OLD LAWS, NEW MEANINGS: OBAMA'S BRAND OF PRESIDENTIAL "IMPERIALISM"

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INTRODUCTION

The cover seemed to be draped in mourning, drenched in funereal black—evoking, its authors hoped, the darkness of tyranny. Inside, the report sought to document the "pattern of overreach by the Executive Branch" under President Barack Obama, amounting to a "break-down in the rule of law" raising "significant constitutional concern."[1]

But while the document and its specific examples were new, its theme was practically antique. Indeed, House Majority Leader Eric Cantor (R-VA) did not have to search far for a title: the trope he wanted was ready to hand. That title, almost inevitably, was *The Imperial Presidency*.

The phrase itself, of course, came from Arthur Schlesinger, Jr.'s iconic indictment of the Vietnam and Watergate era presidents.[2] But even Schlesinger's work invoked earlier disputes about the potentially worrisome scope of presidential power: both at the Constitutional Convention and during the ratification debates, critics prophesied of the literal transformation of president into emperor. "[Y]our posterity,"

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1. ERIC CANTOR, OFFICE OF THE HOUSE MAJORITY LEADER, THE IMPERIAL PRESIDENCY: AN UPDATE i (2014).

2. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1 (1973).

warned the pseudonymous antifederalist Cato in 1787, may well find "a Caesar, Caligula, Nero, and Domitian in America."[3] It captured, too, a sense of territory annexed, of borders crossed—here, between the branches. Imperial presidents sought to gain ground against other political actors, to shape governmental policy according to their own preferences without the pesky compromises required by checks and balances.

Cantor's report, then, chronicled a new set of skirmishes along an old inter-branch frontier. In the months leading up to the 2012 election, Obama embraced unilateralism as a means of evading legislative gridlock: "[W]e can't wait for an increasingly dysfunctional Congress to do its job," he told a Las Vegas crowd in the fall of 2011.[4] "Where they won't act, I will."[5] By the summer of 2012, that impatience had aggregated into forty-plus executive initiatives, ranging from cutting lending fees on government-backed mortgages to the creation of a new national park in Virginia, to more controversial changes regarding immigration and education. After his reelection, Obama returned to the fray, lamenting his becalmed legislative agenda. "[T]here are areas where there obviously have been some frustrations, where I wish Congress had moved more aggressively," he noted in late 2013.[6] "[B]ut even when Congress doesn't move on things they should move on, there are a whole bunch of things that we're still doing."[7] Obama went on to call for a "year of action," pointing out that "I've got a pen and I've got a phone, and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward."[8]

Obama's political opponents reacted largely with fury. Cantor's

3. "CATO," LETTERS V AND VII, N.Y. J. (Nov. 22 & 27, 1787), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 317, 319 (Ralph Ketcham ed., 1986).

4. Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3, 3 (2014) (quoting Matt Compton, *We Can't Wait: President Obama in Nevada*, WHITE HOUSE (Oct. 24, 2011), http://www.whitehouse.gov/blog/2011/10/24/we-cant-wait-president-obama-nevada).

5. *Id.*

6. Barack Obama, President, U.S., Press Conference by the President at the James S. Brady Press Briefing Room (Dec. 20, 2013), http://www.whitehouse.gov/the-press-office/2012/12/20/press-conference-president.

7. *Id.*

8. Ben Goad, *Boehner: Obama "Also Has a Constitution,"* THE HILL (Jan. 16, 2014, 3:07 PM), http://thehill.com/regulation/pending-regs/195724-boehner-obama-also-has-a-constitution; Ben Goad, *Obama Vows More Executive Action*, THE HILL (Jan. 14, 2014, 1:29 PM), http://thehill.com/video/administration/195396-obama-vows-more-executive-action.

report was updated, with a new and outraged preface; Rep. Jim Gerlach (R-PA) complained of an "unparalleled use of executive power."[9] Sen. Ted Cruz (R-TX), in a *Wall Street Journal* op-ed piece, griped that there was "simply no precedent" for such "lawlessness."[10] Speaker John Boehner (R-OH) urged that the House sue the president over his actions ("I would remind the president . . . [w]e have a system of government here, and a system of laws")[11] and endorsed the STOP resolution, short for "Stop This Overreaching President."[12]

Meanwhile, Obama's allies stressed Obama's relative reticence in this area compared to his predecessors and accused Congress, in turn, of partisan extremism. One columnist complained: how could the House sue "a President who has literally done not only what every president before him has done but has done it less often"?[13] White House Senior Advisor Dan Pfeiffer stressed that Obama was "issuing executive orders at the lowest rate in 100 years,"[14] a statistic Obama himself cited in July 2014.[15] A few months later, Obama added that "[t]he history is that I have issued fewer executive actions than most of my predecessors, by a longshot . . . . [T]ake a look at the track records of the modern

9. *Enforcing the President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. On the Judiciary*, 113th Cong. 113-63 (2014) (testimony of Hon. Jim Gerlach, H.R.).

10. Ted Cruz, Commentary, *Ted Cruz: The Imperial Presidency of Barack* Obama, WALL ST. J., (Jan. 28, 2014, 6:57 PM), http://www.wsj.com/articles/SB10001424052702304632204579338793559838308; *see* Andrew Rudalevige, *The Letter of the Law: Administrative Discretion and Obama's Domestic Unilateralism*, 12 THE FORUM 29, 30 (2014) (quoting Benjamin Bell, *Rep. Paul Ryan: Obama Presidency 'Increasingly Lawless'*, ABC NEWS (Feb. 2, 2014), http://abcnews.go.com/blogs/politics/2014/02/rep-paul-ryan-obama-presidency-increasingly-lawless).

11. Goad, *supra* note 8.

12. Jake Sherman, *Boehner: House Moving Toward Suit on Obama's Immigration Steps*, POLITICO (Jan. 27, 2015, 11:50AM), http://www.politico.com/story/2015/01/john-boehner-immigration-lawsuit-obama-114635.

13. Sally Kohn, *Dear Speaker Boehner: Do Your Job Instead*, CNN (July 6, 2014, 2:14 PM), http://www.cnn.com/2014/07/06/opinion/kohn-john-boehner-nonsense/index.html.

14. Benjamin Bell, *Pfeiffer: Boehner May Have the Gavel, But Cruz Has the Power*, ABC NEWS (Aug. 3, 2014, 1:42 PM), http://abcnews.go.com/blogs/politics/2014/08/pfeiffer-boehner-may-have-the-gavel-but-cruz-has-the-power.

15. Barack Obama, President, U.S., Press Conference on the Economy at Paramount Theatre, Austin, TX (July 10, 2014), https://www.whitehouse.gov/the-press-office/2014/07/10/remarks-president-economy-austin-tx; *see also* Glenn Kessler, *Claims Regarding Obama's Use of Executive Orders and Presidential Memoranda*, WASH. POST: FACT CHECKER (Dec. 31, 2014), http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/31/claims-regarding-obamas-use-of-executive-orders-and-presidential-memoranda/ (citing Interview by George Stephanopoulos with Barack Obama, President, U.S. (Nov. 23, 2014), http://abcnews.go.com/blogs/politics/2014/11/full-interview-transcript-president-obama-on-this-week/).

presidency, I've actually been very restrained."[16] A recent scholarly analysis likewise cited an "emerging consensus" that the president was a "diffident unilateralist."[17]

Which, if either, is right? Is Obama "imperial," and if so, is his "imperialism" different than his predecessors? This Article will assess Obama's actions in the unilateral arena, focusing on the subjects most controversial to his congressional antagonists but also taking note of the war powers. The next Section briefly outlines presidential relations with Congress, relations that often elicit incentives to act unilaterally. The Article then traces the development of an administrative state that enhances those incentives, and details Obama's contribution to the development of the "administrative presidency" developed as a result. I suggest that Obama has aggressively stressed statutory interpretation as a means of implementing laws old and new in line with his own policy preferences. But this is a difference in degree, not in kind. Past presidents provided the template; Obama used it, and pushed at its edges; presidents after Obama will be guided by its possibilities as well.

I. PRESIDENTS AND CONGRESS: "EVERYBODY BELIEVES IN DEMOCRACY UNTIL . . ."

"Congress meets—too bad too," Harry Truman confided to his diary, as the legislators he would soon malign as "do-nothing" came into session in early 1948.[18] "They'll do nothing but wrangle, pull phony investigations and generally upset the affairs of the Nation."[19]

Most presidents feel this way, most of the time. As longtime Senator John Warner (R-VA) put it: "Every president, as he leaves the Capitol steps and gets into his limo [after his inauguration], is calculating, 'How soon can I put that place behind me?'"[20] Despite the images of presidential ascendance that have entered the conventional wisdom, from Lyndon Johnson's famous "treatment" to George W. Bush's bullhorn address from atop the rubble of the World Trade

16. Interview by George Stephanopoulos with Barack Obama, President, U.S. (Nov. 23, 2014), http://abcnews.go.com/blogs/politics/2014/11/full-interview-transcript-president-obama-on-this-week/.

17. Graham G. Dodds, Associate Professor, Department of Political Science, Concordia University, Paper Presentation at the Annual Meeting of the American Political Science Association: Loud Bark, Little Bite: President Obama's Unilateral Directives 11 (Sept. 4, 2015).

18. ROBERT H. FERRELL, ED., OFF THE RECORD: THE PRIVATE PAPERS OF HARRY S. TRUMAN 122 (1997).

19. *Id.*

20. Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES MAG., Nov. 9, 2008, at 42, 49.

Center, when it comes to passing legislation the chief executive's sway over Congress is normally more entreaty than edict.[21] To the extent that presidents are successful in this regard, they must usually rely on legislators of their own party. In the heavily Democratic 111th Congress of 2009–2010, Barack Obama won close to ninety percent of the House roll call votes on which he took a position.[22] But in 2011, after Republicans won a House majority, that figure dropped to thirty-one percent.[23] Obama's famous rhetorical skills proved unable to persuade those inclined against him; as the Victorian-era British Prime Minister Benjamin Disraeli once observed, "a majority is . . . the best repartee."[24]

Facing these constraining realities, presidents have not always accepted that the creation of policy by legislative means should trump their own abilities to do the same by executive action. As a presidential aide once told political scientist Thomas Cronin, "[e]verybody believes in democracy until he gets to the White House."[25] At that point unilateralism begins to look rather promising.

In 2004, for example, George W. Bush spoke to a group about trying to change the law to facilitate government contracting with religious organizations. "I got a little frustrated in Washington because I couldn't get the bill passed out of the Congress," the President said.[26] "They were arguing *process*."[27] Bush, though, had an answer to the tedious "process" that meant "Congress wouldn't act."[28] He had gone around legislators by issuing an executive order.[29] In short, he said, he could "[do] it on [his] own."[30] It would not be the only time: certainly not for Bush, but not for the presidency, either. Given the institutional limits on presidential power—not least, a Constitution that gives the

21. Andrew Rudalevige, *The Executive Branch and the Legislative Process*, *in* THE EXECUTIVE BRANCH 419, 419, 435 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

22. Andrew Rudalevige, *"A Majority is the Best Repartee": Barack Obama and Congress, 2009-2012*, 93 SOC. SCI. Q. 1272, 1277 (2012).

23. *Id.* at 1285.

24. *Id.* at 1279–80 (citing BENJAMIN DISRAELI, TANCRED OR THE NEW CRUSADE 145 (1927)).

25. Thomas E. Cronin, *"Everybody Believes in Democracy Until He Gets to the White House . . ."*: *An Examination of White House-Departmental Relations*, 35 L. & CONTEMP. PROBS. 573, 574 (1970).

26. George W. Bush, President, U.S., Remarks at the White House Conference on Faith-Based And Community Initiatives in Los Angeles, California (Mar. 3, 2004), http://www.presidency.ucsb.edu/ws/?pid=62778.

27. *Id.* (emphasis added).

28. *Id.*

29. Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

30. George W. Bush, *supra* note 26; *see also* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001); Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

president few explicit grants of unchecked authority, nor much ability to command congressional compliance—presidents have long sought to build up resources that enable them to make policy on their own and bypass Capitol Hill.[31] Even if Congress objects to presidential action, presidents (as single actors) have a structural edge over their co-equal but divided branch, reliant as it is on collective action. As Alexander Hamilton shrewdly noted in 1793, "the Executive in the exercise of its constitutional powers, may establish an antecedent state of things" which shapes the policy terrain other political actors must cross.[32] Congress may be the first branch, but it does not usually get to make the first move.[33]

Over time, through generous interpretations of Article II's vesting clause and their duties as commander-in-chief of the armed forces, through creative extension of their charge to "faithfully execut[e]" the laws,[34] and through their ability to set the national agenda as the first mover,[35] presidents have stocked the White House toolbox with executive powers, piece by piece. "Modern presidents have attempted to strengthen their capacity to achieve political and policy objectives . . . through the bureaucracy rather than navigating a complex system of separated powers."[36] Put another way, the growth of an administrative state has bequeathed an administrative presidency.

II. THE ADMINISTRATIVE STATE AND THE ADMINISTRATIVE PRESIDENCY

The relationship of the president to the bureaucracy is not well-defined in the Constitution, and there is very little mention of a wider executive branch in that document in any case. Article II's vesting clause assigns the otherwise undefined "executive Power" to "a President of the United States."[37] It goes on to assign the responsibility of the president to "take Care that the Laws be faithfully executed" and lays out his power to make appointments (subject to the advice and consent of the Senate), fill vacant posts, and "require the Opinion, in

31. THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY (George C. Edwards, III, & William Howell eds., 2009).

32. ALEXANDER HAMILTON, PACIFICUS NUMBER I (1793), *reprinted in* ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 19, 24 (Morton J. Frisch ed., 2007).

33. *See id.*; *see also* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUDS. Q. 850, 851 (1999).

34. U.S. CONST. art. II, § 3.

35. Moe & Howell, *supra* note 33, at 856.

36. Lowande & Milkis, *supra* note 4, at 5.

37. U.S. CONST. art. II, § 1, cl. 1.

writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[38] This last provision at least contemplates both executive departments and a managerial hierarchy topped by the president. There is no implication that he is bound to follow the advice of those "principal officers" nor that they form any sort of presidency by committee (as some of the framers would have preferred).[39]

Arguments over what the executive power might constitute started in the Washington Administration (e.g., over the Neutrality Proclamation of 1793) and have continued ever since. Did the executive power—as Theodore Roosevelt would later argue in his autobiography—allow presidents to do more or less anything, so long as it was not expressly forbidden in the Constitution or the laws? Supreme Court Justice James McReynolds sarcastically commented in 1926 that if such "illimitable" power existed, it seemed rather odd that the Framers bothered to haggle over the need to grant that executive the authority to ask for memos from his subordinates.[40] Even James Wilson of Pennsylvania, an advocate of a strong executive, noted at the Constitutional Convention that "[t]he only powers he conceived strictly Executive were those of executing the laws, and appointing officers."[41]

In the early United States, the role of the federal government was generally limited. The executive power was constrained by the limited reach of the executive branch. After the Civil War, though, and especially in the twentieth and twenty-first centuries, exactly what Wilson sought to downplay rose dramatically in importance.[42] Since the 1930s, the American national state has expanded dramatically, prodded by wars—hot and cold—economic depression, civil rights, and bipartisan regulatory zeal. This has enhanced presidential opportunities to utilize administrative strategies seeking to control the bureaucracy and shape policy implementation.

One of those stems from Wilson's second aspect of power: appointing officers. From the late 1920s to the late 1930s, the number of

38. U.S. CONST. art. II, § 2, cl. 1, 3.

39. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 268–69 (1996) (stating that George Mason was a leading advocate of a plural presidency).

40. Myers v. United States, 272 U.S. 52, 207 (1926).

41. THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY xxii (David Gray Adler & Michael A. Genovese eds., 2002).

42. *See generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (Cambridge Univ. Press 1982).

civilians employed by the federal government nearly doubled to just under a million people.[43] The Second World War boosted this figure far higher, on the civilian as well as the military side.[44] In 2014, the executive departments and agencies housed some 4.1 million civilian and military personnel.[45] These figures do not include workers paid for by government grants or those contracted as third parties to do government work.[46] If included these would bring what Paul C. Light calls "the true size of government" far higher—by one count to an astounding 14.6 million persons.[47]

All of these people, on paper at least, report to the president. But clearly no single individual can do anything like manage this mass of personnel. Presidents have reacted in two ways. On the one hand, they have increased the size of their own, centralized staff—the Executive Office of the President (EOP) has grown to around 1500 staff in its own right, 900-plus in the White House proper and much of the rest in the Office of Management and Budget (OMB), with an expanding roster of "czars" who help coordinate specific policy areas across multiple departmental jurisdictions.[48] On the other, they have paid increased attention to the wide range of political appointments within their putative control.[49] Presidents have consistently worked to pull appointees away from the sway of party patronage and to bring them within their own purview.[50] They have built up a permanent office of presidential personnel as part of the White House in search of executive branch appointees loyal to their preferences and goals, including lower-level appointees whose selection was once delegated to cabinet secretaries. The broad hope for presidents is to (as one George W. Bush

43. SOLOMON FABRICANT ASSISTED BY ROBERT E. LIPSEY, THE TREND OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900 182–83 (1952).

44. *Id.* at 172.

45. U.S. OFFICE OF PERSONNEL MGMT, HISTORICAL FEDERAL WORKFORCE TABLES: TOTAL GOVERNMENT EMPLOYMENT SINCE 1962, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/ (last visited Dec. 12, 2015).

46. *Id.*; *see also* Christopher Lee, *Big Government Gets Bigger*, WASH. POST (Oct. 6, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/05/AR2006100501782.html (reporting Paul Light's figures).

47. Lee, *supra* note 46.

48. MITCHEL A. SOLLENBERGER & MARK J. ROZELL, THE PRESIDENT'S CZARS (2012); *see also* JUSTIN S. VAUGHN & JOSE D. VILLALOBOS, CZARS IN THE WHITE HOUSE: THE RISE OF POLICY CZARS AS PRESIDENTIAL MANAGEMENT TOOLS (2015).

49. *See generally* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008).

50. SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL (1993).

aide put it) "implant their DNA throughout the government."[51] Indeed, Bush was particularly energetic in this regard: great care was taken to install presidential loyalists across and deep within the executive branch, extending even to the General Services Administration—the agency that deals with cleaning federal buildings and organizing the motor pool—and the civil rights division within the Justice Department.[52] Bush also extended ongoing structural changes in the Federal Civil Service.[53] In the 2000s, new personnel systems were created in the Department of Homeland Security and within the Department of Defense, greatly enhancing executive flexibility over pay, performance, and discipline for some 900,000 employees.[54]

The growth in executive branch personnel, of course, reflected the growth in the size and scope of the U.S. government generally—into broad social welfare and economic management functions—not to mention a broadly globalized role in the postwar military and economic orders. The sheer number of laws and the institutionalization of regulatory and national security states enhanced the discretion bureaucrats had to shape policy at the most tangible level. "[I]n a complex, technologically advanced society in which the role of government is pervasive," Nathan observed, "much of what we would define as policymaking is done through the execution of laws in the management process."[55] That meant management and administration became critical functions. And that, in turn, highlighted the Article II mandate (and Wilson's observation) that the president "take care that the laws be faithfully executed."[56]

Fidelity in this function has often been in the eye of the beholder. If nothing else, presidents have many laws to choose between—some of them contradicting others, and many more sitting in the statute books

51. Mike Allen, *Bush to Change Economic Team*, WASH. POST (Nov. 29, 2004), http://www.washingtonpost.com/wp-dyn/articles/A18599-2004Nov28.html; *see also* Dana Milbank, *Bush Seeks to Rule the Bureaucracy: Appointments Aim at White House Control*, WASH. POST (Nov. 22, 2004), http://www.washingtonpost.com/wp-dyn/articles/A18599-2004Nov28.html; LEWIS, *supra* note 49; THOMAS J. WEKO, THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994 (1994).

52. *See* Andrew Rudalevige, *"The Decider": Issue Management and the Bush White House*, *in* THE GEORGE W. BUSH LEGACY 135 (Colin Campbell et al. eds., 2008); CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2008).

53. LEWIS, *supra* note 49.

54. *Id.* Such stratagems may incur their own costs. *See* George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRESIDENTIAL STUDS. Q. 74, 74–76 (2009).

55. RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY 82 (1983).

56. *See* U.S. CONST. art. II, § 3.

awaiting rediscovery. For instance, the power to declare "national monuments" as a means of land conservation came from a 1906 law.[57] Further, complex substantive debates tend to generate complex statutes: the No Child Left Behind Act (NCLB) of 2001 required 670 pages,[58] while the Affordable Care Act (ACA) of 2010 ran to more than 900.[59] Their contents contained varieties of vagueness, drafting errors, and any number of unintended consequences. Maneuvering a bill through Congress requires almost by definition some degree of ambiguity, so as to allow all sides to point to the same language as supporting their ideals. That means that the specifics of policy implementation are often up for grabs, giving presidents the chance to put in place their preferred version of a statute's concrete meaning.

Frequently, this discretion is granted directly via congressional delegation. In NCLB, for instance, how was the broad notion of "accountability" to be defined in practice? In the ACA, what did insurance plans need to cover to comply with the law? These details were not in the statutes themselves. Given the difficulty of passing laws and the multiplicity of circumstances to which they must apply, it rarely makes sense to try to anticipate every possible outcome in legislative language. Thus, executive departments and agencies are routinely delegated power to promulgate regulations specifying how a given law will work in practice. Statutes also frequently grant waiver authority, allowing presidents or departmental secretaries to suspend provisions of the law under certain conditions. Such authority aggregates with the U.S. Code itself. As Martha Derthick observed in chronicling 1990s efforts to use the 1938 Food and Drug Act to regulate nicotine levels in cigarettes, "[m]uch of the activity of American policymaking consists of attempts not to pass new laws but to invest old ones with new meanings."[60]

A variety of unilateral administrative instruments have been developed to direct bureaus to implement the law in a certain way—to find those "new meanings."[61] (And obviously, following from the

57. Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (1906) (codified at 54 U.S.C. § 320301 (2014)).

58. No Child Left Behind Act, PUB. L. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 (2012)).

59. Patient Protection and Affordable Care Act, PUB. L. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 (2012)).

60. MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 56 (3rd ed. 2011); *see generally* Phillip A. Wallach, *When Can You Teach an Old Law New Tricks?*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 689 (2013).

61. DERTHICK, *supra* note 60.

discussion above, it helps to have loyalists in place across the executive branch to follow those directives.) Generally, executive orders get the most attention; they have the dual virtues of being substantively important and easy to track, since the vast majority are published in the *Federal Register*.[62] However, the number of formal executive orders issued has declined since a huge surge during the New Deal and World War II.[63] While 573 orders were issued in 1933, that fell to 80 in 1953 and 62 in 1963.[64] The average number in the past decade was just 30.7.[65]

Taking up the slack have been other kinds of unilateral presidential directives (UPDs). In one Nixon Administration memo, the family of UPDs was described as comprising executive orders, proclamations, presidential memoranda, and "Executive instructions issued by elements of the Executive Office of the President or designated federal agency officials to implement Presidential or legislative initiatives."[66] More broadly, a 2008 Congressional Research Service report listed twenty-three types of unilateral directives, including not only the well-known variants of executive orders and presidential proclamations but also various formal findings, designations, letters, memoranda, and a wide range of national security orders.[67] Signing statements are also worth noting. These occur when presidents use the occasion of signing a bill into law to append instructions to agencies, or claims regarding their intention, to enforce certain sections of the bill. These received renewed attention during the George W. Bush Administration because of his

62. *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 71 (2001); ADAM WARBER, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY 136 (2005).

63. MAYER, *supra* note 62, at 70–71 (2001).

64. U.S. Nat'l Archives & Records Admin., *Executive Orders Disposition Tables Index*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/executive-orders/disposition.html (last visited Dec. 12, 2015).

65. U.S. Nat'l Archives & Records Admin., *Executive Orders Disposition Tables Index, Administration of Barack Obama (2009-present)*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/executive-orders/obama.html (last visited Dec. 12, 2015); U.S. Nat'l Archives & Records Admin., *Executive Orders Disposition Tables Index, Administration of George W. Bush (2001–2009)*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/executive-orders/wbush.html (last visited Dec. 12, 2015).

66. Letter from Karl E. Bakke, Gen. Counsel, Dep't of Commerce, to Stanley Ebner, Gen. Counsel, Off. of Mgmt & Budget 1 (Sept. 20, 1973) (on file with the National Archives and Records Administration, College Park, MD).

67. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 3–16 (2008); *see also* GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS 6 (2013); PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 2 (Univ. Press of Kan. 2d ed. 2014).

extensive use of them to assert his authority over a "unitary executive" branch.[68] Signing statements, as Bush staffer Brad Berenson observed, served as "a way to advance executive power through [the] inner alleyways" of bureaucratic combat.[69]

Elena Kagan's *Presidential Administration*,[70] based on her experience on President Clinton's Domestic Policy Council staff, centered instead on the use of presidential memoranda to agencies. One use of those memoranda, given Bill Clinton's "assertion of personal ownership over regulatory product," was for the proactive prodding of departmental rulemaking.[71]

Indeed, rulemaking generally is a key aspect of the administrative presidency. As noted above, the power to promulgate regulations is an important means of translating a vague statute into a substantive outcome. Presidents would like that outcome to reflect their preferences, but rulemaking power is normally vested in a department or agency, not the White House. Thus, since the 1970s, presidents have sought to extend their reach over agencies' regulatory agendas.[72] Using OMB to centralize the review of proposed major regulations, Presidents Nixon, Ford, and Carter directed agencies to consider the inflationary impact and cost-benefit ratio of new regulations, but applied no sanctions.[73] Ronald Reagan took a more aggressive tack, stating flatly via executive order that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society"[74] and giving OMB's new Office of Information and Regulatory Affairs (OIRA) the power to recommend that regulations be withdrawn if they could not be reformulated to meet its objections. OIRA's Director, James Miller, noted in a 1981 internal memo that previous efforts "did not make much of an inroad into the substance of

68. Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRES. STUD. Q. 248, 262–63 (2008).

69. SAVAGE, *supra* note 52, at 236. Note that the Reagan staff working on this issue anticipated the potential for this broader impact, though that Administration's main concern was to make signing statements part of the legislative record for use in shaping jurisprudence. Ralph Tarr, acting head of the Office of Legal Counsel, suggested in 1985 that signing statements were "presently underutilized and could become far more important as a tool of Presidential management of the agencies." *Id.* at 233.

70. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

71. *Id.* at 2250. Indeed, Kagan argues it was her then-boss who truly "treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done." *Id.* at 2281.

72. *Id.* at 2274.

73. *Id.* at 2275–76.

74. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

regulations (it was 'business as usual'). Our program will . . . for the first time, make real changes in the substance."[75] Its success in so doing was such that every president since has utilized a similar process. Clinton, as suggested above, showed that regulatory review could be used not only to limit the scope of regulation but to expand it.[76] George W. Bush, by contrast, charged OIRA with newly skeptical analysis of what constituted the costs and benefits of agency action, bolstering its scope with a second term executive order (E.O. 13422),[77] adding internal "guidance documents" to the regulatory materials requiring centralized review, and mandating that a new political appointee sign off on anything included in an agency's annual rulemaking plan.[78] This emphasis on influencing statutory interpretation, and thus the practicalities of implementation, was particularly strong after Democrats regained congressional majorities in the 2006 elections. As John Graham (who headed OIRA during Bush's first term) noted, "[c]reative lawyers can find lots of lawful ways for a determined president to advance an agenda."[79]

III. OBAMA AND THE ADMINISTRATIVE PRESIDENCY

We can now assess Obama's fit on this trend line. Were his executive actions "unparalleled" or "without precedent," as his fiercest critics claimed? Or was the shift actually in the other direction, towards a "restrained," constrained unilateral agenda, as the president and his loyalists insisted?

The short answer to both questions is, quite clearly, no. Despite his early rhetoric disclaiming unilateralism, Obama fully inhabited the institutional structure of the administrative presidency he inherited from his predecessors, and their reliance on "creative lawyers" to boot. In some areas, he built extensions on their work. In general, though, these were changes in degree and not in kind.

Obama did not show much interest in management of the executive branch, per se—the centralized "presidential management agenda" put

75. Memorandum from Jim Miller, Adm'r, Off. of Info. & Regulatory Affairs, Off. of Mgmt. & Budget, to Ed Harper, Deputy Director, Off. of Mgmt. & Budget, on Regulatory & Legal Devs. (Jan. 27, 1981) (on file with National Archives and Records Administration, College Park, MD); *see also* LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 106–08 (Stephen M. Sheppard ed., 2014).

76. Kagan, *supra* note 70, at 2315–16.

77. *See* Curtis W. Copeland, *Executive Order 13422: An Expansion of Presidential Influence in the Rulemaking Process*, 37 PRESIDENTIAL STUD. Q. 531 (2007).

78. *See* Rudalevige, *supra* note 52, at 139–45.

79. Rebecca Adams, *Lame Duck or Leapfrog?*, 65 CQ WKLY. 450, 450 (2007).

in place during the Bush Administration was soon dismantled, and there seemed to be little proactive White House attention to bureaucratic missteps ranging from the Department of Veterans Affairs to the Office of Personnel Management.[80] And it is true that Obama had seemed an unlikely unilateralist. In his first week in office, he did an odd thing for a president: he renounced precedent that gave his office power, setting aside a series of legal opinions from the Bush Justice Department's Office of Legal Counsel (OLC) that had asserted extraordinary emergency powers for the president at home and abroad.[81]

But at the same time Obama was very interested in using the power of the administrative state to effect policy change, in both domestic and foreign policy. As a candidate, he had argued "it is appropriate to use signing statements to protect a president's constitutional prerogatives."[82] Yet he also promised that he would "not use signing statements to nullify or undermine congressional instructions as enacted into law";[83] that pledge would not, and could not, survive the actual issuance of such a statement. Further, despite his critiques during the 2008 campaign of the Bush Administration's conduct in the War on Terror, he had voted in the Senate to reauthorize the PATRIOT Act and for the 2008 FISA Amendments Act legalizing the National Security Agency's (NSA's) warrantless surveillance program.[84] Especially with the large-scale statutory shifts of 2009–2010 in place, much work remained to fill in the legislative blanks with regulation and implementation. "[T]he next phase," Obama political aide David Axelrod noted in 2010, "is . . . less about legislative action than it is about managing the change that we've brought about."[85] The Administration was keen to stress that—in

80. EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. & BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA FISCAL YEAR 2002 (2002), https://www.whitehouse.gov/sites/default/files/omb/budget/fy2002/mgmt.pdf.

81. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). Note that the Bush Administration had also distanced itself from the full breadth of some of these opinions, especially late in 2008. *See* R. Jeffrey Smith & Dan Eggen, *Post-9/11 Memos Show More Bush-Era Legal Errors*, WASH. POST (Mar. 3, 2009), http://www.washingtonpost.com/wpdyn/content/article/2009/03/02/AR2009030202906.html.

82. Michael Abramowitz, *On Signing Statements, McCain Says 'Never,' Obama and Clinton 'Sometimes'*, WASH. POST (Feb. 25, 2008), http://www.washingtonpost.com/wpdyn/content/article/2008/02/24/AR2008022401995.html.

83. Karen Tumulty, *Obama Circumvents Laws with 'Signing Statements,' a Tool He Promised to Use Lightly*, WASH. POST (June 2, 2014), http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html.

84. GovTrack.us, *H.R. 6304 (110th): FISA Amendments Act of 2008*, CIVIC IMPULSE, LLC, http://www.govtrack.us/congress/votes/110-2008/s168 (last visited Dec. 12, 2015).

85. Peter Nicholas & Christi Parsons, *Obama Reshapes Administration for a Fresh Strategy*, L.A. TIMES (Oct. 6, 2010), http://articles.latimes.com/2010/oct/06/nation/la-na-

contrast to the Bush Administration's emphasis on presidential prerogative, especially as amplified in wartime—Obama acted according to, and derived his authorities from, statute.[86] But that only made the interpretation of that statute all the more important.

This was done using a number of tools ranging from old standbys, like executive orders, to the use of relatively informal regulatory guidance documents. These are explored briefly below, before turning to the war powers in the next section.

A. Executive Orders and Memoranda

The math is straightforward enough: Obama did issue fewer executive orders than his immediate predecessors. In fact, over the first six years of his Administration (2009–2014) he issued fewer executive orders per year than any president since Grover Cleveland—just twenty in 2013, the lowest single-year total in more than a century.[87]

Even so, many of those orders served as significant policy tools. For instance, Obama used a flurry of executive orders early in his term to reverse a number of Bush Administration positions on matters ranging from the Presidential Records Act to the disposition and interrogation of detainees in the War on Terror.[88] Later, he issued an order reassuring pro-life Democrats concerned the Affordable Care Act would channel federal funds towards abortion, and another implementing budget sequestration even in the absence of a budget deal.[89] Most extensively, perhaps, he sought to extensively rework the relationship between the federal government and the private contractors it relies on, issuing a series of orders limiting government procurement to providers who agreed to follow certain policies—including paying a higher minimum wage,[90] banning discrimination on the basis of sexual orientation and identity,[91] tightening compliance with laws mandating

obama-staff-strategy-20101007.

86. *See*, *e.g.*, Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech on the Obama Administration and International Law at the Meeting of the American Society of International Law in Washington D.C. (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

87. LYN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY 349–52 (rev. ed., 1998); U.S. Nat'l Archives & Records Admin., *Executive Orders Disposition Tables Index*, *supra* note 64.

88. Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009); Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

89. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

90. Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

91. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

"integrity and business ethics"[92] and providing paid sick leave.[93]

However, not all orders achieved their goals. Where they went beyond reinterpreting past statutes to attempt more novel and far-reaching policy change, they ran up against the prospect of congressional resistance. Most notably, the President's order that the Guantánamo Bay detention camp in Cuba be shuttered within a year was undercut by legislative and budget restrictions effectively forbidding such action.[94] Ironically, given his original intent, the President returned to the field in March 2011 with Executive Order 13567 by stating "the executive branch's continued, discretionary exercise of . . . detention authority" at Guantánamo and beyond.[95]

In any case, the smaller number of orders was a poor proxy for administrative activism generally. Obama continued the long secular trend of replacing orders with other forms of executive action. For instance, in 2013, while he issued just twenty orders,[96] he issued forty-one published presidential memoranda to various departments and agencies (others may have been issued, but were not published).[97] There were also at least nine additional presidential "determinations" designed to serve as the basis for administrative action, as well as an unknown number of Presidential Policy Guidance and Presidential Policy Directive documents produced that year through the National Security Council advising process.[98] That total does not include proposed regulations, signing statements, legal interpretations, or administrative orders issued by department heads but at White House behest.[99] It is worth turning to these other, less salient, forms of administrative control.

92. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014).

93. Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015).

94. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

95. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar.7, 2011).

96. Gerhard Peters & John T. Woolley, *Executive Orders in the APP Collection 2013*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/executive_orders.php?year=2013&Submit=DISPLAY (last visited Dec. 12, 2015); Press Office, *Executive Orders*, WHITE HOUSE, https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders (last visited Dec. 12, 2015).

97. Press Office, *Presidential Memoranda*, WHITE HOUSE, https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda (last visited Dec. 12, 2015).

98. Press Office, *Presidential Actions*, WHITE HOUSE, https://www.whitehouse.gov/briefing-room/presidential-actions (last visited Dec. 12, 2015).

99. *See id.*

B. Administrative Clarifications and Guidance

One early case built on the wide discretion that the 2008 Troubled Asset Relief Program (TARP) granted the Treasury Department in dealing with the financial crisis that came to a head that fall. President Bush, and then Obama, approved using billions of dollars in funds appropriated through TARP to bail out financial institutions to rescue General Motors and Chrysler from bankruptcy.[100] The details, which involved largescale government-mandated restructurings of both companies, were managed through a team of presidential staffers linked to the National Economic Council.[101] Steven Rattner, dubbed Obama's "auto czar," later wrote of the process that "[t]he auto rescue succeeded in no small part because we did not have to deal with Congress."[102]

The implementation of the Affordable Care Act, later in the administration, required the issuance of regulations, but also raised vexing issues that were dealt with largely on the fly. The Administration authorized a series of delays to ACA requirements beginning in February 2013, most notably in July of that year, when the employer mandate portion of the bill was put off for twelve months; the deadline was extended again in February 2014.[103] Other shifts included a smaller shift in the deadline for the individual mandate; adjustments to the online marketplace for small businesses; and, with HealthCare.gov functioning embarrassingly ineffectively, extension of the general deadline for enrollment online. When insurance companies (quite properly, under the law) began to cancel plans that did not meet the ACA's minimum requirements, they were granted the discretion to extend the plans.[104]

These changes were described by Treasury officials as well within their extant statutory authority under the Internal Revenue Code; as

100. STEVEN RATTNER, OVERHAUL: AN INSIDER'S ACCOUNT OF THE OBAMA ADMINISTRATION'S EMERGENCY RESCUE OF THE AUTO INDUSTRY 21 (2011).

101. *Id.* at 55–56.

102. *Id.* at 304.

103. *See* Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST (Feb. 10, 2014), https://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html.

104. Ashley Parker & Robert Pear, *In a Reversal, Obama Moves to Avert the Cancellation of Health Policies*, N.Y. TIMES (Nov. 15, 2013), http://www.nytimes.com/2013/11/15/us/politics/obama-to-offer-health-care-fix-to-keep-plans-democrat-says.html?pagewanted=all; Steven T. Dennis & Matt Fuller, *Obama Skips Past Congress Again with Health Mandate Delay*, ROLL CALL (July 5, 2013, 2:29 PM), http://www.rollcall.com/news/obama_skips_past_congress_again_with_health_mandate_delay-226124-1.html.

Assistant Secretary Mark Mazur told a House committee chair in July 2013, they were "an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing new legislation."[105] Other recommendations, such as an additional package of rules changes in March 2014, were announced by an administrative bulletin through the Centers for Medicaid and Medicare Services.[106] These shifts were the main subject of the House-sponsored lawsuit against President Obama filed in November 2014, but a district court held the House had no standing to sue.[107]

The ACA itself, as the Supreme Court later said, "contain[ed] more than a few examples of inartful drafting."[108] The convoluted parliamentary tactics necessitated by the loss of a Democratic supermajority partway through its legislative journey meant that divergent sections of the law were never made consistent.[109] One key confusion arose over contradictory language some interpreted as limiting the tax credits provided to subsidize individuals' insurance coverage to those receiving their coverage from state-created exchanges.[110] Since somewhat fewer than half the states had created such exchanges, forcing the federal government to step in and create its own, this was more than a semantic matter. Not surprisingly, the Internal Revenue Service announced it would read the ACA to provide tax credits to those enrolled on the federal exchanges as well.[111]

105. Letter from Mark J. Mazur, Assistant Sec'y for Tax Policy, Dep't of the Treasury, to Fred Upton, Chairman, House Comm. on Energy & Commerce (July 9, 2013).

106. HHS 2015 Health Policy Standards Fact Sheet, CTRS. FOR MEDICARE & MEDICAID SERVS. (Mar. 5, 2014), http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2014-Fact-sheets-items/2014-03-05-2.html; *see* Letter from Mark J. Mazur to Fred Upton, *supra* note 105; Emily Ethridge, *Washington Health Policy Week in Review*, THE COMMONWEALTH FUND (July 15, 2013), http://www.commonwealthfund.org/publications/newsletters/washington-health-policy-in-review/2013/jul/jul-15-2013/administration-issues-defense-of-employer-mandate.

107. U.S. House of Representatives v. Burwell, No. 14–1967, 2015 WL 5294762, at *1 (D.D.C. Sept. 9, 2015). The House as an institution had not been harmed by the Administration's actions, the district court decided—raising a broader issue—since delaying the mandates did not do any individuals or corporations harm (indeed, it benefited them) in a fiscal sense. *Id.* at *16. However, the court held the House did have standing to bring suit on a different point: that of the Administration's use of funds that the House held had not been appropriated. *Id*. That case has not been argued on the merits as of this writing.

108. King v. Burwell, 135 S. Ct. 2480, 2492 (2015).

109. *See* Barbara Sinclair, *Doing Big Things: Obama and the 111th Congress*, *in* THE OBAMA PRESIDENCY: APPRAISALS AND PROSPECTS 198, 211–12, 215 (Bert A. Rockman et al. eds., 2012).

110. Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 26, 2015), http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html.

111. *See, e.g.*, *The Premium Tax Credit*, IRS, https://www.irs.gov/Affordable-Care-

Ultimately, the Supreme Court upheld this reading, ruling that despite the statute's internal inconsistencies, Congress could not have meant to write a law that was doomed to failure in the marketplace.[112]

Another instance of this sort of statutory interpretation arose in the area of immigration—the Obama Administration's efforts to read the Immigration and Nationality Act in a way that gave him wide discretion to protect certain groups from deportation. One of these occurred in June 2012, when Obama resuscitated the heart of the failed Development, Relief, and Education for Alien Minors (DREAM) Act administratively, using a directive issued by Secretary of Homeland Security Janet Napolitano.[113] In a memo to her department, Napolitano noted that "I am setting forth how, in the exercise of our prosecutorial discretion, the [department] should enforce the immigration laws."[114] In this case, that discretion was to be used to grant "relief from removal" or "deferred action": to move aliens meeting the criteria above to the back of the line for deportation, granting them a two-year waiver from such proceedings and, in the meantime, the ability to work legally in the United States.[115] It did not grant them citizenship: "only the Congress," the DHS memo noted, "acting through its legislative authority," could do that.[116] "It remains within the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."[117]

Some questioned whether groups or categories of alleged offenders—as opposed to individuals on a case by case basis—could or should be pre-emptively cleared.[118] Still, those who benefited from this particular exercise of discretion, the potential beneficiaries of the DREAM Act, were young people who had been brought to the United States as children and done well in their new country.[119] They were a

Act/Individuals-and-Families/The-Premium-Tax-Credit (last updated Oct. 30, 2015) (describing regulations on the matter and failing to distinguish between state and federal exchanges).

112. *King*, 135 S. Ct. at 2494.

113. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar et al., Acting Comm'r, U.S. Customs & Border Prot. 1 (June 15, 2012).

114. *Id.*

115. *Id.* at 2, 4.

116. *Id.* at 4.

117. *Id.*; *see also* Memorandum from Andorra Bruno et al., Specialist in Immigration Policy, to Multiple Cong. Requesters 5 n.16 (July 13, 2012), http://edsource.org/wp-content/uploads/Deferred-Action-Congressional-Research-Service-Report.pdf (quoting Memorandum from Janet Napolitano to David V. Aguilar et al., *supra* note 113).

118. *E.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 742 (2014).

119. Memorandum from Janet Napolitano, to David V. Aguilar et al., *supra* note 113.

sympathetic population. But in November 2014, with comprehensive immigration legislation stalled in the House, the President decided to order a far broader shift in enforcement priorities.[120] It enlarged the population of those eligible for deferred action for childhood arrivals along the lines of the 2012 directive.[121] But it also extended such protections to millions of adults whose children were U.S. citizens or legal residents.[122]

These were not formal changes in regulation. Nor, despite their characterization in the popular press and even in trade journals like *The Hill* as "executive orders,"[123] were these policies carried out by executive order. Obama did issue two memoranda on the subject, ordering the departments to rationalize the visa system and creating a White House Task Force on New Americans.[124] But the real work of implementation was done by guidance issued by DHS. In a flurry of memos to immigration officials, for example, DHS Secretary Jeh Johnson laid out new rules for revising removal priorities and for "[e]xercising [p]rosecutorial [d]iscretion with [r]espect to [i]ndividuals [w]ho [c]ame to the United States as [c]hildren and with [r]espect to [c]ertain [i]ndividuals [w]ho [a]re the [p]arents of U.S. [c]itizens or [p]ermanent [r]esidents."[125] The Department of Justice's (DOJ's) advisory opinion upholding the validity of these interpretations was thus addressed to DHS, not the White House, and addressed its proposed actions, not the President's.[126]

120. Press Release, Office of the Press Sec'y, The White House, Remarks of the President in Address to the Nation on Immigration (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

121. *Id.*

122. *Id.*

123. *See, e.g.*, Jordan Fabian, *Obama's Immigration Orders Face Dim Outlook at Federal Court*, THE HILL (July 10, 2015, 6:01 AM), http://thehill.com/homenews/administration/247433-dim-outlook-for-obamas-immigration-orders-at-federal-court.

124. Press Release, Office of the Press Sec'y, The White House, Presidential Memorandum—Creating Welcoming Communities and Fully Integrating Immigrants and Refugees (Nov. 21, 2014), https://www.whitehouse.gov/the-press-office/2014/11/21/presidential-memorandum-creating-welcoming-communities-and-fully-integra; Press Release, Office of the Press Sec'y, The White House, Presidential Memorandum—Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century (Nov. 21, 2014), https://www.whitehouse.gov/the-press-office/2014/11/21/presidential-memorandum-modernizing-and-streamlining-us-immigrant-visa-s.

125. Memorandum from Jeh Charles Johnson, Sec'y of U.S. Dep't of Homeland Sec., to León Rodrigues, Dir. of U.S. Citizenship and Immigration Servs., et al. 1 (Nov. 20, 2014).

126. The Dep't of Homeland Sec. Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C., Nov. 19,

These cases did not change the letter of the law; rather, they provided guides to its enforcement, since in a system plagued by inadequate resources not everyone eligible for deportation could be deported anyway. The Office of Legal Counsel Opinion just noted argues that immigration law emphasizes keeping families together: thus, in OLC's judgment, the DHS guidance does in fact faithfully execute the law.[127] Others, of course, strongly disagreed that the statute was so expansive.[128]

Lawsuits stemming from this argument are pending, as of this writing. The first line of defense was procedural—the plaintiffs argued that policy changes should have been conducted not through guidance memos but through regulatory means, formal rulemaking under the Administrative Procedure Act.[129] A district judge agreed,[130] and at this writing, an injunction blocking the changes is in place, upheld by the Fifth Circuit Court of Appeals in November 2015.[131]

The case will make its way to the Supreme Court in 2016. The justices asked that four questions be briefed: whether the states objecting to the changes had standing to sue in the first place; whether the administration should have followed formal rulemaking procedure; whether the administration's changes went beyond the president's power under the Immigration and Naturalization Act (as the Fifth Circuit concluded); and whether those changes constituted a violation of the constitutional mandate that the president "take care" that the law be faithfully executed.[132]

The outcome is uncertain, though immigration is an area where

2014, at 1, http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf.

127. *Id.* at 26 (*citing* Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977); INS v. Errico, 385 U.S. 214, 220 (1966)).

128. *See e.*g., Brief for Amicus Curiae of Citizens United et al. in Support of Appellees and Affirmance at 15–16, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 15–40238).

129. Texas v. United States, 86 F. Supp. 3d 591, 614, 664–72 (S.D. Tex. 2015).

130. *Id.* Despite its procedural basis, the ruling made little secret of the judge's readiness (even eagerness) to rule against the Administration on substantive grounds as well. He said the changes amounted to "a substantive change to immigration policy," and, "in effect, a new law." *Id.* at 670. Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. TIMES (Feb. 17, 2015), http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html.

131. Texas v. United States, No. 15-40238, 2015 WL 6873190, at *26–27 (5th Cir. Nov. 9, 2015).

132. Immigration and Naturalization Act, Pub. L. 82–414 (1952) (codified in scattered sections of 8 U.S.C.); Texas v. United States, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015), *aff'd*, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), *cert. granted*, 2016 WL 207257.

the executive branch has long been given wide discretion. As long ago as 1950, the Supreme Court held that in immigration matters "flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program,"[133] and as recently as 2012 it found that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials" in order to deal with "immediate human concerns" as well as "policy choices that bear on this Nation's international relations" and "other realities."[134]

C. Prosecutorial Discretion, Redux

The notion of prosecutorial discretion extends past immigration law. It is worth noting three examples under the Obama Administration.

First, the Administration decided not to pursue violations of federal drug law after Colorado and Washington voters adopted referenda in 2012 legalizing the recreational use of marijuana. Even though that use would still be illegal in those states under federal law, Justice Department guidance told U.S. Attorneys to be cautious.[135] "We've got bigger fish to fry," the President noted in a December 2012 interview.[136] "It would not make sense for us to see a top priority as going after recreational users in states that have determined that it's legal."[137] The DOJ stressed that this in no way diminished the government's ability to prosecute nor the standing of the law itself; it merely sought to "guide . . . the exercise of investigative and prosecutorial discretion."[138] And in some cases, enforcement would proceed—for example, when minors were targeted or when prosecutors identified the involvement of "criminal enterprises, gangs, and cartels."[139]

Second was a separate class of federal cases, also dealing with drug users—non-violent, low-level offenders who would receive what Attorney General Eric Holder called draconian punishment under extant

133. United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

134. Arizona v. United States, No. 11–182, slip op. at 4–5 (U.S. Jun. 25, 2012); *see also* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–90 (1999); Memorandum from Andorra Bruno et al., to Multiple Cong. Requesters, *supra* note 117, at 13.

135. Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, to All U.S. Attorneys (Aug. 29, 2013).

136. Devin Dwyer, *Marijuana Not High Obama Priority*, ABC NEWS (Dec. 14, 2012), http://abcnews.go.com/Politics/OTUS/president-obama-marijuana-users-high-priority-drug-war/story?id=17946783.

137. *Id.*

138. Memorandum from James M. Cole, to All U.S. Attorneys, *supra* note 135, at 4.

139. *Id.* at 1.

mandatory minimum sentencing laws.[140] "[T]oo many Americans go to too many prisons for far too long, and for no truly good law enforcement reason," the Attorney General said, and the President has "made it part of his mission to reduce the disparities in our criminal justice system."[141] One way to do this, given limited resources, was to charge the drug users in the category above with different crimes that would lead to sentences "better suited to their individual conduct" rather than the mandatory minimums set in statute.[142]

The third case was slightly different: the President's decision to abandon a law already in place, namely the Defense of Marriage Act (DOMA).[143] DOMA, passed in 1996, prohibited the federal government from recognizing same-gender marriages for the purpose of providing benefits under federal law.[144] President Bill Clinton, worried about election-year wedge issues, signed the bill into law.[145]

In 2013 Clinton declared he had made a mistake: "I have come to believe that DOMA is . . . incompatible with our Constitution."[146] Obama had come to that position earlier.[147] His Administration had enforced DOMA even as increasing numbers of states (ten by the end of 2012) legalized same-gender marriage.[148] But as litigation over DOMA's constitutionality advanced in the federal courts, Obama ordered the Justice Department not to defend the law.[149] Attorney General Holder, in a February 2011 letter to congressional leaders, said the President had decided DOMA violated the equal protection provisions of the Fourteenth Amendment and provided a detailed

140. Eric Holder, Attorney General, U.S. Dep't of Justice, Remarks at the Annual Meeting of the Am. Bar Ass'n's House of Delegates (Aug. 12, 2013).

141. *Id.*

142. *Id.*

143. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

144. *Id.*

145. JOHN F. HARRIS, THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE 245 (Random House, 2005).

146. Bill Clinton, *Bill Clinton: It's Time to Overturn DOMA*, WASH. POST (Mar. 7, 2013), https://www.washingtonpost.com/opinions/bill-clinton-its-time-to-overturn-doma/2013/03/07/fc184408-8747-11e2-98a3-b3db6b9ac586_story.html.

147. Joel Rosenblatt, *Obama Administration Won't Support Defense of Marriage Act*, WASH. POST (Feb. 23, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022304434.html.

148. *Maps of State Laws & Policies*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/state_maps (select "Select An Issue"; select "Marriage Equality and Other Relationship Recognition Laws"; scroll down and "Use the slider to see changes throughout the years" and adjust the slider to "Jan 2013"); *see also* Aziz Huq, *Enforcing (But Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1021 (2012).

149. Rosenblatt, *supra* at note 147.

history of Supreme Court precedent with regard to what groups might qualify for the protection of heightened scrutiny.[150] Gays and lesbians, Holder concluded, met the Court's standards: thus "[t]his is the rare case where the proper course is to forgo the defense of this statute."[151] After the *Windsor* decision in June 2013,[152] hundreds of federal provisions had to be reinterpreted to accommodate same-gender couples (again, subject to presidential preferences on the matter).[153] As more cases challenged state bans on such marriages, Holder encouraged state attorneys general to follow his lead and not to defend the bans—a stance which prompted further protest from states' rights advocates. In 2015, of course, the Court ruled that states were required to allow and recognize same-sex marriages under the Fourteenth Amendment.[154]

That did not make the Administration's decisions less controversial. This "is a transparent attempt to shirk the department's duty to defend the laws passed by Congress," argued Rep. Lamar Smith (R-TX), then chair of the House Judiciary Committee, bemoaning the impression that "the personal views of the president override the government's duty to defend the law of the land."[155]

Still, there are numerous examples where the executive branch has declined to defend and sometimes even to enforce a legislative enactment.[156] Such cases include a Bush Administration decision in 1990 to oppose a law governing Federal Communications Commission regulations and the Clinton Administration's desertion of a 1960s law that was the basis of an effort to overturn the famous *Miranda* doctrine against self-incrimination.[157] Seth Waxman, who served as Solicitor General during the Clinton Administration, argues that the executive branch should defend a law "whenever professionally respectable arguments can be made in support of its constitutionality"—quite a low

150. Letter from Eric Holder, Attorney General, U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act.

151. *Id.*

152. United States v. Windsor, 133 S. Ct. 2584, 2608 (2013).

153. Charles Delafuente, *Victory, and Tax Changes, for Same-Sex Couples*, N.Y. TIMES (Feb. 7, 2014), http://www.nytimes.com/2014/02/09/business/yourtaxes/victory-and-tax-changes-for-same-sex-couples.html?_r=0.

154. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

155. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all.

156. Seth Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001); *see also* Huq, *supra* note 148, at 1047.

157. Waxman, *supra* note 156, at 1084.

bar, though one he raises higher when separation of powers issues are concerned (as with the *Chadha* legislative veto case in 1983).[158]

The broader principle of prosecutorial discretion seemed likewise well-settled, especially under statutes that left room for such judgments in a world of insufficient resources. Congress could write into law limits on presidential flexibility, as discussed in Section D below. But otherwise, as the Supreme Court (via Justice William Rehnquist) held in the 1985 case *Heckler v. Chaney*, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[159]

D. Waivers

Another route to administrative discretion is opened when executive officials are given authority in a given statute to waive provisions of that statute. The idea is to promote policy experimentation and provide flexibility where it is difficult to foresee in advance how implementation might play out. This discretion is clearly legal: it is in the law. But its use may still be contested. Two prominent Obama Administration examples involved welfare reform (under the Personal Responsibility and Work Opportunity Act of 1996)[160] and education policy (under the NCLB of 2001).[161]

"There is a long history of waivers to welfare requirements, aimed at allowing states to experiment with different mechanisms for achieving policy goals."[162] "Traditionally, Republicans favored more waiver authority, not less, while Democrats were nervous about what responsibilities waivers might allow the states to evade."[163] "[I]n July 2012 Republican presidential nominee Mitt Romney accused the Obama Administration of seeking to remove the work requirements from the Temporary Aid to Needy Families (TANF) program created by

158. *Id.* at 1078.

159. 470 U.S. 821, 831 (1985).

160. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

161. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.); *see also Flexibility and Waivers*, U.S. DEP'T OF EDUC., http://www2.ed.gov/nclb/freedom/local/flexibility/index.html (last modified Oct. 12, 2012).

162. Rudalevige, *supra* note 10, at 46.

163. *Id.* "In 1988, for instance, Attorney General Ed Meese reported that the president had decided to (a) support only welfare reform legislation that enhanced the president's ability to grant more waivers, and (b) set a goal that half of all the states would receive waivers from federal welfare requirements." *Id.* at 46.

the 1996 law."[164] This proved to be a tempest in a teapot, since section 415 of the statute seems to specify that presidents could *not* use waivers for this purpose.[165] But it was true the Administration (in the words of a guidance letter issued by the Department of Health and Human Services (HHS) in 2012) was interested in:

> encouraging states to consider new, more effective ways to meet the goals of TANF, particularly helping parents successfully prepare for, find, and retain employment . . . HHS is issuing this information memorandum to notify states of the Secretary's willingness to exercise her waiver authority . . . to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families.[166]

The HHS guidance, in turn, was apparently spurred by a 2011 presidential memorandum to the heads of executive departments and agencies geared toward "administrative flexibility" for state and local governments.[167] In a follow-up memo, OMB director Jacob Lew told department heads to "use waivers as a component of bold pilots to test promising hypotheses about how to improve outcomes at lower cost."[168]

If this came to little on the TANF front, the No Child Left Behind Act bequeathed a far more aggressive use of waivers. Until superseded by the December 2015 passage of its successor, the Every Student Succeeds Act,[169] NCLB allowed the education secretary to grant them when a state could show doing so would "(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students" (meeting those standards was for the secretary to gauge).[170] Once again some portions of the statute were exempted from the possibility of waiver—including annual testing—but the NCLB's titular promise that all students would be "proficient" in math and reading by 2014 was not.[171] Thus, in exchange for various policy commitments at

164. *Id.*

165. *Id.* at 47.

166. Memorandum from Off. of Family Assistance to States Administering the Temp. Assistance for Needy Families (TANF) Program and Other Interested Parties (July 12, 2012), http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203.

167. Memorandum on Admin. Flexibility, Lower Costs, & Better Results for St., Loc., and Tribal Gov'ts, 2011 DAILY COMP. PRES. DOC. 1–3 (Feb. 28, 2011).

168. Memorandum from Jacob J. Lew, Dir., Off. of Mgmt. & Budget, to Heads of Exec. Dep'ts and Agencies, 8 (Apr. 29, 2011).

169. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

170. 20 U.S.C. § 7861 (1946).

171. Anya Kamenetz, *It's 2014. All Children Are Supposed to Be Proficient. What Happened?*, NPR (Oct. 11, 2014), http://www.npr.org/sections/ed/2014/10/11/354931351/

the state level favored by the Obama Administration—such as the adoption of stronger core curriculum requirements and the creation of a new teacher evaluation rubric—the Secretary of Education had the authority to waive that burden and help states avoid the label of "failing" schools.[172] Since by 2014 few (if any) schools nationally seemed likely to meet the 100% proficiency target, waivers seemed a plausible route to take.[173] As of this writing, forty-three states and the District of Columbia have received "flexibility," as the Department of Education put it.[174] That the Administration extracted significant policy concessions in return was aggressive, but politically savvy. After all, whether waivers enhance, gut, or simply modify, a given law is usually in the eye of the beholder—and whether that beholder likes the policy change in question.

E. Rulemaking

The power to promulgate regulations, as noted in Section II, is another way to provide flexibility in implementing broad statutory mandates.[175] It is a slower process but one that yields particularly powerful results: regulations have the force of law, and once enacted they are difficult to reverse.[176] Unlike an executive order, which can be readily superseded by another executive order, regulations must be issued under the auspices of the Administrative Procedure Act, which mandates the publication of draft regulations leading to a public comment process before a final rule can be published.[177] Revising the rule requires repeating the process.

The Obama Administration was an eager regulator: some 3500 rules were issued during the first term, about ten percent of which were "significant" and thus subject to the OIRA review process.[178] Obama

it-s-2014-all-children-are-supposed-to-be-proficient-under-federal-law.

172. Patrick McGuinn, *Presidential Policymaking: Race to the Top, Executive Power, and the Obama Education Agenda*, 12 THE FORUM 61, 68–69 (2014).

173. After all, in the heady days of 2001, Congress presumably did not foresee it would fail to reauthorize NCLB for eight years (and counting) past its original expiration date.

174. *ESEA Flexibility: State Requests and Related Documents*, U.S. DEP'T EDUC., http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html (last visited Dec. 12, 2015).

175. *See supra* text accompanying notes 47–69 and note 60.

176. CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 1 (CQ Press 4th ed. 2011).

177. 5 U.S.C. § 553 (2012).

178. Adam J. White, *Obama's Regulatory Rampage*, WEEKLY STANDARD (Jan. 28, 2013), http://www.weeklystandard.com/articles/obamasregulatoryrampage_696381.html.

was also no exception to the nearly five decade-long trend whereby presidents seek to assert centralized control over that process: he placed strong emphasis on regulatory review, underlined by his appointment of his University of Chicago colleague and cost-benefit enthusiast Cass Sunstein to head OIRA. In January 2011, Obama issued Executive Order 13563,[179] which "reaffirm[ed] the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12,866," Bill Clinton's 1993 directive continuing the Reagan/Bush review regime.[180] As Obama's order summarized:

> [E]ach agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs . . . ; (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives . . . ; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits [broadly defined]; (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior . . . .[181]

The order also directed agencies to carry out a "regulatory look back" procedure designed to assess whether extant regulations could be rescinded or revised to make them less intrusive.[182]

Clinton, as noted earlier, routinely sought to extract additional regulatory activity from the bureaucracy; Obama did likewise.[183] In May 2010, for instance, Obama sent a memorandum to four agency heads, directing (technically, "requesting") them to tighten greenhouse gas and fuel efficiency standards such that "coordinated steps . . . produce a new generation of clean vehicles."[184] One result came in March 2014, when the Environmental Protection Agency (EPA) announced new rules that would reduce sulfur in gasoline and drive changes in both automotive and oil refinery technology.[185]

179. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

180. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

181. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

182. *Id.*

183. *Supra* text accompanying notes 72–79; Kagan, *supra* note 70, at 2250, 2281–82.

184. Memorandum from Barack Obama, President, U.S., *Presidential Memorandum Regarding Fuel Efficiency Standards* (May 21, 2010), https://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards.

185. ENVTL. PROT. AGENCY, EPA-420-F-14-009, EPA SETS TIER 3 MOTOR VEHICLE EMISSION AND FUEL STANDARDS (Mar. 14, 2014), http://www3.epa.gov/otaq/documents/

It is environmental regulations generally that have generated the most controversy during the Obama Administration. Democrats had pushed "cap and trade" emissions legislation in the 111th Congress, but failed to win Senate approval; its chances shifted from slim to none in the aftermath of growing Republican majorities in both chambers. Especially after the 2012 election, Obama moved ahead instead with a Clean Power Plan based on an empowering reading of the Clean Air Act[186] (first passed in 1963, but revised and expanded in 1970 and 1990, and given broader remit by the Supreme Court's 2007 decision in *Massachusetts v. EPA*[187]).

The rule-writing project resulted in 2012 and 2014 draft rules aiming to extend Clean Air Act authority to existing power plants, especially those fueled by coal, and to limit greenhouse gases produced by new development.[188] Even agency attorneys suggested "the legal interpretation is challenging";[189] not surprisingly, a collation of lawsuits over these issues wound up before the Supreme Court in 2014, notably as *Utility Air Regulatory Group v. EPA (UARG)*.[190]

Normally the Court preaches judicial deference to an executive branch department or agency's interpretation of a vague law—assuming the agency makes "a reasonable choice within a gap left open by Congress,"[191] a template laid out in the 1984 *Chevron* case.[192] And the Court wound up largely upholding the EPA's substantive position, noting that "Congress's profligate use of [the phrase] 'air pollutant' is not conducive to clarity."[193]

tier3/420f14009.pdf.

186. 42 U.S.C. § 7401 (2012).

187. 549 U.S. 497, 532 (2007).

188. *See, e.g.*, Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Environmental Plan with His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), http://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html.

189. Coral Davenport, *E.P.A. Staff Struggling to Create Pollution Rule*, N.Y. TIMES (Feb. 4, 2014), http://www.nytimes.com/2014/02/05/us/epa-staff-struggling-to-create-rule-limiting-carbon-emissions.html.

190. 134 S. Ct. 2427, 2438 (2014).

191. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

192. Under *Chevron*, the court is supposed to follow three steps, namely: (1) To ask, is the meaning of the law clear, or ambiguous? (2) If the latter, did the agency come up with a "permissible" or "reasonable" interpretation of what it might mean? (3) If yes, to let the agency interpretation stand, even if it is not the interpretation the judges themselves might prefer. *Id.* at 843–44, 866. That is, "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Id.* at 866.

193. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2431; *see also* Lyle Denniston, *EPA*

However, in this case and another in 2015, the Court also clarified some administrative boundaries. In *UARG*, the EPA had sought to change the threshold for regulating carbon emissions produced by new development.[194] The Clean Air Act states this should occur when a facility generates more than 250 tons of a given pollutant—a very small number when it comes to greenhouse gases.[195] To avoid this "absurd result," EPA's regulation raised the limit for carbon pollutants to 75,000 tons per year.[196] While this did mean less rather than more agency oversight of industry, it achieved that end (as one opposing legal brief argued) by "amending [and] disregarding specific, unambiguous statutory text."[197] The Court agreed.[198] Indeed, in oral argument, one justice mused: "[T]he solution that EPA came up with actually seems to give it complete discretion to do whatever it wants, whenever it wants."[199] That this was Justice Elena Kagan,[200] author of *Presidential Administration*, did not bode well for the President's position.

In a later case dealing with a rule aimed at emissions from power plants, the Court overturned the EPA's rules as having shown insufficient regard for the costs they imposed.[201] Here, the justices split sharply over whether the EPA's interpretation of the Clean Air Act was reasonable (as *Chevron* requires).[202] The majority opinion scolded the agency for what it called "interpretive gerrymanders" that "keeps parts of statutory context it likes while throwing away parts it does not."[203]

That is a useful summary of the Obama Administration's efforts in extending presidential control over statutory implementation. Those efforts are not new, and like his predecessors, Obama met with

Mostly Wins, But with Criticism, SCOTUSBLOG (June 23, 2014), http://www.scotusblog.com/2014/06/opinion-analysis-epa-mostly-wins-but-with-criticism (recognizing that the author of the majority opinion, Justice Scalia, noted from the bench that "EPA is getting almost everything it wanted in this case").

194. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442; Peter Glaser, *Symposium: Can the EPA Really Rewrite a Statute? Really?*, SCOTUSBLOG (Feb. 4, 2014), http://www.scotusblog.com/2014/02/symposium-can-the-epa-really-rewrite-a-statute-really.

195. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2440.

196. *Id.* at 2437.

197. Brief for Senator Mitch McConnell, et al. as Amici Curiae Supporting Petitioners at 2, *Util. Air Regulatory Grp.*,, 134 S. Ct. at 2427 (Nos. 12–1146, 12–1248, 12–1254, 12–1268, 12–1269, 12–1272), 2013 WL 6673698, at *2.

198. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445.

199. Transcript of Oral Argument at 60, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2427 (No. 12–1146).

200. *Id.*

201. Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015).

202. *Id.*

203. *Id.* at 2708.

occasional setbacks as he clashed with other parts of the political system. But the surprisingly systematic approach, taken by a novice to executive management, suggested the residual strength of the institutionalized, administrative presidency.

IV. THE WAR POWERS: A CODA

Criticism of Obama's "imperial" tendencies was far more muted in foreign policy—the only war decried in the House of Representatives' *Imperial Presidency* report noted at the outset of this Article was the "war on coal."[204] But the war powers generally do deserve brief mention here, since their use has been so consistent with the narrative above. That is, the Obama Administration has stressed its reliance on delegated statutory authority, but has generally read the relevant statutes in ways that empower presidential preferences.

It is worth noting that the growth of a national security establishment during World War II and the Cold War gives the president another form of administrative freedom. Garry Wills goes so far as to claim that the atomic age "redefined Congress, as an executor of the executive."[205] But we need not fully accept that in order to observe that the simple fact of a permanently activated army and navy has amplified the abilities of the commander-in-chief of the armed services beyond that title's original intentions.[206] With 1.15 million active duty troops in the United States, and another 150,000 based in 153 countries—not including zones of active hostilities like Iraq or Afghanistan—that position now provides many resources for unilateral policymaking.[207] In general, forcing Congress to be reactive—whether to the insertion of troops into war zones, the rescission of treaties, or to executive agreements with other nations—serves to highlight the "first mover" advantage noted above.[208] In the case of the Iran nuclear

204. Cantor, *supra* note 1, at viii.

205. GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1 (2010).

206. As Hamilton pointed out in the Federalist, the title means little if there is nothing to command, and presidential power did not extend "to the declaring of war and to the raising and regulating of fleets and armies." THE FEDERALIST NO. 69, at 352 (Alexander Hamilton).

207. *See* Def. Manpower Data Ctr., Off. of the Sec. of Def., *Total Military Personnel and Dependent End Strength by Service, by Regional Area, and Country*, DMDC (June 30, 2015), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp. Countries that host only Department of Defense civilian personnel are not included in the tally. *Id.*

208. WILLIAM HOWELL & JON PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS xiii (2007) (providing systematic evidence of when this advantage is strongest and when presidents act in ways that reveal

agreement, Congress found itself reduced to bargaining over notice of, and information about, the specifics of the deal, since the process of disapproval was stacked against its opponents (that would have been true, though, with or without the statute they negotiated).[209]

Presidents have sometimes argued the commander-in-chief power not only evades but affirmatively overrides legislative directives. For instance, within weeks of the terrorist attacks of September 11, 2001, the Justice Department's Office of Legal Counsel advised the President that no statute could "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."[210] Indeed, even "Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force."[211] When dealing with potential statutory limits on that authority—a ban on the use of torture in the interrogation of prisoners, for example—the Administration asserted that "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."[212]

The Obama Administration, by contrast, argued that the President was *not* setting statute aside: that his actions were grounded not in abstract commander-in-chief authority but rather allowed under the laws of war, or directly derived from the U.S. code.[213] Relevant enactments included the Military Commissions Act, the FISA Amendments Act, the various reauthorizations of the PATRIOT Act, and most prominently

their wariness of congressional reaction).

209. Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114–17, 129 Stat. 201 (2015).

210. The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 214 (2001).

211. *Id.* at 193.

212. Memorandum from Jay S. Bybee, Assistant Attorney General, Dep't of Justice on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); *see also* Memorandum from Jay S. Bybee, Assistant Attorney General, Dep't of Justice on Interrogation of al Qaeda Operative to John Rizzo, Acting General Counsel of the Cent. Intelligence Agency (Aug. 1, 2002); *see also* Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 30 Op. O.L.C. 1, 3, 10–11, 17, 30–31 (2006) (arguing for an inherent presidential power to order surveillance of Americans' communications with people abroad, which claimed that any statute that purported to limit the president's "core exercise of Commander in Chief control" was unconstitutional and did not need to be enforced).

213. Koh, *supra* note 86.

the very broad 2001 Authorization for the Use of Military Force (AUMF).[214] The last reads in part:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[215]

As with the domestic statutes discussed above, in the sphere of foreign policy the President's lawyers tended to find ways in the law to do what the President wanted to do. In the 2011 NATO operation against the Libyan regime, for instance, the Administration claimed the War Powers Resolution (WPR) did not apply and thus legislative approval was not required.[216] Relying on a legal opinion from the State Department (and apparently setting aside a contrary opinion from the normally dispositive Office of Legal Counsel in the DOJ), the President argued that the threshold of "hostilities" that would activate the WPR had not been met.[217] The WPR itself, notoriously vague, does not define "hostilities."[218] In a press conference, the President suggested that only a conflict like the Vietnam War ("those kinds of commitments") would require its activation and advance consultation with Congress.[219]

The 2001 AUMF also found itself stretched. In 2015, as the self-proclaimed Islamic State of Iraq and the Levant (ISIL, also known as ISIS) began to seize territory in Syria and Iraq, the President claimed to have the authority to respond without seeking a new authorization from Congress. The Obama Administration argued that ISIL's past affiliation with al-Qaeda meant that the provisions of the 2001 AUMF applied to that group as well. The White House Press Secretary said:

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214. Military Commissions Act, 10 U.S.C. §§ 948–950 (2012); 50 U.S.C. § 1801 (2012); PUB. L. 107–56, as reauthorized by, *inter alia*, PUB. L. 109–177 (2005); PUB. L. 107–56, as reauthorized by, *inter alia*, PUB. L. 109–177 (2005); Authorization for Use of Military Force, 50 U.S.C. § 1541 (2012).

215. 50 U.S.C. § 1541.

216. Barack Obama, President, U.S., Press Conference of the President (June 29, 2011), https://www.whitehouse.gov/the-press-office/2011/06/29/press-conference-president; *see also* Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 16, 2011), http://www.nytimes.com/2011/06/16/us/politics/16powers.html?_r=0; Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES, (June 18, 2011), http://www.nytimes.com/2011/06/18/world/africa/18powers.html?_r=0.

217. Obama, *supra* note 216.

218. *See* ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 192–200 (2005).

219. Obama, *supra* note 216.

> [I]t is the view of the . . . Obama administration, that the 2001 AUMF continues to apply to ISIL because of their decade-long relationship with al Qaeda, their continuing ties to al Qaeda; because they have continued to employ the kind of heinous tactics that they previously employed when their name was al Qaeda in Iraq; and finally, because they continue to have the same kind of ambition and aspiration that they articulated under the previous name.[220]

Most legal scholars were dubious of what might be dubbed a six-degrees-of-separation rationale for the application of authority given in a different context; ISIL, not itself associated with the 9/11 attacks, had broken rather firmly with al-Qaeda and been repudiated by it.[221] Benjamin Wittes thus observed that "'associated' does not mean 'not associated' or 'repudiated by' or 'broken with' or even 'used to be associated with.'"[222] Nonetheless, when Obama did send a new draft AUMF to Congress in early 2015, legislators declined to act on it, at least de facto accepting the Administration's rationale.[223]

The AUMF, in conjunction with the laws of war, was also taken as authorization for the greatly expanded use of drone strikes. These took place against suspected militants not just in Afghanistan but in a number of other nations, including Yemen—where an American citizen was targeted and assassinated.[224] This was backed by the Justice Department's opinions justifying killings of this sort, which greatly broadened the notion of "imminent" threat.[225] Due process, Attorney General Holder argued in 2012, did not need to be judicial due process—"[w]here national security operations are at stake, due process takes into account the realities of combat."[226]

220. Josh Earnest, Press Sec'y, White House, Press Briefing (Sept. 11, 2014), https://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014.

221. Andrew Rudalevige, *Six Degrees of Al-Qaeda?*, WASH. POST (Sept. 12, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/12/six-degrees-of-al-qaeda.

222. Benjamin Wittes, *Not Asking the Girl to Dance*, LAWFARE (September 10, 2014, 9:41 PM), https://www.lawfareblog.com/not-asking-girl-dance.

223. Peter Beinart, *Why Won't the GOP Declare War on ISIS?*, ATLANTIC (May 28, 2015), http://www.theatlantic.com/politics/archive/2015/05/congress-aumf-isis-war/394268/.

224. *See generally* SCOTT SHANE, OBJECTIVE TROY (2015).

225. Dep't of Justice, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force*, MSNBC, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last visited Dec. 12, 2015).

226. Eric Holder, Attorney Gen., Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

The Bowe Bergdahl case is a useful way to conclude. In mid-2009, Bergdahl had gone AWOL from his Afghan base and been captured by the Taliban. In May 2014, the White House announced that the President had approved a prisoner swap, obtaining Bergdahl's freedom in exchange for five members of the Taliban held at Guantanamo Bay.[227] In so doing, the President skirted a section of the fiscal 2014 National Defense Authorization Act (NDAA) requiring that Congress receive notification thirty days in advance of a transfer of a Guantanamo detainee.[228] When he signed the bill into law in late 2013, Obama issued a statement holding that provision, "in certain circumstances, would violate constitutional separation of powers principles. The executive branch must have the flexibility, among other things, to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."[229]

One possibility was that the President felt the Bergdahl case presented just that circumstance. But such a view would require overriding the law based on prerogative power. Thus the Administration argued instead that the Administration was following the NDAA but that (in a National Security Council statement) it had "determined that the notification requirement should be construed not to apply to this unique set of circumstances."[230]

> In these circumstances, delaying the transfer in order to provide the 30-day notice would interfere with the Executive's performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. soldiers. Because such interference would significantly alter the balance between Congress and the President, and could even raise constitutional concerns, we believe it is fair to conclude that Congress did not intend that the Administration would be barred from taking the action it did in these circumstances.[231]

Thus the Administration argued that it was following the law Congress had *meant* to write. Here, prerogative and statutory interpretation

227. Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (June 1, 2014), http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html?_r=0.

228. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013).

229. Barack Obama, President, U.S., Statement by the President on H.R. 3304 (Dec. 26, 2013), https://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304.

230. Press Release, Caitlin Hayden, Nat'l Sec. Council Spokesperson, NSC Statement of 30-day Transfer Notice Law (June 3, 2014).

231. *Id.*

seemed indistinguishable.

CONCLUSION: PERSONALITY AND "POSITIONALITY"

When President Harry Truman denounced the "do-nothing" Congress, that body was on track to pass 511 laws in 1948 alone.[232] By contrast, the 113th Congress saw 297 bills become law in 2013 and 2014 combined.[233] Thus even as presidents' administrative toolbox grew in conjunction with the size and scope of government in the post-war era, partisan polarization made achieving legislative action more difficult. Opportunity aligned near-perfectly with motive: what Justice Kagan called "directive authority" over the bureaucracy became both more feasible and more appealing.[234] Implementing extant laws in new ways—whether through executive orders, signing statements, regulatory review, or bureaucratic directives—may be as effective a mechanism for policy change as passing new law.

As this Article has shown, President Obama has taken full advantage of those possibilities. His Administration has clearly been aggressive in utilizing both its administrative discretion under existing law and its regulatory authority to implement new law in ways that suit presidential preferences. These efforts, unsurprisingly, clustered in areas where Congress did not act: either in the first place, as in the fields of climate change and immigration (or, for that matter, to pass a new AUMF), or where the usual route of legislative technical corrections was blocked by polarized frenzy, as with "Obamacare." Thus Obama's "pen and phone" allowed him to find ways to draw new wine from old bottles on the policy front. He could make progress on his top priority agenda items. And even when that progress was at best incremental, the Administration proved particularly skilled at packaging bureaucratic procedure into branded collations ("We Can't Wait," "A Year of Action") that gave the semblance of substantial movement.[235] All this came with political benefits as well, highlighting legislative gridlock versus presidential efficacy. This last is one reason William Howell

232. Résumé of Congressional Activity, 80th Congress, http://library.clerk.house.gov/reference-files/RCA_80.pdf.

233. Résumé of Congressional Activity, 113th Congress, 1st Session, http://library.clerk.house.gov/reference-files/RCA_113_1.pdf; Résumé of Congressional Activity, 113th Congress, 2nd Session, http://www.senate.gov/reference/resources/pdf/Resumes/113_2.pdf.

234. Kagan, *supra* note 70, at 2250.

235. In January 2013, the President announced twenty-three separate executive actions on gun control in response to the mass shootings of kindergarten students in Newtown, Connecticut; most of these emerged from within the bureaucracy.

argues that presidents are almost always better off politically when they take decisive action, even if that action is not obviously legal.[236]

In short, President Obama acted as presidents do. Their personality is channeled by what might ungrammatically be called their positionality in a separated system of governance. As political scientist Terry Moe puts it, in a key sense, "[p]residents are not individual people . . . They are actor-types occupying an office whose powers and incentives are institutionally determined . . . ."[237] And others played their roles too: Obama's opponents exaggerated the potency and novelty of his "imperialism" even as his allies downplayed it. As usual, opinions on presidential activism correlated nearly perfectly with opinions about the President doing the acting. It is worth noting that the Administration's most forceful actions—those least compatible with its own claim that it always abided by the limits of statute, properly interpreted—might have been the least novel. After all, they moved closer than Obama might have liked to his predecessors' claims of inherent power.

If the Obama Administration shows the utility of unilateralism, it also shows its limits. Sometimes, these seemed self-imposed: for example, the President declined to claim any authority under the Fourteenth Amendment to ignore the statutory debt ceiling, despite the urgings of prominent academic lawyers (and even former President Clinton).[238] This was perhaps too close to a completely new claim of power to fit the Administration's image of itself. In other cases the politics of the moment restrained presidential action, where Obama argued we *can* wait: consider the delay of environmental regulations until after the 2012 election,[239] or the belated order implementing a small piece of the Employment Non-Discrimination Act.[240] Eric Posner and Adrian Vermeule go so far as to argue that such constraints are the

236. *See generally* WILLIAM G. HOWELL WITH DAVID MILTON BRENT, THINKING ABOUT THE PRESIDENCY: THE PRIMACY OF POWER 6–7, 17–18 (2013).

237. Terry A. Moe, *The Revolution in Presidential Studies*, 39 PRESIDENTIAL STUD. Q. 701, 704 (2009).

238. Adam Liptak, *Experts See Potential Ways Out for Obama in Debt Ceiling Maze*, N.Y. TIMES (Oct. 4, 2013), http://www.nytimes.com/2013/10/04/us/politics/experts-see-potential-ways-out-for-obama-in-debt-ceiling-maze.html; Joe Conason, *Exclusive Bill Clinton Interview: I Would Use Constitutional Option To Raise Debt Ceiling and "Force The Courts To Stop Me"*, NAT'L MEMO (July 19, 2011), http://www.nationalmemo.com/exclusive-former-president-bill-clinton-says-he-would-use-constitutional-option-raise-debt/.

239. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST (Dec. 14, 2013), https://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html

240. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

key check on presidential behavior.[241] Yet in other instances Obama ran up against other political actors with a stake in bureaucratic behavior—the courts, especially, as noted above, but also the executive branch itself. After all, the bureaucracy is harder to control than recent rhetoric (and even the discussion above) suggests. The "unitary executive" remains a plural entity; and even orders that ultimately issue from the White House may have their original source elsewhere in the wider bureaucracy.

As this suggests, unilateral action is a form of bargaining with the public but also with the other branches of government. In fact it is a way of shifting the bargaining market in the president's favor—into the ostensibly non-partisan world of "administration" or by establishing the new "antecedent state of things" Hamilton predicted two and a quarter centuries ago.[242] Obama got at this during his national address on immigration in November 2014, setting down a challenge: "[T]o those members of Congress who question my authority . . . or question the wisdom of me acting . . . I have one answer: Pass a bill."[243]

And indeed, the greatest controls on presidential overreach should come from the actor absent without leave from the previous paragraph: Congress. The House, of course, has a pending lawsuit against the President and has actively considered suing once more over the Iran nuclear agreement.[244] House Republicans have also backed statutory mechanisms such as the Faithful Execution of the Law Act and the ENFORCE the Law Act (a strained acronym for Executive Needs to Faithfully Observe and Respect Congressional Enactments of the Law). But these seem signals of weakness rather than strength; they only serve to divert attention from the "[i]nvisible Congress,"[245] from its members' inability or unwillingness to do the hard work of governance, institutional and substantive.

To be sure, polarization has made it hard to prioritize institutional pride over party loyalty. But prosecutorial discretion and statutory

241. *See generally* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011); *see also* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012).

242. Hamilton, *supra* note 32.

243. Barack Obama, President, U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

244. Formally known as the Joint Comprehensive Plan of Action. For discussion of the lawsuit, see Emma Dumain, *Why House Republicans Are Excited About New Iran Strategy*, ROLL CALL (Sept. 10, 2015, 5:00 AM), http://blogs.rollcall.com/218/house-republicans-excited-new-iran-strategy/?dcz=.

245. RUDALEVIGE, *supra* note 218, at 261.

interpretation are very much subject to legislative specification. Legislators maintain the power to rein in the President's unilateral wanderings through the ordinary legislative process: to specify less freedom of action, to rule out waivers, even to fail to appropriate funds to support the affected agencies. In short, this is certainly an area where Congress *can* act. If it is worried about presidential imperialism, it should act. For the administrative state to benefit polity as well as presidency, Congress has to do its job.