress with the creation of new criteria or conditions by the Administration for schools to receive the waivers. This new system is entirely the product of an intrabranch process in circumvention of Congress. Likewise, the Administration effectively flipped the interpretation of the Wire Act, 18 U.S.C. § 1084, from years of prohibiting Internet gambling to a limited bar just on sports betting.⁵⁵ The interpretation effectively flipped the long-standing meaning of the federal law – an interpretation favored by many states and lobbyists in the industry. After years of maintaining a consistent interpretation, the 180 degree change transformed the Act into a vastly different law that potentially allowed billions of dollars’ worth of gambling operations on the Internet. While defensible as an interpretative function, it was a radical change made without congressional hearings or debate.

A different rationale was used for delaying enforcement of the employer mandate set by Congress in the Affordable Care Act. Once again, this remains one of the most important and divisive questions facing the political system. Yet, the Administration cited deference to agencies in implementing regulations and establishing standards for tax and other provisions. Despite having four years to implement the law and the statutorily-set deadline, the Administration insisted that Congress cannot hold agencies to such schedules. The law itself unambiguously sets January 1, 2014 as the critical date⁵⁶ – a matter of considerable debate within Congress during deliberations. There is no express power given to change that date. Yet, Mark J. Mazur, the Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, insisted that such mandatory dates can be

grants the Supreme Court a general power to decide all legal questions nonetheless cedes the Court a power to definitively answer such questions in some instances. And one has to discover, buried deep within the Constitution's interstices, an interbranch supremacy on constitutional and legal interpretation even though the Constitution contains nary a word hinting at such dominance.”)

⁵⁴ Motoko Rich, “No Child” Law Whittled Down By The White House, New York Times, July 6, 2012.

⁵⁵ Nathan Vardi, Department of Justice Flip-Flops On Internet Gambling, Forbes, Dec. 12, 2011.

⁵⁶ This date applies to the Employer Mandate (26 U.S.C. § 4980H) and the Individual Mandate (id. § 5000A). Pub. L. No. 111-148, 124 Stat. 119.

ignored by the Administration, which will unilaterally decide such questions.⁵⁷ It is another example of the new independence of the “Fourth Branch” and how specific mandates can now be disregarded in the haze of agency deference. The Congress could not have been more clear as to the activation date for the law, but the position of the Administration would make such provisions merely advisory and subject to the agreement of the President.

The Administration’s basis for negating statutory provisions lost even the pretense of reasoned authority in the immigration area.⁵⁸ There has long been a general consensus that a president cannot refuse to enforce a law that is considered constitutionally sound. Thus, in his general support for nonenforcement orders, former Attorney General Benjamin Civiletti acknowledged that “[t]he President has no ‘dispensing power,’” meaning that the President and his subordinates “may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.”⁵⁹ Yet, in June 2012, President Obama appeared to exercise precisely this type of “dispensing power” in issuing an order to federal agencies that the Administration would no longer deport individuals who came to this country illegally as children despite the fact that federal law mandates such deportation. In disregarding the statutory language, the Administration rolled out a new alternative policy that individuals can qualify for “deferred action” if they had come to the country before the age of 16, have no criminal history, resided in the U.S. for at least five consecutive years, and are either a student or have already graduated from high school, or earned an equivalent GED, or served in the military. Yet, this new, detailed system is the product not of Congress but the internal deliberations of a federal agency. While claimed to simply be an act of prosecutorial discretion,⁶⁰ it constitutes a new and alternative immigration process for these individuals.

The Administration again circumvented Congress in August of this year with the announcement that deportation would no longer occur for any primary provider for any

⁵⁷ Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, U.S. Department of the Treasury, July 2, 2013 (available at <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>).

⁵⁸ There was also an immigration component of the controversy over DOMA. Peter Baker, *For Obama, Tricky Balancing Act in Enforcing Defense of Marriage Act*, New York Times (Mar. 28, 2013). Before the ruling of the Supreme Court striking down DOMA, the Department of Homeland Security announced that it would no longer enforce DOMA in its immigration decision. In August 2011, Obama’s DHS announced it would no longer deport the noncitizen spouses of gay Americans in conflict with DOMA.

⁵⁹ The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (opinion of Attorney General Civiletti).

⁶⁰ Memorandum of Janet Napolitano, Secretary of Homeland Security, June 15, 2012, (available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>).

minor child or the parent or guardian of a child who is a U.S. citizen or legal permanent resident. Once again, it is not clear what Congress could do to counter such claims of discretion any more than it could set the date for the implementation of the ACA. The federal law mandates deportation for individuals in the country illegally. While prosecutorial discretion has been cited in individual case decisions, the Administration was using it to nullify the application of federal law to hundreds of thousands, if not millions of individuals. Once again, one's personal view of the merits of such an exception should not be the focus, or even a part, of the analysis. In ordering this blanket exception, President Obama was nullifying part of a law that he simply disagreed with. There is no claim of unconstitutionality. It is a raw example of the use of a "dispensing power" over federal law. It is difficult to discern any definition of the faithful execution of the laws that would include the blanket suspension or nullification of key provisions. What the immigration order reflects is a policy disagreement with Congress. However, the time and place for such disagreements is found in the legislative process before enactment. If a president can claim sweeping discretion to suspend key federal laws, the entire legislative process becomes little more than a pretense. What is most striking is the willingness of some to accept this transparent effort to rewrite the immigration law after the failure to pass the DREAM Act containing some of the same reforms.

A few weeks ago, President Obama again invoked his inherent power in declaring that individuals with pre-existing policies could retain those policies for a year despite the fact that they do not conform with the requirements of the ACA.⁶¹ The ACA expressly sets the date for compliance that penalizes non-exempt individuals who do not maintain "minimum essential" health insurance coverage.⁶² Those non-compliant individuals are subject to a "[s]hared responsibility payment."⁶³ By saying that states can allow individuals to remain non-compliant after the statutory deadline, President Obama inserted a constructive exemption that would have been the subject of intense political debate at the time of the deliberations.

Notably, the unilateral change occurred when legislation addressing this issue was being debated in Congress. Moreover, this change was made after an outcry over what many viewed as the central selling point of the President's during the debate over the ACA: suggesting that, if people liked their current policies, they would be allowed to keep them. After securing passage of the ACA, however, on a thin vote margin, many accused the President of a bait-and-switch when millions lost their policies. I will leave others to work through the merits of that controversy. For my purposes, I am only interested in the fact that a key issue discussed during the debate over the legislation was unilaterally altered after passage. This is an obviously important part of the debate. The law does not expressly give the President the authority to waive the application of the provisions for selected groups. To the extent that the President was claiming that he had the authority to amend the law in this way, I fail again to see the legal basis for such authority.

Notably, the unilateral changes made to laws like the ACA are not done (as with

⁶¹ Juliet Eilperin, Amy Goldstein and Lena H. Sun, *Obama Announces Change To Address Health Insurance Cancellations*, Wash. Post, Nov. 14, 2013.

⁶² 26 U.S.C. § 5000A.

⁶³ 26 U.S.C. § 5000A(b).

Jefferson's refusal to enforce the Sedition Act) in defiance of an act viewed as unconstitutional and abusive. Rather, President Obama has invoked a far broader authority to tailor laws based on his judgment and discretion. This may be done ostensibly to "improve" the law as with the one-year waiver for individual policies or to mitigate the hardship of a law as with the immigration law. These happen to be areas of great political division in the country as well as substantial opposition to the President's policies in Congress. Many applauded the President's transcending politics by ordering such unilateral action without considering the implications of such inherent authority for the system as a whole.

Once again, it is important to divorce the subject of such legislation or the identity of the president from the constitutional analysis. The circumvention of the legislative process not only undermines the authority of this branch but destabilizes the tripartite system as a whole. If President Obama can achieve the same result of legislation by executive fiat, future presidents could do the same in negating environmental or discrimination or consumer protection laws. Such practices further invest the Administrative State with a degree of insularity and independence that poses an obvious danger to liberty interests protected by divided government. This danger is made all the more menacing by the clear assumption by the Executive Branch that artificially narrow standing rules will insulate the orders from judicial scrutiny and relief. With Congress so marginalized and courts so passive, the Fourth Branch threatens to become a government unto itself for all practical purposes.

IV. CONCLUSION

In Federalist No. 51, James Madison explained the essence of the separation of powers – and the expected defense of each branch of its constitutional prerogatives and privileges:

"But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

A provision was once made for the defense of this branch against the type of "encroachments" discussed in this hearing. It was found in the power of Congress to establish federal law and the obligation of the Executive Branch to faithfully execute those laws. For decades, however, Congress has allowed its core authority to drain into a fourth branch of federal agencies with increasing insularity and independence. It has left Congress intact but inconsequential in some disputes. If this trend continues unabated, Congress will be left like some Maginot Line on the constitutional landscape – a sad relic of a once tripartite system of equal branches.

There remain legitimate questions over when a President can refuse to defend or enforce a statute and whether the former duty is a subset of the latter duty. As an academic deeply concerned over the concentration of power under the modern presidency,

I tend to minimize such authority in favor of a more formalist division of powers.⁶⁴ Functionalists take a clearly more fluid approach to such powers. However, I do not view the recent controversies as “close questions.” The actions of the Obama Administration challenge core principles of the separation of powers and lack meaningful limiting principles for future executive orders.

Clearly, these are times of bitter and intractable divisions between the parties. It is not the first time such divisions have emerged in Congress. However, Madison and others believed that petty partisanship would ultimately yield to common institutional interests when faced with the “danger of attack.” After all, members have a common article of faith. It is Article I of the Constitution and the words “All legislative powers herein granted shall be vested in a Congress of the United States.”

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⁶⁴ See generally Turley, *Age of Regulation*, *supra*.