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# The Take Care Clause and Executive Discretion in the Enforcement of Law

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## Summary

The Take Care Clause would appear to stand for two, at times diametrically opposed propositions—one imposing a “duty” upon the President and the other viewing the Clause as a source of Presidential “power.” Primarily, the Take Care Clause has been interpreted as placing an obligation on both the President and those under his supervision to comply with and execute clear statutory directives as enacted by Congress. However, the Supreme Court has also construed the Clause as ensuring Presidential control over the enforcement of federal law. As a result, courts generally will not review Presidential enforcement decisions, including the decision of whether to initiate a criminal prosecution or administrative enforcement action in response to a violation of federal law.

In situations where an agency *refrains* from bringing an enforcement action, courts have historically been cautious in reviewing the agency determination—generally holding that these nonenforcement decisions are “committed to agency discretion” and therefore not subject to judicial review under the Administrative Procedure Act. The seminal case on this topic is *Heckler v. Chaney*, in which the Supreme Court held that an “agency’s decision not to take enforcement action should be presumed immune from judicial review.”

However, the Court also clearly indicated that the presumption against judicial review of agency nonenforcement decisions may be overcome in a variety of specific situations. For example, a court may review an agency nonenforcement determination “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,” or where the agency has “consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”

As such, it would appear that Congress may overcome the presumption of nonreviewability and restrict executive discretion through statute by expressly providing “meaningful standards” for the manner in which the agency may exercise its enforcement powers.

Nevertheless, legislation that can be characterized as significantly restricting the exercise of executive branch enforcement decisions, in either the criminal, civil, or administrative context, could raise questions under the separation of powers.

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The Obama Administration has faced significant scrutiny following a series of determinations in which the relevant federal agency charged with the implementation of a given statute has chosen to limit or delay the enforcement of specific provisions of federal law.<sup>1</sup> These nonenforcement, under enforcement, or delayed enforcement decisions have generally been implemented through stated agency policies directing officials *not* to take action to ensure compliance with statutory requirements that federal law imposes upon a third party. Notably, these policies have been grounded in practical or policy considerations, and have not been based on any argument that the statutory provisions themselves are unconstitutional or otherwise invalid.<sup>2</sup> Instead, the Administration has largely justified its inaction as consistent with a proper exercise of enforcement discretion, a legal doctrine that generally shields executive branch enforcement decisions, including the determination of whether to initiate a criminal, civil, or administrative enforcement action, from judicial review. This report focuses on two distinct forms of enforcement discretion: prosecutorial discretion, exercised in the criminal context; and administrative enforcement discretion, exercised in the administrative context.

The Department of Justice (DOJ) has cited prosecutorial discretion as the basis for its efforts to curtail the enforcement of the federal Controlled Substances Act (CSA) in states that have adopted both medical and recreational marijuana legalization initiatives.<sup>3</sup> Although the possession, cultivation, or distribution of marijuana remains a clear federal crime, the DOJ has directed federal prosecutors to “not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>4</sup> Rather, U.S. Attorneys have been directed to prioritize investigative and prosecutorial resources on persons whose actions relate to identified federal priorities such as distribution to minors, the participation of criminal enterprises and cartels, or the use of marijuana on federal property.<sup>5</sup>

In 2012, the Secretary of Homeland Security relied on the doctrine of administrative enforcement discretion in a memorandum setting forth guidelines on how to “enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only

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<sup>1</sup> The Obama Administration is not the first Presidential Administration to use nonenforcement as a means of achieving policy goals. See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 686 (2014) (“The George W. Bush Administration apparently underenforced certain environmental, product safety, and civil rights laws as a matter of policy; in one case the Environmental Protection Agency stopped enforcing certain air pollution restrictions after the D.C. Circuit declared its regulatory standards too permissive. Critics also accused the Clinton and Bush Administrations of neglecting enforcement of gun safety laws, and the Reagan Administration of deliberately failing to enforce antitrust statutes.”)(citations omitted).

<sup>2</sup> These decisions should be distinguished from the Obama Administration’s decision not to prosecute Attorney General Eric Holder for criminal contempt of Congress. The executive branch policy of not enforcing the criminal contempt statute against an executive branch official asserting executive privilege in response to a congressional subpoena—which dates at least to the Reagan Administration—is based on constitutional objections. See e.g., *U.S. v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J. dissenting) (“This suit saw the light of day only because the President enforced the Act (and thus gave Windsor standing to sue) even though he believed it unconstitutional. He could have equally chosen (more appropriately, some would say) neither to enforce nor to defend the statute he believed to be unconstitutional...”).

<sup>3</sup> See, CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

<sup>4</sup> Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009, available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

<sup>5</sup> Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013, available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

this country as home.”<sup>6</sup> The directive provided that, rather than use limited agency removal resources on low priority deportation cases, immigration officers should exercise their discretion to forego enforcement actions, for at least a period of time, against a specific class of individuals who unlawfully entered the United States as children, have not committed certain crimes, and meet other key requirements.<sup>7</sup> It has been argued, however, that the Secretary’s memorandum contravenes statutory mandates under the Immigration and Nationality Act which, opponents of the policy assert, *require* that aliens who entered the country without inspection be “detained for removal proceedings.”<sup>8</sup>

In 2013 and 2014, the Administration utilized enforcement discretion to justify delays in the enforcement of a number of provisions of the Affordable care act (ACA), including the law’s employer mandate and minimum coverage requirements. These provisions were to take effect beginning on January 1, 2014. In July 2013, the Treasury Department announced that enforcement of the ACA’s new excise tax on employers with 50 or more employees that fail to provide affordable health coverage (the “employer mandate”) would be delayed for one year, until 2015.<sup>9</sup> In February 2014, the Administration announced that employers with at least 50 but fewer than 100 full-time equivalent employees would have an additional year to comply with the mandate.<sup>10</sup> Similarly, the Centers for Medicare and Medicaid Services announced in November 2013 that it was adopting a “transitional policy,” under which health insurers can continue to offer coverage that fails to meet certain statutorily required minimum standards for private health insurance under the ACA without threat of federal enforcement consequences.<sup>11</sup>

In contrast to the Administration position, some Members of Congress have asserted that these unilateral Presidential nonenforcement determinations upset the separation of powers, harm Congress as an institution and a coordinate branch of government, and are in direct violation of

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<sup>6</sup> Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, at 1, available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>7</sup> The Memorandum lays out the precise criteria to be satisfied “before an individual is considered for an exercise of prosecutorial discretion”:

- came to the United States under the age of sixteen;
- has continuously resided in the United states for at least five years preceding the date of this memorandum and is present in the United states on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

*Id.* See also, CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

<sup>8</sup> See, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013).

<sup>9</sup> See, CRS Legal Sidebar, *Obama Administration Delays Implementation of ACA’s Employer Responsibility Requirements: A Brief Legal Overview*.

<sup>10</sup> 79 Fed. Reg. 8544 (Feb. 12 2014).

<sup>11</sup> See, Letter from Gary Cohen, Director, Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicaid Services, to State Insurance Commissioners (Nov. 14, 2013) available at: <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF>; CRS Legal Sidebar, *Obama Administration’s “Fix” for Insurance Cancellations: A Legal Overview*.

the President’s constitutional obligation to “take Care that the Laws be faithfully executed...”<sup>12</sup> Although the House has held hearings addressing the issue and has approved legislation that would require the Administration to provide Congress with a report describing the legal grounds for any nonenforcement decisions, the Senate has not concurred with the House’s objections.<sup>13</sup>

As a result, the House appears to be focusing on the judicial process as a means of addressing the Administration’s nonenforcement policies. The ENFORCE the Law Act of 2014, which passed the House in March 2014, would establish an expedited process by which either house of Congress could file a lawsuit challenging a “formal or informal policy, practice, or procedure to refrain from enforcing, applying, following, or administering any provision of a Federal statute, rule, regulation, program, policy, or other law in violation of the requirement that the President take care that the laws be faithfully executed...”<sup>14</sup> In addition, the House approved a joint resolution that would authorize the Speaker—through the House General Counsel—to file a lawsuit seeking “any appropriate relief regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that official’s duties under the Constitution and laws of the United States with respect to implementation of any provision of the [ACA].”<sup>15</sup>

In light of these ongoing controversies, this report will address the President’s general obligation to “take Care that the Laws be faithfully executed.” The report will then discuss the limited role the judicial branch has traditionally adopted in reviewing discretionary enforcement decisions, including the decision to initiate a criminal prosecution or an administrative enforcement action. The report will conclude with a discussion of Congress’s authority to restrict executive discretion in the enforcement of federal law.

## The Dual Purposes of the Take Care Clause

[H]e shall take Care that the Laws be faithfully executed...

U.S. Constitution, Article II, §3

The Take Care Clause would appear to stand for two, at times diametrically opposed propositions—one imposing a “duty” upon the President and the other viewing the Clause as a source of Presidential “power.” Primarily, the Take Care Clause has been interpreted as placing an obligation on both the President and those under his supervision to comply with and execute clear statutory directives as enacted by Congress.<sup>16</sup> However, the Supreme Court has also construed the

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<sup>12</sup> See, e.g., H.Rept. 113-376 113<sup>th</sup> Cong. (2014); H.Rept. 113-377 113<sup>th</sup> Cong. (2014).

<sup>13</sup> H.R. 3973, Faithful Execution of the Law Act, 113<sup>th</sup> Cong. (2014).

<sup>14</sup> H.R. 4138 113<sup>th</sup> Cong. (2014).

<sup>15</sup> H. Res. 676 113<sup>th</sup> Cong. (2014).

<sup>16</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 532 (U.S. 2008) (“This authority allows the President to execute the laws, not make them.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”); *Myers v. United States*, 272 U.S. 52, 177(1926) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”); *Lear Siegler, Inc. v. Lehman*, 842 F. 2d 1102, 1124 (9th Cir. 1988) (“To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the ‘take care’ clause. . . (continued...)”).

Clause as ensuring Presidential control over the *enforcement* of federal law.<sup>17</sup> As a result, courts generally will not review Presidential enforcement decisions, including the decision of whether to initiate a criminal prosecution or administrative enforcement action in response to a violation of federal law or regulation. The puzzling result is that the Clause has been invoked as forming the constitutional basis for both the President's obligation to enforce the law, and his discretion not to.

## **The President's Obligation to Follow and Execute the Law**

It is beyond dispute that the President plays a significant role in the legislative process. The specific powers enumerated in Article II, §3<sup>18</sup> and Article I, §7<sup>19</sup> of the Constitution, along with the general vesting of "the executive power" in Article II, §1,<sup>20</sup> provide the President with the authority to recommend legislation to Congress, communicate his opposition or support for legislation under consideration,<sup>21</sup> and, ultimately, to either sign legislation that meets his approval, or veto that legislation which "he thinks bad."<sup>22</sup>

It is equally well established, however, that once a bill is enacted into law,<sup>23</sup> the President's legislative role comes to an end and is supplanted by his express constitutional obligation under Article II, §3 to "take Care that the Law[] be faithfully executed."<sup>24</sup> Although there was little discussion of the Clause at the Constitutional Convention, most scholars have agreed that, at a

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(...continued)

...), reh'g en banc ordered sub nom. *Lear Seigler, Inc. v. Ball*, 863 F. 2d 693 (9th Cir. 1988) (en banc); *National Treasury Employees Union v. Nixon*, 492 F. 2d 587, 604 (D.C.Cir. 1974) ("That constitutional duty does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary.").

<sup>17</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); *Buckley v. Valeo*, 424 U.S. 1 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *U.S. v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996) ("They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"); *Confiscation Cases*, 74 U.S. 454 (1869); *Smith v. U.S.*, 375 F.2d 243 (5<sup>th</sup> Cir. 1967) ("The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to 'take Care that the Laws be faithfully executed'...The discretion...in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute."); *U.S. v. Cox*, 342 F.2d 167 (5<sup>th</sup> Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

<sup>18</sup> U.S. Const. Art. II, §3 ("He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient...").

<sup>19</sup> U.S. Const. Art. I, §7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated...").

<sup>20</sup> U.S. Const. Art. II, §1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>21</sup> One way in which the President communicates his views on bills currently under consideration is through Statements of Administration Policy. See, [http://www.whitehouse.gov/omb/legislative\\_sap\\_default](http://www.whitehouse.gov/omb/legislative_sap_default).

<sup>22</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) ("The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.")

<sup>23</sup> The President's obligation to execute the law is equally applicable whether the law was enacted with the approval of the President or by a congressional override of the President's veto.

<sup>24</sup> U.S. Const. Art. II, §3 ("[H]e shall take Care that the Laws be faithfully executed.")



minimum, the Clause represents a repudiation of the royal suspending and dispensing power that had been historically exercised by English monarchs.<sup>25</sup> James Wilson, delegate to the constitutional convention from Pennsylvania, summarized this view in characterizing the Clause as providing the President with the “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws.”<sup>26</sup> The executive branch has agreed with this view, acknowledging that “the Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes.”<sup>27</sup> The Clause would appear then to prevent the President from simply disregarding or suspending laws enacted by Congress.

Today, the Take Care Clause makes a significant contribution to the separation of powers. The constitutionally created distinction between the “faithful” execution of the law under Article II, and the “finely wrought” process for the creation of law under Article I §4, operates as a clear demarcation of the legitimate powers and responsibilities of both the President and Congress in our constitutional system.<sup>28</sup> Just as Congress may neither enforce the laws nor improperly intrude into the President’s execution of the same, the President and his subordinates may not create law by unilaterally disregarding, amending, or repealing a validly enacted statute.<sup>29</sup> The ultimate power to legislate is a power possessed solely by Congress, and to permit the President the freedom to suspend, amend, or disregard laws of his choosing would be to “clothe” the executive branch with the power of lawmaking.<sup>30</sup>

A long line of Supreme Court precedent indicates the Court’s consistent view that the Take Care Clause imposes a “duty” or “obligation” upon the President to ensure that executive branch officials obey Congress’s commands, and, additionally, that the Clause does not provide the President with the authority to frustrate legal requirements imposed by law. The notion that the President and executive branch officers must “faithfully” implement and execute the law can be seen as early as the seminal case of *Marbury v. Madison* in 1803.<sup>31</sup> Although *Marbury* is best known for Chief Justice John Marshall’s discussion of the Supreme Court’s power of “judicial review”—the authority of the Court to invalidate laws it determines to be unconstitutional—the case also contains strong language relating to the obligation of executive branch officials to comply with the law.

In the final hours of his Presidency, John Adams had appointed William Marbury to serve as Justice of the Peace for the District of Columbia. Marbury’s commission, however, was never delivered, and upon assuming office President Thomas Jefferson instructed Secretary of State

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<sup>25</sup> See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 693 (2014). Beyond this limited agreement, there is little consensus among scholars as to the historical meaning of the Take Care Clause. Compare Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L. J. 541 (1994) with Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

<sup>26</sup> 2 James Wilson, Lectures on Law Part 2, in *Collected Works of James Wilson* 829, 878 (2007).

<sup>27</sup> Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7 1995).

<sup>28</sup> See, *INS v. Chadha*, 462 U.S. 919, 945 (1983) (“Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”).

<sup>29</sup> See, *Clinton v. City of New York*, 524 U.S. 417, 488 (1998) (“There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”).

<sup>30</sup> *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838).

<sup>31</sup> 5 U.S. 137 (1803).



James Madison to withhold the commission, thus denying Marbury the position. Marbury filed suit, asking the Supreme Court to compel Madison to deliver the commission as, Marbury argued, was required by law. Although the Supreme Court determined that it lacked jurisdiction to hear the case and therefore did not compel Madison to take any action, Chief Justice Marshall nonetheless established that when an executive officer fails to perform a “specific duty [] assigned by law,” the courts may enforce the obligation through a writ of mandamus.<sup>32</sup> The *Marbury* opinion recognized Congress’s authority to impose specific duties upon executive branch officials by law, as well as the official’s corresponding obligation to execute the congressional directive. The general rule established in *Marbury* had limits, however; the Chief Justice drew a clear distinction between the enforceability of ministerial or mandatory requirements—which were subject to judicial enforcement—and political acts involving either statutory or constitutional discretion—which were not.<sup>33</sup>

The Supreme Court’s most forceful articulation of the President’s obligation to execute the law came thirty years later in *Kendall v. United States ex rel. Stokes*.<sup>34</sup> In *Kendall*, a federal law directed the Postmaster General to provide back pay to a group of mail carrier contractors in an amount determined by the Solicitor of the Treasury. The Postmaster General, apparently at the express direction of the President, refused to pay the amount that the Solicitor had found owing. The Supreme Court, viewing the Postmaster General’s duty to pay the full amount as ministerial rather than discretionary, held that the President had no authority to direct the Postmaster’s performance of his statutory obligation.<sup>35</sup> Where Congress has imposed upon an executive officer a valid duty, the Court declared “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”<sup>36</sup> Any interpretation of the Constitution that characterized the obligation of an executive branch official to execute the law as arising from the direction of the President alone, and not as arising from the law itself, would “cloth[e] the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.”<sup>37</sup> “This is a doctrine,” the majority held “that cannot receive the sanction of this court.”<sup>38</sup>

Perhaps the most significant aspect of the *Kendall* opinion was its repudiation of the government’s assertion that the Take Care Clause constituted a source of presidential power. The Court plainly rejected this argument, holding that the Clause could *not* be relied upon as a basis for noncompliance with the law. “To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution,” the Court held, “is a novel construction of the Constitution, and entirely inadmissible.”<sup>39</sup> The legal reasoning in *Kendall* has long been cited as refuting any asserted presidential power to block the execution of validly enacted statutes.

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<sup>32</sup> *Id.* at 166.

<sup>33</sup> *Id.* at 164 (“Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?”).

<sup>34</sup> 37 U.S. 524 (1838).

<sup>35</sup> *Id.* at 610.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 613.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

The Supreme Court reinforced the Constitution's clear distinction between Congress's role in the creation of the law and the President's role in the execution of the law in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>40</sup> In *Youngstown*, the Court heard a challenge to an Executive Order issued by President Harry Truman directing the Secretary of Commerce to seize various steel mills in an effort to avert the detrimental effect a potential workers' strike would have on the prosecution of the Korean conflict. The Court invalidated the President's directive, holding that neither the Constitution nor any statutory delegation from Congress authorized such an order. The majority opinion was based chiefly on the proposition that the Constitution limits the President's "functions in the lawmaking process" to recommending laws he supports, vetoing laws he opposes, and executing laws that have been enacted by Congress.<sup>41</sup> "In the framework of our Constitution," wrote Justice Black, "the President's power to see that the laws be faithfully executed refutes the idea that he is to be a lawmaker."<sup>42</sup> Justice Jackson's influential concurring opinion likewise concluded that "the Executive, except for recommendation and veto, has no legislative power."<sup>43</sup>

The legal reasoning espoused in *Marbury*, *Kendall*, and *Youngstown* is buttressed by the judicial response to an illustrative conflict in which President Richard Nixon claimed the authority to disregard congressional enactments. Beginning in 1972, President Nixon asserted the authority to decline to spend or obligate appropriated funds in order to reduce public spending and to negate programs established by congressional legislation.<sup>44</sup> Termed an "impoundment," the legal justification for Nixon's policy was claimed to have derived from the Take Care Clause. Most of the courts that reviewed the matter rejected the declared authority, holding—generally on statutory grounds—that neither the President nor the agency heads involved had discretion as to whether to spend appropriated funds.<sup>45</sup> To permit such an action would be to allow a President to substitute his policy choices on spending for those established by congressional appropriations. The Supreme Court agreed in *Train v. City of New York*, holding that as a statutory matter the Administrator of the Environmental Protection Agency had no discretion to withhold funds that had been validly appropriated.<sup>46</sup>

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<sup>40</sup> 343 U.S. 579 (1952).

<sup>41</sup> *Id.* at 587-88. ("[T]he Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.")

<sup>42</sup> *Id.* at 587.

<sup>43</sup> *Id.* at 655 (Jackson, J. concurring).

<sup>44</sup> See, *Clinton v. City of New York*, 524 U.S. 417, 468 (1998) (Kennedy, J. concurring) ("President Nixon, the Mahatma Gandhi of all impounders, asserted at a press conference in 1973 that his 'constitutional right' to impound appropriated funds was 'absolutely clear.'").

<sup>45</sup> See, e.g., *State Highway Comm'n. of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974); *Local 2677, American Fed. of Gov. Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

<sup>46</sup> 420 U.S. 35 (1975). Lower federal courts similarly rejected President Reagan's assertion that he had the authority to disregard the automatic stay provisions of the Competition in Contracting Act (CICA). President Reagan objected to the law on constitutional grounds, asserting that the law frustrated the separation of powers by delegating executive powers to a legislative branch officer in violation of the principles established in *INS v. Chadha*, 462 U.S. 919 (1983) and *Bowsher v. Synar*, 478 U.S. 714 (1986). Consistent with the President's view, the Office of Management and Budget issued a directive to all executive branch agencies to disregard the stay provisions of the law.

An initial decision in *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9<sup>th</sup> Cir. 1988) by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that CICA did not impermissibly intrude on the President's authority to execute the laws, but also contained strong language criticizing the President's nonenforcement decision. The government asserted that nonenforcement was warranted "because the President's duty to uphold the Constitution and faithfully execute the laws empowers the President to *interpret* the Constitution and *disregard* laws he deems unconstitutional." *Id.* at 1121. (continued...)

The U.S. District Court for the District of Columbia, however, offered a more robust rejection of the impoundments and the President's claimed constitutional authority. In *Local 2677 AFGE v. Phillips*, the district court held that until Congress terminates a program, "historical precedent, logic, and the text of the Constitution itself obligate the [President] to continue to operate [the program] as was intended by the Congress..."<sup>47</sup> The opinion further suggested that were the President's asserted power to be accepted, "no barrier would remain to the executive ignoring any and all Congressional authorizations if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation."<sup>48</sup>

Notwithstanding the Supreme Court's articulation of the President's constitutional responsibility to execute the law, it is important to note that judicial enforcement of that duty is wholly contingent upon the creation of a well-defined statutory mandate or prohibition.<sup>49</sup> Where Congress has legislated broadly, ambiguously, or in a nonobligatory manner, courts are unlikely to command or halt action by either the President or his officials.<sup>50</sup> Absent the creation of a clear duty, "the executive must be allowed to operate freely within the sphere of discretion created for him by that legislation."<sup>51</sup>

## **The Take Care Clause as Establishing Presidential Control Over Law Enforcement**

In addition to establishing the President's obligation to execute the law, the Supreme Court has simultaneously interpreted the Take Care Clause as ensuring presidential control over those who execute and enforce the law.<sup>52</sup> In framing the Clause as establishing a *personal* responsibility in

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(...continued)

The court rejected this argument, holding the position to be "utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent." *Id.* In an approach slightly different from that taken by other courts, the Ninth Circuit reasoned that the President's asserted power would provide the President with "absolute veto power" by vitiating Congress's constitutional authority to override a Presidential veto. *Id.* at 1124. By unilaterally suspending a law, as opposed to vetoing the law, the President "afforded no opportunity for congressional override, thereby violating the override as well as the veto provision of the Constitution." *Id.* On appeal en banc, however, the Ninth Circuit withdrew the above quoted portions on other grounds. *Lear Siegler v. Lehman*, 893 F.2d 205 (9th Cir. 1989) ("Accordingly, Part III of the decision...is withdrawn from publication...").

<sup>47</sup> *Local 2677, American Fed. of Gov. Employees v. Phillips*, 358 F. Supp. 60, 76 (D.D.C. 1973); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes...").

<sup>48</sup> *Id.* at 77.

<sup>49</sup> See, e.g., *Ameron Inc. v. U.S. Army Corps of Engineers*, 808 F.2d 979, 993 (3rd Cir. 1986) ("If Congress gives the President only a few general instructions, and allows the executive 'to fill up the details,' then the scope of the executive power is great. If, on the other hand, Congress chooses to specify a great number of details concerning how it wants the executive to proceed, such as specifying what it wants the executive to procure, the legislature is entirely free to take that course.") (citations omitted).

<sup>50</sup> *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930) ("Where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.").

<sup>51</sup> *Ameron*, 808 F.2d at 994.

<sup>52</sup> See, *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3151 (2010) ("As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.' 1 Annals of Cong. 463 (1789).").

the President, the court has previously invalidated laws that would undermine the President's ability to oversee the execution and enforcement of the law.<sup>53</sup> These principles have grown mainly out of the Court's consideration of the President's appointment and removal power. In *Bowsher v. Synar*, for example, the Court invalidated a law that had delegated executive powers, including the authority to interpret and execute the law, to the Comptroller General—a legislative branch officer removable by Congress.<sup>54</sup> The Court held that “[a] direct congressional role in the removal of officers charged with the execution of the laws ... is inconsistent with separation of powers.”<sup>55</sup>

Likewise, in *Buckley v. Valeo*, the Court determined that Congress could not provide itself with the power to appoint members of an independent commission that had been vested, among other powers, with the authority to undertake enforcement actions.<sup>56</sup> In striking down the appointment structure of the Federal Election Commission, the Court held that “a lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to Congress, that the Constitution entrusts the responsibility to take care that the laws be faithfully executed.”<sup>57</sup>

In *Printz v. U.S.*, the Court suggested that vesting state and local officers with the authority to enforce federal law may also intrude upon the President's duty to oversee those that execute the law.<sup>58</sup> Although *Printz* is primarily known as a 10<sup>th</sup> Amendment case addressing federal intrusion into state sovereignty, the Court also considered the effect the Brady Handgun Violence Prevention Act would have on the President's obligation to “take Care that the Laws be faithfully executed.” At issue in *Printz* was a provision of the Act that required the chief law enforcement officers (CLEOs) of state and local governments to conduct background checks to ascertain whether individuals were ineligible to purchase handguns. The Court suggested that the law may impermissibly diminish presidential power, noting:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, “shall take Care that the Laws be faithfully executed,” personally and through officers whom he appoints... The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.<sup>59</sup>

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<sup>53</sup> See, e.g., *Id.* at 3152 (“Article II confers on the President ‘the general administrative control of those executing the laws.’ It is his responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase.”)(citations omitted); *Nixon v. Fitzgerald*, 457 U.S. 731, 750, (1982) (“This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to ‘take Care that the Laws be faithfully executed’”).

<sup>54</sup> 478 U.S. 714 (1986).

<sup>55</sup> *Id.* at 723.

<sup>56</sup> 424 U.S. 1 (1976).

<sup>57</sup> *Id.* at 138.

<sup>58</sup> 521 U.S. 898 (1997).

<sup>59</sup> *Id.* at 922 (citations omitted).

More recently in *Free Enterprise Fund v. PCAOB*, the Supreme Court invalidated a statute that insulated officers of the Public Company Accountability Oversight Board from the President by providing Board members with dual layers of “for cause” removal protections.<sup>60</sup> In the course of striking down the law, the Court cited with approval the holding in *Myers v. U.S.* that the President must retain “general administrative control of those executing the laws,” for he cannot “take Care that the laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them.”<sup>61</sup>

Whereas the President must be able to oversee those who enforce the law, Presidential control over law enforcement officers need not be absolute. In *Morrison v. Olson*, a case upholding a law establishing the office of the Independent Counsel, the Court summarized its removal jurisprudence as ensuring that “Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”<sup>62</sup> However, the opinion then sanctioned Congress’s authority to provide a prosecutor with independence from the President by providing the officer with “for cause” removal protections—holding that such protections did *not* “sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”<sup>63</sup> *Morrison*, which may act as a significant limitation on the exclusivity of executive branch enforcement discretion, will subsequently be discussed in greater detail.

As a corollary to the requirement that the President must retain some level of control over those that enforce the law, the courts have similarly cited the Clause as providing the President and his officers with discretion as to *how* the laws are to be enforced against the general public. This discretion has been considered an essential component of the President’s obligation to “discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>64</sup> It is worth emphasizing, however, that any discretion that may arise from the Take Care Clause would extend only to decisions directly related to the enforcement of federal law upon third parties. At no time has the Court recognized the Clause as a justification for either affirmatively suspending federal law or refusing to comply with explicit mandates or restrictions imposed on the executive branch. Moreover, whether executive enforcement discretion constitutes a presidential “power” or a rule of judicial restraint is an important question, and a crucial one in delineating Congress’s authority to restrict that discretion, yet unanswered by the Supreme Court.

The Obama Administration has relied upon enforcement discretion, in both the criminal and administrative context, as the chief legal justification for the previously identified actions and it is to this doctrine that this report now turns.

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<sup>60</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>61</sup> *Id.* at 3147, 3152.

<sup>62</sup> 487 U.S. 654, 690 (1988).

<sup>63</sup> *Id.* at 693.

<sup>64</sup> *U.S. v. Armstrong*, 517 U.S. at 464 (“They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”);



## Prosecutorial Discretion and Judicial Restraint

The judicial branch has traditionally accorded federal prosecutors “broad” latitude in making a range of investigatory and prosecutorial determinations, including when, against whom, and whether to prosecute particular criminal violations of federal law.<sup>65</sup> This doctrine of prosecutorial discretion has a long historical pedigree—the early roots of which can be traced at least to a sixteenth century English common law procedural mechanism known as the *nolle prosequi*.<sup>66</sup> In the early English legal system, criminal prosecutions were generally initiated by private individuals rather than public prosecutors. The *nolle prosequi*, however, allowed the government, generally at the direction of the Crown, to intervene in and terminate a privately initiated criminal action it viewed as “frivolous or in contravention of royal interests.”<sup>67</sup> The discretionary device and its principles were later adopted into American common law, permitting prosecutors to avoid prosecutions that were determined to be unwarranted or which the prosecuting authority chose not to pursue.<sup>68</sup>

Notwithstanding this historical background, the modern doctrine of prosecutorial discretion derives more from our constitutional structure than English common law. The exact justification for the doctrine, however, does not appear to have been explicitly established. Generally, courts have characterized prosecutorial discretion as a function of some mixture of constitutional principles, including the separation of powers, the Take Care Clause, and the duties of a prosecutor as an appointee of the President.<sup>69</sup> Regardless of its precise textual source, courts generally will not review discretionary prosecutorial decisions in criminal matters, nor coerce the executive branch to initiate a particular prosecution. Most courts have agreed that judicial review

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<sup>65</sup> *Wayte v. U.S.*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”)(citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982)); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case...”)(citing the *Confiscation Cases*, 74 U.S. 454 (1869)).

<sup>66</sup> See, e.g., Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 *Seton Hall Cir. Rev.* 1, 19-26 (2009) (describing the English use of the *nolle prosequi* and its “absorb[ti]on” by American law).

<sup>67</sup> *Id.* at 20.

<sup>68</sup> See, e.g., *Confiscation Cases*, 74 U.S. 454 (1869); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Most recently, the issue of the United States Attorney’s ‘discretionary control of criminal prosecutions has arisen in connection with the filing of a *nolle prosequi*, and the Courts have regularly refused to interfere with these voluntary dismissals of prosecution.”)(citing Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 *Law & Contemp. Prob.* 64, 83 (1948)).

<sup>69</sup> See, e.g., *Armstrong*, 517 U.S. at 464 (“They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”); *Confiscation Cases*, 74 U.S. at 458 (“Appointed, as the Attorney General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed....”); *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (“The Attorney General is the head of the Department of Justice. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences be faithfully executed.”); *Smith v. Meese*, 821 F.2d 1484, 1491 (11<sup>th</sup> Cir. 1987) (“The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive, and the judicial branch’s deference to the executive on prosecutorial decisionmaking is grounded in the constitutional separation of powers.”); *United States v. Cox*, 342 F.2d 167, 171 (5<sup>th</sup> Cir. 1965) (“as an incident of the constitutional separation of powers...the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”).

of prosecutorial decisions is generally improper given that the “prosecutorial function, and the discretion that accompanies it, is [] committed by the Constitution to the executive.”<sup>70</sup>

Judicial deference to prosecutorial decisions made by federal prosecutors has been justified on the ground that the “decision to prosecute is particularly ill-suited to judicial review.”<sup>71</sup> The courts have repeatedly acknowledged that these types of discretionary decisions involve the consideration of factors—such as the strength of evidence, deterrence value, available resources, and existing enforcement priorities—“not readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>72</sup> Indeed, “[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.”<sup>73</sup>

A core aspect of prosecutorial discretion would appear to be the decision to initiate a criminal prosecution.<sup>74</sup> As a result, judicial hesitance to review prosecutorial decisions is perhaps at its peak when the government chooses not to prosecute. The Supreme Court issued one of its strongest pronouncements of this principle in *U.S. v. Nixon*, proclaiming that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”<sup>75</sup> Although the Court did not elaborate on the statement, other lower courts have adopted similar lines of reasoning. For example, a strong statement of judicial restraint was issued in the oft cited case of *United States v. Cox*, in which the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) held that a district court could not compel a U.S. Attorney to sign an indictment returned by the grand jury.<sup>76</sup> The court held that as an

officer of the executive department...[the prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.<sup>77</sup>

This principle was further exemplified by the U.S. Court of Appeals for the Second Circuit (Second Circuit) in *Inmates of Attica Correctional Facility v. Rockefeller*.<sup>78</sup> In that case, prison

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<sup>70</sup> *Smith v. Meese*, 821 F.2d 1484, 1491 (11<sup>th</sup> Cir. 1987).

<sup>71</sup> *Wayte v. U.S.*, 470 U.S. 598, 607 (1985).

<sup>72</sup> *Id.* at 607-608 (“Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.”).

<sup>73</sup> *Newman v. U.S.*, 382 F.2d 479, 480 (D.C. Cir. 1967).

<sup>74</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“The decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”);

<sup>75</sup> 418 U.S. 683, 693 (1974).

<sup>76</sup> 342 F.2d 167 (5<sup>th</sup> Cir. 1965).

<sup>77</sup> *Id.* at 171.

<sup>78</sup> 477 F. 2d 375 (2<sup>nd</sup> Cir. 1973).



inmates brought suit against the U.S. Attorney for the Western District of New York for his failure to take any action against government officials following the suppression of the Attica prison revolt that resulted in the deaths of 32 inmates. The plaintiffs sought a mandamus order, directing the U.S. Attorney to “investigate, arrest, and prosecute” those state officials who committed federal criminal civil rights violations.<sup>79</sup> The court dismissed the claim, holding that “federal courts have traditionally *and, to our knowledge, uniformly* refrained from overturning...discretionary decisions of federal prosecuting authorities not to prosecute...”<sup>80</sup> The court noted that this “judicial reluctance” and the “traditional judicial aversion to compelling prosecutions” is grounded in the constitutional separation of powers as well as the practical consideration that “the manifold imponderables which enter into the prosecutor’s decision to prosecute or not to prosecute make the choice not readily amendable to judicial supervision.”<sup>81</sup>

In its view, the executive branch has asserted that it must maintain absolute control over prosecutorial decisions, concluding specifically that “because the essential core of the President’s constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress.”<sup>82</sup> The DOJ has also asserted a “corollary” proposition, “that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.”<sup>83</sup>

While prosecutorial discretion is broad, it is not “unfettered.”<sup>84</sup> Indeed, the government “cannot cloak constitutional violations under the guise of prosecutorial discretion and expect the federal courts simply to look the other way.”<sup>85</sup> For example, in discussing the scope of the executive branch’s discretion, courts have repeatedly noted that the determination as to whether to prosecute may not be based upon “race, religion, or other arbitrary classification.”<sup>86</sup> Nor may an exercise of prosecutorial discretion infringe individual constitutional rights.<sup>87</sup> Where prosecutions (or other enforcement actions) are based upon impermissible factors “the judiciary must protect against unconstitutional deprivations.”<sup>88</sup> This principle was evident in *Yick Wo v. Hopkins*, where the Supreme Court found that prosecutors’ practice of enforcing a state law prohibiting the operation of laundries against only persons of Chinese descent ran afoul of the Equal Protection Clause.<sup>89</sup> In practice, however, defendants generally find it difficult to maintain a claim of selective

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<sup>79</sup> *Id.* at 381.

<sup>80</sup> *Id.* at 379.

<sup>81</sup> *Id.* at 380.

<sup>82</sup> See, *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 114 (1984) (emphasis added). This traditional conception may, however, have been qualified in some respects following the Supreme Court’s decision in *Morrison v. Olson*, in which the Court upheld a congressional delegation of prosecutorial power to an independent counsel under the Ethics in Government Act. 487 U.S. 654 (1988).

<sup>83</sup> 8 Op. Off. Legal Counsel 101, 115 (1984).

<sup>84</sup> *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

<sup>85</sup> *Smith v. Meese*, 821 F.2d 1484, 1492 (11<sup>th</sup> Cir. 1987).

<sup>86</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1977) (finding that a state prosecutor’s decision to indict the defendant as habitual offender after he refused to plead guilty of a felony did not violate the defendant’s constitutional rights).

<sup>87</sup> *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

<sup>88</sup> *U.S. v. Johnson*, 577 F.2d 1304 (5<sup>th</sup> Cir. 1978).

<sup>89</sup> 118 U.S. 356 (1886).

prosecution. Courts generally require defendants to introduce “clear evidence” displacing the presumption that the prosecutor has acted lawfully.<sup>90</sup>

In addition to reviewing decisions that violate individual constitutional rights, courts may also choose to review prosecutorial decisions for compliance with express statutory requirements. In *Nader v Saxbe*, a case involving nonenforcement of the Federal Corrupt Practices Act, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) suggested that “the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to *statutory* and constitutional limits enforceable through judicial review.”<sup>91</sup> Although dismissing the case for lack of standing, the D.C. Circuit rejected the district court’s determination that “prosecutorial decision-making is wholly immune from judicial review.”<sup>92</sup> Therefore, it would appear that where Congress has explicitly established a statutory framework under which prosecutions are to take place, and as a result altered the traditional scope of prosecutorial discretion, “the judiciary has the responsibility of assuring that the purpose and intent of congressional enactments are not negated...”<sup>93</sup> Under these rare circumstances, courts may elect to review prosecutorial decisions—including the decision of whether to initiate a criminal prosecution—to ensure compliance with federal law.

However, courts have been reluctant to read criminal statutes as establishing the type of framework necessary to withdraw the executive’s discretion to decide whether to initiate a prosecution, instead requiring clear and unambiguous evidence of Congress’s intent to withdraw traditional prosecutorial discretion. For example, in *Powell v Katzenbach*, the D.C. Circuit dismissed a challenge to the Attorney General’s failure to prosecute a national bank for certain criminal violations.<sup>94</sup> After assuming, “without deciding, that where Congress has withdrawn all discretion from the prosecutor by special legislation, a court might be empowered to force prosecutions in some circumstances,” the circuit court determined “the language of [the provision in question] and its legislative history fail to disclose a congressional intent to alter the traditional scope of the prosecutor’s discretion.”<sup>95</sup> Moreover, both the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) and the U.S. District Court for the District of Columbia have held that language in the federal civil rights statutes stating that U.S. Attorneys are “authorized *and required to institute prosecutions* against all persons violating” certain provisions of the Civil Rights Act<sup>96</sup> similarly failed to “strip” federal prosecutors of “their normal prosecutorial discretion.”<sup>97</sup> The Fourth Circuit specifically found the use of the word “require” to be “insufficient to evince a broad congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes.”<sup>98</sup> As a result, the court determined that it was

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<sup>90</sup> *Reno v. American-Arab Anti-Discrimination Comm*, 525 U.S. 471, 489 (1999) (quoting *Armstrong*, 517 U.S. at 463). Specifically, they must show that: (1) they were singled out for prosecution on an impermissible basis; (2) the government had a policy of declining to prosecute similarly situated defendants of other races, religions, etc.; and (3) the policy was motivated by a discriminatory purpose.

<sup>91</sup> 497 F.2d 676, 679 n.19 (1974).

<sup>92</sup> *Id.*

<sup>93</sup> *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C. 1976).

<sup>94</sup> 359 F.2d 234 (D.C. Cir. 1965).

<sup>95</sup> *Id.* at 235.

<sup>96</sup> See, 42 U.S.C. §§1984, 1986, 1987, 1988.

<sup>97</sup> *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2<sup>nd</sup> Cir. 1973); *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963).

<sup>98</sup> *Inmates of Attica Correctional Facility*, 477 F.2d at 381.

“unnecessary to decide whether, if Congress were by explicit direction and guidelines to remove all prosecutorial discretion with respect to certain crimes or in certain circumstances we would properly direct that a prosecution be undertaken.”<sup>99</sup>

The separation of powers concerns that would derive from a law that unambiguously and expressly sought to remove prosecutorial discretion and compel criminal prosecutions will be explored in greater detail *infra*.<sup>100</sup>

## Judicial Review of Administrative Nonenforcement

Agency civil enforcement decisions in the *administrative* context “share[] to some extent the characteristics of the decision of a prosecutor” in the *criminal* context.<sup>101</sup> This freedom in setting enforcement priorities, allocating resources, and making specific strategic enforcement decisions—including the decision to initiate an enforcement action—is commonly described as “administrative enforcement discretion.” Whether this form of enforcement discretion enjoys the same constitutional footing as prosecutorial discretion is not entirely clear. Indeed, the judicial reluctance to review agency enforcement decisions would appear to arise as much from the Administrative Procedure Act (APA) as it does from the Take Care Clause.

Although the APA establishes a general presumption that all final agency decisions are subject to judicial review, it also specifically precludes from judicial consideration any agency action that is “committed to agency discretion by law.”<sup>102</sup> A decision is generally considered “committed to agency discretion” when a reviewing court would have “no law to apply” in evaluating the determination.<sup>103</sup> Consistent with this framework, and in light of the traditional discretion exercised by agencies in enforcing statutes they administer, courts generally will not review discretionary agency enforcement decisions.<sup>104</sup> These discretionary activities may include any

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<sup>99</sup> *Id.* at 382.

<sup>100</sup> In a concurring opinion in *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984) Judge Bork identified the “severity of the constitutional problem that would arise” were Congress to authorize the courts to direct the Attorney General in his law enforcement function.

<sup>101</sup> *Heckler v. Chaney*, 470 U.S. at 832 (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict — a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”). It would appear that agency enforcement discretion exercised in the administrative context, though similar, is to be distinguished from prosecutorial discretion exercised in the criminal context.

<sup>102</sup> 5 U.S.C. §701(a).

<sup>103</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that the “committed to agency discretion” exception to judicial review is “very narrow” and “is applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”) (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

<sup>104</sup> It should be noted that the dismissal of a challenge to an agency nonenforcement decision under the APA is not necessarily recognition by the court that the agency was acting within its authority. A legal distinction must be made between a decision in which a court reviews the merits of a challenge and approves of the agency action or inaction, and one in which a court dismisses the challenge for lack of jurisdiction before reviewing the merits. Although, as a practical matter, either decision results in the same outcome, (i.e., the continuation of the agency decision) it would be inappropriate to state that a court that has dismissed a nonenforcement decision as “committed to agency discretion” has accorded legal confirmation to the agency action or inaction. See also, *Johnson v. U.S. Office of Pers. Mgmt.*, No. 14-C-009, slip op. at 17 (E.D. Wisc. July 21, 2014) (“[T]here is nothing in the Constitution stipulating that all wrongs must have remedies, much less that the remedy must lie in federal court.”).

range of actions and decisions taken throughout the investigative and enforcement process, including, but not limited to, the imposition of penalties or the initiation of an agency investigation, prosecution, adjudication, lawsuit, or audit.<sup>105</sup>

In situations where an agency *refrains* from bringing an enforcement action, courts have historically been cautious in reviewing the agency determination—generally holding that these nonenforcement decisions are “committed to agency discretion” and therefore not subject to judicial review under the APA.<sup>106</sup> The seminal case on this topic is *Heckler v. Chaney*, a Supreme Court decision in which death row inmates challenged the Food and Drug Administration’s refusal to initiate an enforcement action to block the use of certain drugs in lethal injection.<sup>107</sup> In rejecting the challenge, the Supreme Court held that “an agency’s decision not to prosecute or enforce...is a decision generally committed to an agency’s absolute discretion.”<sup>108</sup> The Court noted that agency enforcement decisions, involve a “complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise” including,

whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.<sup>109</sup>

Agencies, the Court reasoned, are “far better equipped” to evaluate “the many variables involved in the proper ordering of its priorities” than are the courts.<sup>110</sup> Consistent with this deferential view, the *Heckler* opinion proceeded to establish the standard for the reviewability of agency nonenforcement decisions, holding that an “agency’s decision not to take enforcement action should be *presumed immune from judicial review*.”<sup>111</sup>

However, the Court also clearly indicated that the presumption against judicial review of agency nonenforcement decisions may be overcome in a variety of specific situations.<sup>112</sup> For purposes of

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<sup>105</sup> For a typical description of how agencies exercise enforcement discretion see, Securities and Exchange Commission Division of Enforcement: Enforcement Manual, 2.1.1 Ranking Investigations and Allocating Resources, *available at*: <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

<sup>106</sup> 5 U.S.C. §701(a).

<sup>107</sup> 470 U.S. 821.

<sup>108</sup> *Id.* at 831.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 831-32.

<sup>111</sup> *Id.* at 832.

<sup>112</sup> One commentator has identified seven exceptions to the *Heckler v. Chaney* rule, concluding that it “would probably be a mistake to read Chaney as establishing a general rule of nonreviewability for enforcement decisions.” See, Cass Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 675-683 (1985). These exceptions include: “Inaction Based on Constitutionally Impermissible Factors;” “Inaction Based on Asserted Absence of Statutory Jurisdiction;” “Inaction Based on Statutorily Irrelevant Factors or Otherwise in Violation of Statutory Constraints on Enforcement Discretion;” “‘Abdication’ of Statutory Duty or a ‘Pattern’ of Nonenforcement;” “Refusal to Enforce Agency Regulations;” “Failure to Initiate Rulemaking;” “Generalized Arbitrariness.” The D.C. Circuit has also held that the *Heckler* presumption does not apply when a nonenforcement decision is actually an agency interpretation of a statute. See, *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) (“[N]othing in the holding or policy of *Heckler v. Chaney* [] precludes review of a ...challenge of an agency’s announcement of its interpretation of a statute, even when that interpretation is advanced in the context of a decision not to take enforcement action.”) (citations omitted).

this report, two identified exceptions necessitate significant discussion. First, a court may review an agency nonenforcement determination “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”<sup>113</sup> In such a situation, Congress has supplied the court with “law to apply” in reviewing the agency decision. Second, the Court suggested that judicial review of nonenforcement may be appropriate when an agency has “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>114</sup> Due presumably to standing limitations, lower federal courts have only rarely had opportunity to clarify these exceptions to *Heckler’s* presumption of non-reviewability of nonenforcement decisions.<sup>115</sup>

## Statutory Guidelines

The *Heckler* opinion specifically recognized Congress’s authority to curtail an agency’s ability to exercise enforcement discretion “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”<sup>116</sup> Congress may, for instance, choose to remove an agency’s discretion by indicating “an intent to circumscribe agency enforcement discretion” and “provid[ing] meaningful standards for defining the limits of that discretion.”<sup>117</sup> In this manner Congress overrides the inherent discretion possessed by the agencies in the enforcement of federal law and provides a reviewing court with a standard upon which to review the agency inaction. The Court succinctly articulated the principle in *Heckler*:

If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is “law to apply” under [the APA] and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision “committed to agency discretion by law” within the meaning of that section.<sup>118</sup>

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<sup>113</sup> *Heckler*, at 833.

<sup>114</sup> *Id.* at 833 n.4.

<sup>115</sup> The dearth of case law relating to agency nonenforcement may be due to the difficulty of finding a plaintiff who has been sufficiently injured by the agency inaction, such that the individual can establish standing. *See e.g.*, CRS Legal Sidebar, *Obama Administration Delays Implementation of ACA’s Employer Responsibility Requirements: A Brief Legal Overview*. The U.S. District Court for the Southern District of Florida recently dismissed a challenge to the administration’s delayed enforcement of the employer mandate for lack of standing. *Kawa Orthodontics, LLP v. Lew*, Case No. 13-80990-CIV-DIMITROULEAS (D. Fl. Jan. 13, 2014). Justice Scalia articulated his views of how the standing doctrine generally should bar challenges to executive nonenforcement decisions in his dissent in *FEC v. Atkins*, 524 U.S. 11 (1998)(Scalia, J. dissenting) (“The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party. Despite its liberality, the [APA] does not allow such suits, since enforcement action is traditionally deemed ‘committed to agency discretion by law.’ If provisions such as the present one were commonplace, the role of the Executive Branch in our system of separated and equilibrated powers would be greatly reduced, and that of the Judiciary greatly expanded.”)(citations omitted).

<sup>116</sup> *Heckler*, 470 U.S. at 833. *See also*, *Souder v. Brennan*, 367 F. Supp. 808, 811-12 (D.D.C. 1973) (“It is undisputed that the Department of Labor has a declared policy of nonenforcement of the minimum wage and overtime provisions with regard to patient-workers at non-Federal institutions for the mentally-ill. It is also clear to the Court that if the Fair Labor Standards Act does apply to such patient-workers then the policy of nonenforcement is a violation of the Secretary’s duty to enforce the law.”).

<sup>117</sup> *Id.* at 834.

<sup>118</sup> *Id.* at 834-35.

Although the exercise of agency discretion may therefore be influenced by congressional controls, it would appear that Congress's intent to curtail the agency enforcement discretion must be made explicit, as courts are hesitant to imply such limitations.<sup>119</sup>

In applying this standard, the *Heckler* opinion held that the FFDCCA had not curtailed the FDA's discretion in a manner sufficient to allow the court to review the agency's nonenforcement determination. The FFDCCA provided only that the Secretary was "authorized to conduct examinations and investigations;" and not that he was required to do so.<sup>120</sup> Moreover, the Court determined that the FFDCCA's requirement that any person who violates the Act "shall be imprisoned...or fined," could *not* be read to mandate that the FDA initiate an enforcement action in response to every violation.<sup>121</sup> The FFDCCA's prohibition on certain conduct, although framed in mandatory terms, was insufficient to permit review of nonenforcement absent additional language delineating how and when the agency was to respond to violations. "The Act's enforcement provisions," held the Court "thus commit complete discretion to the Secretary to decide how and when they should be exercised."<sup>122</sup>

In his concurrence, Justice Brennan identified the potential consequences of the majority's position and attempted to narrow the scope of the opinion, writing that agencies should not feel "free to disregard legislative direction in the statutory scheme that the agency administers."<sup>123</sup> Brennan emphasized that the presumption against reviewability applied only to the "individual, isolated nonenforcement decisions" that "must be made by hundreds of agencies each day."<sup>124</sup> "Absent some indication of congressional intent to the contrary," Brennan found it reasonable to believe that Congress did not intend the courts to review "such mundane matters."<sup>125</sup>

Justice Brennan's more limited reasoning had carried the day in the pre-*Heckler* case of *Dunlop v. Bachowski*.<sup>126</sup> In *Dunlop*, a union member challenged the Secretary of Labor's refusal to bring an enforcement action to set aside a union election. The Labor-Management Reporting and Disclosure Act (L-MRDA) provides that upon the filing of a complaint, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation... has occurred...he shall...bring a civil action..."<sup>127</sup> Brennan's majority opinion rejected the agency's argument that the Secretary's determination of whether to bring a civil action was an unreviewable exercise of administrative discretion. In doing so, the Court did not itself address the enforcement discretion question, but rather stated its agreement with the appellate court's conclusion that "[a]lthough the Secretary's decision to bring suit bears some similarity to the decision to commence a criminal prosecution, the principle of absolute prosecutorial discretion is not applicable to the facts of this case."<sup>128</sup>

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<sup>119</sup> The D.C. Circuit has suggested that "guidelines" can take the form of "standards in the statute itself, in regulations promulgated by an administrative agency in carrying out its statutory mandate, or in other binding expressions of agency viewpoint." *Crowley Caribbean Transp. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (citations omitted).

<sup>120</sup> 21 U.S.C. §372.

<sup>121</sup> *Heckler*, 470 U.S. at 835.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 839 (Brennan, J. concurring.)

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 421 U.S. 560 (1975).

<sup>127</sup> 29 U.S.C. §482.

<sup>128</sup> *Dunlop v. Bachowski*, 421 U.S. 560, 567 n.7 (1975) ("We agree with the Court of Appeals, for the reasons stated in (continued...)



The appellate court identified two reasons for this conclusion. First, the court found that enforcement discretion in the civil context should be limited to cases which, “like criminal prosecutions, involve the vindication of societal or governmental interests, rather than the protection of individual rights.”<sup>129</sup> Second, the court found the “most convincing reasoning” for reviewability of the Secretary’s decision was that in criminal cases, a prosecutor generally must balance “considerations that are ‘beyond the judicial capacity to supervise.’”<sup>130</sup> To the contrary, the court found the “factors to be considered by the secretary” under the L-MRDA to be “more limited and clearly defined.”<sup>131</sup> The court determined that the statute:

provides that after investigating a complaint, he must determine whether there is probable cause to believe that violations of § 481 have occurred affecting the outcome of the election. Where a complaint is meritorious and no settlement has been reached which would remedy the violations found to exist, the language and purpose of § 402(b) indicate that Congress intended the Secretary to file suit. Thus, apart from the possibility of settlement, the Secretary’s decision whether to bring suit depends on a rather straightforward factual determination, and we see nothing in the nature of that task that places the Secretary’s decision ‘beyond the judicial capacity to supervise.’<sup>132</sup>

The language held to override the presumption against review of agency nonenforcement in *Dunlop* contained an express trigger for an enforcement action. The Secretary, however, retained discretion in determining whether the precondition (whether there was probable cause to believe a violation had occurred) was met.<sup>133</sup>

The Supreme Court confirmed the continued validity of *Dunlop* in *Heckler*, but distinguished the two decisions, holding that unlike the FFDCA, the L-MRDA “quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power.”<sup>134</sup>

Federal statutes, unlike the L-MRDA, that do not contain language defining how and when the agency is to exercise its enforcement discretion, even when framed in mandatory terms, generally have not been held to override agency enforcement discretion. As previously discussed, a congressional command that an agency “shall enforce” a particular statute, without additional guidelines as to the circumstances under which enforcement is to occur, is generally insufficient to permit review of a nonenforcement decision. The *Heckler* court suggested as much, noting that it could not “attribute such a sweeping meaning” to the type of mandatory language that was commonly found in federal law.<sup>135</sup>

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(...continued)

its opinion, 502 F. 2d 79, 86-88 (CA3 1974), that there is no merit in the Secretary’s contention that his decision is an unreviewable exercise of prosecutorial discretion.”); *Bachowski v. Brennan*, 502 F.2d 79, 87 (3<sup>rd</sup> Cir. 1974).

<sup>129</sup> *Bachowski v. Brennan*, 502 F.2d 79, 87 (3<sup>rd</sup> Cir. 1974).

<sup>130</sup> *Id.* at 88 (citing Davis, *Administrative Law Treatise*, §28.16 at 984 (1970 Supp.).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Dunlop*, at 571. (“Since the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit.”).

<sup>134</sup> *Heckler*, 470 U.S. at 834.

<sup>135</sup> *Id.*



A Florida district court applied this reasoning in its review of a statute commanding that “the provisions of [the Endangered Species Act (ESA)] and any regulations or permits issued pursuant thereto shall be enforced by the Secretary.”<sup>136</sup> Citing to *Heckler*, the court held that the provision “plainly does not mandate an impossibility—i.e., the Service to pursue to the fullest each and every possible violation of the ESA or permits thereunder.”<sup>137</sup> Moreover, the ESA did not “provide criteria or guidelines charting a process the Service shall use to investigate possible noncompliance.”<sup>138</sup>

The U.S. District Court for the Northern District of Texas applied *Heckler* and *Dunlop* in a recent challenge to the Secretary of Homeland Security’s exercise of administrative enforcement discretion in the granting of “deferred action”—the name given to one type of relief from removal whereby immigration officials agree to forego taking action against an individual for a specified time frame—under the DACA memorandum.<sup>139</sup> In *Crane v. Napolitano*, Immigration and Customs Enforcement (ICE) agents asserted that the Secretary’s directive was in violation of the Immigration and Nationality Act (INA), which, the plaintiffs argued, “requires” ICE officers to initiate a removal proceeding if they encounter an unlawfully present alien who is not “clearly and beyond a doubt entitled to be admitted.”<sup>140</sup>

Section 1225(b)(2)(A) of the INA provides that if an “examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding...”<sup>141</sup> In response to a motion for a preliminary injunction, the district court determined that the INA established an obligation for officers to initiate a removal proceeding against any alien whom the officer determines is not “clearly and beyond a doubt entitled to be admitted.”<sup>142</sup> The court held that judicial review of the agency nonenforcement policy was appropriate because the INA “provides clearly defined factors for when inspecting immigration officers are required to initiate removal proceedings against an arriving alien, just as the statute at issue in *Dunlop* provided certain clearly defined factors for when the Secretary of Labor was required to file a civil action.”<sup>143</sup> The district court ultimately

<sup>136</sup> *Atlantic Green Sea Turtle v. County Council of Volusia County*, 2005 U.S. Dist. LEXIS 38841 (May 3, 2005).

<sup>137</sup> *Id.* at 49.

<sup>138</sup> *Id.* Similarly, in *Tucci v. District of Columbia*, a Washington D.C. court considered whether a D.C. law providing that “the Mayor of the District of Columbia...shall enforce the District of Columbia Solid Waste Management and Multi-Material Recycling Act of 1988,” removed the Mayor’s enforcement discretion. The court analogized the provision to the common use of the phrase “shall be prosecuted,” holding that:

No one would seriously argue that the use of the term “shall be prosecuted” in these statutes requires the...United States Attorney to prosecute each and every violation of these statutes brought to his or her attention. Similarly here, the words “the Mayor ... shall enforce” allocate responsibility — they do not strip the Mayor of discretion in undertaking enforcement action.

956 A. 2d 684 (2008).

<sup>139</sup> *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 57788 (N.D. TX, April 23, 2013); Janet Napolitano, Secretary of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, at 1.

<sup>140</sup> *Crane*, at 7-13.

<sup>141</sup> 8 U.S.C. §1225.

<sup>142</sup> *Crane*, at 39 (“Given the use of the mandatory term “shall,” the structure of Section 1225(b) as a whole, and the defined exceptions to the initiation of removal proceedings located in Sections 1225(b)(2)(B) and (C), the Court finds that Section 1225(b)(2)(A) imposes a mandatory duty on immigration officers to initiate removal proceedings whenever they encounter an “applicant for admission” who “is not clearly and beyond a doubt entitled to be admitted.”).

<sup>143</sup> *Id.* at 59.

dismissed the case, however, holding that the employment related claims asserted by the ICE agents were within the exclusive jurisdiction of the Merit Systems Protection Board and, therefore, not properly before the court.<sup>144</sup>

The above cases would appear to establish the proposition that agency nonenforcement decisions are presumptively unreviewable exercises of administrative discretion. However, when Congress removes or restricts that discretion, by expressly providing “guidelines” or “meaningful standards” for the manner in which the agency may exercise its enforcement powers, the presumption of nonreviewability may be overcome. Whether Congress has provided sufficient guidelines is difficult to determine. For example, establishing that certain conduct constitutes a violation of law and then authorizing an agency to enforce that law, or even establishing that the agency “shall” enforce the law or is “required” to enforce the law, would appear to be insufficient to overcome the *Heckler* presumption. However, where Congress clearly imposes criteria, considerations, standards, or guidelines on the agency’s exercise of its enforcement discretion (i.e., when, or how the agency is to take enforcement actions) or establishes clear conditions to trigger enforcement actions, it would appear that courts may review whether a nonenforcement decision contravenes the statutory framework.

If a court finds that a statute permits review of an agency nonenforcement decision, it would appear that that decision will be evaluated for compliance with statutory requirements under the “arbitrary and capricious” test established in §706 of the APA.<sup>145</sup> In *Dunlop*, the Court was careful to make clear that in such a situation, the reviewing court may not “substitute its judgment for the decision of the [agency] not to bring suit.”<sup>146</sup> The court’s role is limited to determining “whether or not the discretion, which still remains in the [agency], has been exercised in a manner that is neither arbitrary nor capricious.”<sup>147</sup> In order to conduct this review, a court may require that the agency provide a statement of reasons as to why the nonenforcement decision was made that addressed “both the grounds of decision and the essential facts upon which the [agency’s] inferences are based.”<sup>148</sup> The court can then evaluate whether the agency’s decision was “reached for an impermissible reason or for no reason at all.”<sup>149</sup> To the contrary, “if the court concludes there is a rational and defensible basis [for the agency’s] determination, then that should be an end of [the] matter, for it is not the function of the Court to determine whether or not the case should be brought or what its outcome would be.”<sup>150</sup>

## **Abdication of Statutory Responsibilities**

In *Heckler*, the Supreme Court also suggested that the presumption against the review of nonenforcement decisions may be overcome if the agency has “consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory

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<sup>144</sup> *Crane v. Napolitano*, 2013 U.S. Dist. LEXIS 187005 (N.D. TX, July 31, 2013).

<sup>145</sup> 5 U.S.C. §706(2)(A) (“The reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law...”).

<sup>146</sup> 421 U.S. 560, 571 (1975).

<sup>147</sup> *Id.* (citing *DeVito v. Shultz*, 300 F. Supp. 381, 383 (D.D.C. 1969)).

<sup>148</sup> *Id.* at 574.

<sup>149</sup> *Id.* at 573.

<sup>150</sup> *Id.* (citing *DeVito v. Shultz*, 72 L. R. R. M. 2682, 2683 (DC 1969)).

responsibilities.”<sup>151</sup> The Court, however, was unclear as to whether such an agency policy would in fact be reviewable, stating only that “[a]lthough we express no opinion on whether such decisions would be unreviewable under [the APA], we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not “committed to agency discretion.”<sup>152</sup>

In raising the “statutory abdication” argument, the Court cited to *Adams v. Richardson*, a decision from the D.C. Circuit.<sup>153</sup> *Adams* involved a challenge to the Secretary of Health, Education, and Welfare’s (HEW) failure to enforce Title VI of the Civil rights Act of 1964.<sup>154</sup> The Act “authorizes and directs” federal agencies to ensure that federal financial assistance is not provided to segregated educational institutions.<sup>155</sup> The district court had rejected the Secretary’s assertion that the law provided federal agencies with “absolute discretion” with respect to whether to take action to terminate funding, holding that the agency has “the duty of accomplishing the purposes of the statute through administrative enforcement proceedings or by other legal means.”<sup>156</sup> The district court ordered the agency to commence enforcement proceedings against certain school districts within a specified time period.<sup>157</sup>

The D.C. Circuit affirmed the district court decision in language characteristic of the “statutory guidelines” exception, holding that “Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures.”<sup>158</sup> The court distinguished the *Adams* nonenforcement scenario from traditional exercises of enforcement discretion, noting that in past cases, Congress had not enacted “specific legislation requiring particular action.”<sup>159</sup> The court appeared to then give great weight to the breadth of the Secretary’s nonenforcement, noting:

More significantly, this suit is not brought to challenge HEW’s decisions with regard to a few school districts in the course of a generally effective enforcement program. To the

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<sup>151</sup> *Heckler*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

<sup>152</sup> *Id.*

<sup>153</sup> 480 F.2d 1159 (1973).

<sup>154</sup> Rather than invoking formal enforcement procedures, the agency had been pursuing voluntary compliance. The court held that the agency’s reliance on voluntary compliance was inadequate:

The Act sets forth two alternative courses of action by which enforcement may be effected. In order to avoid unnecessary invocation of formal enforcement procedures, it includes the proviso that the institution must first be notified and given a chance to comply voluntarily. Although the Act does not provide a specific limit to the time period within which voluntary compliance may be sought, it is clear that a request for voluntary compliance, if not followed by responsive action on the part of the institution within a reasonable time, does not relieve the agency of the responsibility to enforce Title VI by one of the two alternative means contemplated by the statute. A consistent failure to do so is a dereliction of duty reviewable in the courts.

*Id.* at 1163.

<sup>155</sup> 42 U.S.C. §2000d-1.

<sup>156</sup> *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972).

<sup>157</sup> *Id.* at n.2 (“In the present case, the Court feels that ordering the Secretary of HEW to commence enforcement proceedings is not only appropriate but, indeed, required by the statute.”).

<sup>158</sup> *Adams v. Richardson*, 480 F.2d 1159, 1162 (1973). Although affirming most of the lower court opinion, the appellate court modified the district court’s order as applied to higher education facilities.

<sup>159</sup> *Id.*

contrary, appellants allege that HEW has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty.<sup>160</sup>

The court determined that HEW had consistently and unsuccessfully relied on voluntary compliance as a means of enforcing Title VI without resorting to the more formal and effective enforcement procedures available to the agency. This “consistent failure” was a “dereliction of duty reviewable in the courts.”<sup>161</sup>

Although arguably applicable to any “general policy” of nonenforcement, the *Adams* opinion may be limited to certain types of enforcement. In reaching its conclusion the court stressed the “nature of the relationship between the agency and the institutions in question.”<sup>162</sup> The court noted that:

HEW is actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress. It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools. The anomaly of this latter assertion fully supports the conclusion that Congress’s clear statement of an affirmative enforcement duty should not be discounted.<sup>163</sup>

As such, it is not clear that the *Adams* exception would apply with equal force to more traditional enforcement actions—such as those that require the expenditure of significant agency resources in investigating and penalizing members of the public for violations of law.

Given the sparse case law associated with this exception, it is difficult to assess what level of nonenforcement constitutes an “abdication of statutory responsibilities.” Presumably, if an agency announced that it would no longer enforce a provision of law against any individual at any time, regardless of the nature of the violation, a court would likely be willing to review the policy.<sup>164</sup> The Fifth Circuit, however, has stated that merely “inadequate” enforcement is insufficient to overcome the *Heckler* presumption of nonreviewability.<sup>165</sup> In *Texas v. United States*, the state of Texas sued the United States arguing that the Attorney General had failed to control immigration

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<sup>160</sup> *Id.* The court also noted that HEW was playing an affirmative role in the violation of federal law by “actively supplying segregated institutions with federal funds.” *Id.*

<sup>161</sup> *Id.* at 1163.

<sup>162</sup> *Id.* at 1162.

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., *Dunlop*, 421 U.S. at 574 (1975) (“The Secretary himself suggests that the rare case that might justify review beyond the confines of the reasons statement might arise, for example, ‘if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogate his enforcement responsibilities. . . [or] if the Secretary prosecuted complaints in a constitutionally discriminatory manner . . . .’ Other cases might be imagined where the Secretary’s decision would be ‘plainly beyond the bounds of the Act [or] clearly defiant of the Act.’ Since it inevitably would be a matter of grave public concern were a case to arise where the complaining member’s proofs sufficed to require judicial inquiry into allegations of that kind, we may hope that such cases would be rare indeed.”)(citations omitted); *Northern Indiana Public Service Co. v. Federal Energy Regulatory Com.*, 782 F.2d 730, 745, 1986 (7th Cir. 1986) (“We do not think that the Commission can essentially abandon its regulatory function of ensuring just, reasonable, and preferential rates to Natural under the guise of unreviewable agency inaction.”).

<sup>165</sup> In considering whether the abdication standard has been met, one legal commentator has suggested that a focus on the “sheer magnitude” of the agencies nonenforcement would be misplaced, noting that “to conclude that abdication has occurred, it may [] be necessary to find that the refusal to act applies in a large number of cases weighed against the total jurisdiction of the agency under the relevant statute.” Cass Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 679 (1985).

as dictated by the INA, and that the failure to enforce the immigration laws had resulted in substantial costs to the state.<sup>166</sup> With respect to the enforcement claim, the court rejected “out-of-hand the State’s contention that the federal defendants’ alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty.”<sup>167</sup> In holding that nonenforcement decisions are not subject to judicial review, the court concluded:

The State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived *inadequate* enforcement of immigration laws does not constitute a reviewable abdication of duty.<sup>168</sup>

Whether limited nonenforcement policies—for instance if an agency announced that it will *delay* enforcement of a particular provision for a specified period of time—could also be subject to review would appear to be less clear. For example, in *Schering Corp. v. Heckler*, the D.C. Circuit held that the FDA decision not to pursue an enforcement action against a drug manufacturer for a specific period of time fell “squarely within the confines of *Chaney*” and was therefore not reviewable.<sup>169</sup> In that case, the FDA had reached a settlement with an animal drug manufacturer in which the agency had agreed not to “initiate any enforcement action...for a period of 18 months.”<sup>170</sup> A rival drug manufacturer brought a claim seeking a declaration that the settlement was invalid. The court dismissed the claim, holding that there was no “policy or pattern of nonenforcement that amounts to ‘an abdication of its statutory responsibilities,’” and that the agency decision to hold enforcement in “abeyance” while it considered its position was a “paradigm case of enforcement discretion.”<sup>171</sup> It should be noted that as a general matter, agency delays are notoriously difficult to enforce, even in situations where Congress has established a clear statutory deadline for mandatory action.<sup>172</sup>

## Distinguishing Individual Nonenforcement Decisions From Nonenforcement Policies

In light of the standards established in *Heckler* and other cases, it would appear that, absent explicit statutory language, challenges to particular prosecutorial or agency nonenforcement decisions are unlikely to meet with much success. Courts have made clear that these decisions are generally committed to the agency’s or the prosecutor’s discretion and are not subject to judicial

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<sup>166</sup> 106 F.3d 661 (5<sup>th</sup> Cir. 1997).

<sup>167</sup> *Id.* at 667.

<sup>168</sup> *Id.* See also, *Myers v. U.S.*, 272 U.S. 52, 292 (1926)(Brandeis, J. dissenting) (“The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”).

<sup>169</sup> 779 F.2d 683, 685 (D.C. Cir. 1985).

<sup>170</sup> *Id.* at 685.

<sup>171</sup> *Id.* at 686-87 (“The FDA’s action here was simply an exercise of its ‘complete discretion . . . to decide how and when to enforce the Act.’”).

<sup>172</sup> See, CRS Report R43013, *Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment*, by Daniel T. Shedd.

review. However, the mere invocation of prosecutorial or enforcement discretion is not “to be treated as a magical incantation which automatically provides a shield for arbitrariness.”<sup>173</sup>

It would appear that courts may be more willing to grant review of established agency policies of nonenforcement than more traditional, case-by-case, individual enforcement decisions. Justice Brennan emphasized this point in his *Heckler* concurrence, noting that the presumption against reviewability applied only to “individual, isolated nonenforcement decisions.”<sup>174</sup> Similarly, in *Crowley Caribbean Transportation v. Pena*, the D.C. Circuit made a clear distinction between “single-shot nonenforcement decisions” on one hand, and “an agency’s statement of a general enforcement policy” on the other.<sup>175</sup> The court determined that review of an agency’s “general enforcement policy” was reviewable where the agency had 1) “expressed the policy as a formal regulation,” 2) “articulated [the policy] in some form of universal policy statement,” or 3) otherwise “[laid] out a general policy delineating the boundary between enforcement and nonenforcement” that “purport[s] to speak to a broad class of parties.”<sup>176</sup> The court articulated its reasons for finding review of general enforcement, or nonenforcement policies to be appropriate as follows:

By definition, expressions of broad enforcement policies are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings. As general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion. Second, an agency’s pronouncement of a broad policy against enforcement poses special risks that it ‘has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities,’ a situation in which the normal presumption of nonreviewability may be inappropriate. Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc.<sup>177</sup>

Other cases similarly support the notion that courts are more willing to review nonenforcement policies than individual enforcement-based decisions in both the criminal and administrative contexts. In *Nader v. Saxbe*, the D.C. Circuit drew a clear distinction between judicial review of discretionary enforcement decisions, and judicial review of compliance with “statutory and constitutional limits to” those decisions.<sup>178</sup> *Nader* was a suit in which a nonprofit corporation asked the court to compel the Attorney General to initiate criminal prosecutions under the Federal Corrupt Practices Act, a law that required presidential candidates and committees supporting presidential candidates to file reports on campaign contributions and expenditures. The plaintiffs argued that despite numerous allegations of violations of the law, DOJ had adopted a policy, based on prosecutorial discretion, to only respond to violations referred by the Clerk of the House

<sup>173</sup> *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 673 (D.C. Cir. 1970).

<sup>174</sup> *Heckler*, 470 U.S. at 839 (Brennan, J., concurring).

<sup>175</sup> 37 F.3d 671, 676 (D.C. Cir. 1994).

<sup>176</sup> *Id.* at 676-77.

<sup>177</sup> *Id.* at 677 (citations omitted).

<sup>178</sup> 497 F.2d 676, 679 n.19 (D.C. Cir. 1974) (“It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.”).



or the Secretary of the Senate. Although the court found that the plaintiffs lacked standing to bring the claim, it nevertheless determined that “established precedents” do not “necessarily foreclose judicial review of [nonenforcement] policies.”<sup>179</sup> The court then drew a clear distinction between the review of individual enforcement decisions and the review of broad nonenforcement policies:

The instant complaint does not ask the court to assume the essentially Executive function of deciding whether a particular alleged violator should be prosecuted. Rather, the complaint seeks a conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney’s office lie outside the constitutional and statutory limits of “prosecutorial discretion.”<sup>180</sup>

One reason a court may be more receptive to reviewing a nonenforcement policy, as opposed to an individual nonenforcement decision, could relate to the remedy that would ultimately be provided if the court reached a decision favorable to the plaintiffs. The remedy to an individual nonenforcement decision would likely be a court order, perhaps in the form of a writ of mandamus, directing the agency to initiate an enforcement action. Mandamus is an “extraordinary remedy reserved for extraordinary circumstances,” and will generally only be issued where there is a violation of a “clear duty to act.”<sup>181</sup> While courts have granted mandamus to compel an agency to issue a rule where Congress has provided an explicit deadline, courts are generally loathe to order enforcement actions.<sup>182</sup> Indeed, the D.C. Circuit has held in the criminal context that “it is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion.”<sup>183</sup> To the contrary, a court may have greater flexibility in crafting a remedy to an invalid agency nonenforcement policy. For instance, if a reviewing court found the agency policy to be inconsistent with the existing statutory framework, the court may simply invalidate the policy, or direct the agency to reconsider its policy, without necessarily taking additional steps or directing the agency to take any specific action.

This line of reasoning was evident in the U.S. Court of Appeals for the Eleventh Circuit opinion of *Smith v. Meese*.<sup>184</sup> *Meese* involved a claim by black voters and elected officials challenging “a policy and pattern of investigatory and prosecutory decisions,” including the nonenforcement of federal civil rights laws, that allegedly had the effect of depriving the plaintiffs of their constitutional rights.<sup>185</sup> In holding that the separation of powers was not threatened by judicial review of the prosecutorial decisions, the court found it “important to note” that rather than being “asked to block or require the prosecution of any individual” the plaintiffs had instead “asked the federal court to order the defendants to stop following a deliberate policy of discriminatory

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<sup>179</sup> *Id.* at 679.

<sup>180</sup> *Id.* (citations omitted).

<sup>181</sup> *In re Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011).

<sup>182</sup> See, *Powell v. Katzenbach*, 359 F.2d 234, 234-35 (D.C. Cir. 1965) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1868); *Moses v. Katzenbach*, 119 U.S.App.D.C. 352, 342 F.2d 931 (1965), affirming sub nom. *Moses v. Kennedy*, 219 F.Supp. 762 (D.D.C. 1963); *Goldberg v. Hoffman*, 225 F.2d 463 (7th Cir. 1955); *Pugach v. Klein*, 193 F.Supp. 630 (S.D. N.Y.1961); *United States v. Brokaw*, 60 F.Supp. 100 (S.D. Ill. 1945).

<sup>183</sup> *Powell*, 359 F.2d at 234.

<sup>184</sup> 821 F.2d 1484 (11<sup>th</sup> Cir. 1987).

<sup>185</sup> *Id.* at 1489.



investigations and prosecutions.”<sup>186</sup> The court went on to address the type of remedy that a court may be likely to grant in a challenge to nonenforcement, suggesting that

It is unlikely that the appropriate remedy would be for the district court to enjoin all voting fraud prosecutions or to require prosecutions of all possible election crimes. Instead, it is likely that the district court would order the defendants to make prosecutorial decisions based on *constitutional* factors, instead of targeting one race or one political party for investigation.<sup>187</sup>

The Executive branch likewise acknowledges that “the individual prosecutorial decision is distinguishable from instances in which courts have reviewed the legality of general executive branch policies.”<sup>188</sup>

## The Separation of Powers: Congressional Authority to Curtail Enforcement Discretion

As the foregoing discussion makes clear, there is a default presumption that the executive branch has discretion in making a wide range of decisions relating to the discharge of its duty to enforce federal law. Congress, however, may alter the default rule by explicitly guiding or restricting the exercise of that discretion through statute. The Supreme Court has stated quite bluntly that “[a]ll constitutional questions aside, it is for *Congress* to determine how the rights which it creates shall be enforced.”<sup>189</sup> In the administrative context, this principle was reflected in *Heckler*, where the Court expressly held that Congress may establish “guidelines for the agency to follow in exercising its enforcement powers” and the “Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”<sup>190</sup> Thus, Congress may restrain administrative enforcement discretion by statute, and enact laws that reduce agency officials’ freedom in making enforcement, and indeed nonenforcement, decisions.

These principles arguably apply with equal force in the criminal context.<sup>191</sup> Indeed, a pair of early Supreme Court cases suggest that the exercise of prosecutorial discretion must conform to statutory restrictions.<sup>192</sup> In *U.S. v. Morgan* the Supreme Court considered whether a Department of Agriculture hearing was a required condition precedent to a DOJ criminal prosecution under the Pure Food and Drug Act.<sup>193</sup> Under the law, if agency officials determined that a violation had occurred, the federal prosecutor was obliged “to cause appropriate proceedings to be commenced

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<sup>186</sup> *Id.* at 1490.

<sup>187</sup> *Id.* at n.3.

<sup>188</sup> 8 Op. O.L.C. 101, 126 (1984) (“In these cases the courts accepted jurisdiction to rule whether an entire enforcement program was being implemented based on an improper reading of the law.”).

<sup>189</sup> *Switchmen’s Union of North America v. National Mediation Bd.*, 320 U.S. 297, 301 (1943).

<sup>190</sup> *Heckler*, 470 U.S. at 833.

<sup>191</sup> The DOJ has acknowledged that “prosecutorial discretion may be regulated to a certain extent by Congress...” 8 Op. Off. Legal Counsel 101, 126 (1984).

<sup>192</sup> See also, *Nader v. Saxbe*, 497 F. 2d 676, 679 n. 19 (D.C. Cir. 1974) (“It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.”).

<sup>193</sup> 222 U.S. 274 (1911).

and prosecuted.”<sup>194</sup> Although the case did not focus on whether the law mandated prosecutions, the court nonetheless stated in dicta that the law created a “condition where the district attorney is *compelled* to prosecute without delay.”<sup>195</sup> In noting that the statute “compels [the prosecutor] to act” and that “he...is bound to accept the finding of the Department,” the Court made no mention of prosecutorial discretion or the separation of powers.<sup>196</sup>

The Court suggested a similar congressional role in influencing criminal prosecutorial decisions in the *Confiscation Cases*.<sup>197</sup> In that decision, which has been viewed as “one of the canonical statements of executive authority over prosecution,” the Supreme Court nonetheless suggested in dicta that the executive branch’s control over the termination of criminal prosecutions may be subject to limits imposed by statute.<sup>198</sup> Although the case upheld the federal prosecutor’s discretion to dismiss a forfeiture suit, the Court qualified that discretion by suggesting that “public prosecutions...are within the exclusive direction of the district attorney....*except in cases where it is otherwise provided in some act of Congress.*”<sup>199</sup>

Assuming then that Congress has the authority to regulate the exercise of executive enforcement discretion, what limits exist, if any, to that authority?

There has been relatively little judicial discussion of the scope of Congress’s authority to restrict the executive exercise of enforcement discretion. It is clear, however, that the judicial branch’s reluctance to review executive branch prosecutorial and administrative enforcement decisions is grounded in a respect for the roles and functions of each branch of government; an acknowledgement that it would generally be improper and impractical for the court to review discretionary enforcement decisions made by executive branch officers; and the Take Care Clause, as control over the enforcement of law has been viewed as within the “special province of the Executive Branch” and an aspect of executive power that “lies at the core of the Executive’s duty to see to the faithful execution of the laws.”<sup>200</sup>

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<sup>194</sup> Pure Food and Drug Act §5 (1906).

<sup>195</sup> *Morgan*, 222 U.S. at 281.

<sup>196</sup> *Id.* Post *Morgan*, lower courts have hesitated to address whether Congress can simply remove enforcement discretion from executive branch officers by federal law, instead interpreting statutory provisions so as not to remove enforcement discretion. In *Inmates of Attica*, 477 F. 2d 375 (2<sup>nd</sup> Cir. 1973), the Second Circuit found the language of 42 U.S.C. §1987 insufficient to establish “an intent by congress to depart so significantly from the normal assumption of executive discretion.” As a result, the court determined that it “therefore becomes unnecessary to decide whether, if Congress were by explicit direction and guidelines to remove all prosecutorial discretion with respect to certain crimes or in certain circumstances we would properly direct that a prosecution be undertaken.” The Fifth Circuit noted similar concerns in *U.S. v. Cox*, 342 F.2d 167, 172 (5<sup>th</sup> Cir. 1965), warning that “[i]f it were not for the discretionary power given to the United States Attorney to prevent an indictment by withholding his signature, there might be doubt as to the constitutionality of the requirement of Rule 48 for leave of court for a dismissal of a pending prosecution.” In a concurring opinion in *Nathan v. Smith*, 737 F.2d 1069, 1077 (D.C. Cir. 1984), Judge Bork similarly identified the “severity of the constitutional problem that would arise” were Congress to authorize the courts to direct the Attorney General in his law enforcement function.

<sup>197</sup> 74 U.S. 454 (1869).

<sup>198</sup> Price, *supra* note 1 at 715 (“Thus, in one of the canonical statements of executive authority over prosecution, the Court acknowledged congressional authority to override the executive branch’s presumptive discretion to dismiss particular charges.”).

<sup>199</sup> *Confiscation Cases*, 74 U.S. at 457.

<sup>200</sup> *Heckler*, 470 U.S. at 832 (1985); *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986).

However, the presumption against the review of enforcement decisions is also founded upon statutory principles, limitations on judicial review imposed by the APA, and the notion that when Congress delegates enforcement authority to the executive branch, it intends to provide the agency with the discretion that traditionally accompanies those delegations. To the extent that judicial deference to executive enforcement decisions is based on statutory principles, it would appear that Congress must be free to modify the statutory environment and alter the traditional scope of enforcement discretion. Other forms of administrative discretion, for instance, can be enlarged, reduced, or altered by Congress through statute.<sup>201</sup>

While acknowledging that Congress can guide enforcement discretion, the Supreme Court has never directly addressed the precise limits of Congress's power, nor whether Congress can remove that discretion entirely by enacting mandatory enforcement language. Nor has the Court addressed whether Congress's authority to restrict administrative enforcement discretion differs in any meaningful way from its authority to restrict criminal prosecutorial discretion. A comparison of the strong constitutionally-based language used in cases addressing the executive's discretionary authority to initiate a criminal prosecution, with the mainly statutorily-based language in *Heckler*, would appear to suggest that Congress would have wider latitude in controlling civil or administrative enforcement actions than it would over federal criminal prosecutions. Justice Marshall, for instance, felt compelled to draw a distinction between prosecutorial and administrative discretion in his concurrence in *Heckler*, noting that it was "inappropriate to rely on notions of prosecutorial discretion to hold agency action unreviewable" because "arguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act."<sup>202</sup>

The Fifth Circuit has made a similar distinction based expressly on presidential power. In *Riley v. St. Luke's Episcopal Hospital*, the circuit court found intrusions into the executive's control over criminal cases to be more worrisome than intrusions into civil litigation.<sup>203</sup> The *Riley* court made this distinction in upholding the qui tam provision of the False Claims Act against a claim that the law unconstitutionally infringed on the executive's civil enforcement power.<sup>204</sup> The circuit court held that "no function cuts more to the heart of the Executive's constitutional duty to take care that the laws are faithfully executed than criminal prosecution."<sup>205</sup> The conduct of civil litigation, on the other hand, involved "lesser uses of traditional executive power."<sup>206</sup> Given the separate status accorded presidential control over criminal and civil matters, the court determined that:

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<sup>201</sup> *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes..."). Congress enjoys near plenary authority over the administrative state. Indeed, a federal agency "literally has no power to act...unless and until Congress confers power upon it." *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986); *Friends of the Crystal River v. EPA*, 35 F.3d 1073, 1080 (6th Cir. 1994) (noting that "agencies are creatures of statutory authority. Thus, they have no power to act . . . unless and until Congress confers power upon them.").

<sup>202</sup> *Heckler*, 470 U.S. at 847 (Marshall, J. concurring).

<sup>203</sup> *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5<sup>th</sup> Cir. 2001).

<sup>204</sup> The qui tam provision of the False Claims Act, which allows a private individual to institute a civil suit on behalf of the government, is discussed in greater detail *infra*.

<sup>205</sup> *Riley*, 252 F.3d at 755.

<sup>206</sup> *Id.* at 756.

the Executive must wield two different types of control in order to ensure that its constitutional duties under Article II are not impinged. Should the occasion arise, these two different types of control necessarily require the application of two different sorts of tests.<sup>207</sup>

While it would appear that Congress may have greater authority over administrative enforcement discretion, legislation that can be characterized as significantly restricting the exercise of executive branch enforcement decisions, in either the criminal, civil, or administrative context, could raise questions under the separation of powers. This is especially true considering the Supreme Court has had little opportunity to address the precise contours and outer reaches of Congress's authority to impinge on discretionary executive enforcement decisions. In the absence of clearly established judicial precedent, the executive branch has historically opposed any judicial or legislative "interference" with enforcement decisions as a violation of the Take Care Clause.<sup>208</sup>

It may be helpful to first outline what would appear to be general limits to Congress's authority to intrude upon the executive's enforcement power. First, Congress may neither itself, nor through its officers, directly enforce federal law.<sup>209</sup> To exercise both the power to make and enforce the law would be an apparent violation of the separation of powers. The Supreme Court has clearly stated that "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them..."<sup>210</sup> James Madison outlined this fundamental principle in Federalist 47, where he characterized the accumulation of legislative and executive power in a single entity as "the very definition of tyranny."<sup>211</sup>

Second, Congress may neither appoint, nor reserve for itself the power to remove officers engaged in the enforcement of law. The Supreme Court's appointment and removal jurisprudence makes clear that Congress's role in selecting or controlling those who execute and enforce the law is severely limited.<sup>212</sup> The President, and the President alone, must be permitted a degree of control over those engaged in enforcement.<sup>213</sup> Congress may place limits on that control, by providing such officers with "for cause" removal restrictions, but it may not remove presidential control entirely.<sup>214</sup>

Third, it would appear unlikely that Congress could direct the executive to bring a criminal prosecution against a specific individual. In light of the Supreme Court's statement in *U.S. v.*

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<sup>207</sup> *Id.* at 755.

<sup>208</sup> 8 Op. Off. Legal Counsel 101, 115 (1984) ("neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals.").

<sup>209</sup> This general principle has limited exceptions. Congress, may for example, unilaterally enforce contempts against its own proceedings under the inherent contempt power. See, *McGrain v. Daugherty*, 273 U.S. 135 (1927).

<sup>210</sup> *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1927).

<sup>211</sup> The Federalist Papers, No. 47, at 301 (J. Madison)(C. Rossiter ed. 1961). Madison adopted Montesquieu's admonition that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." See, CRS Legal Sidebar, *Separating Power: Ancient Roots and Philosophical Origins*, by Todd Garvey.

<sup>212</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>213</sup> *Myers v. U.S.*, 272 U.S. 52 (1926). An exception to this principle was established in *Young v. United States ex rel. Vuitton*, 481 U.S.787 (1987). In that case, a district court appointed private attorneys as special counsel to prosecute a criminal contempt of court citation against a party that had violated a court injunction. For a discussion of the case and its application to the President's enforcement power see, Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. Rev. 563 (1991).

<sup>214</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

*Nixon* that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case,” the initiation of criminal prosecutions has been considered to be within the “special province of the executive branch” and at the heart of prosecutorial discretion.<sup>215</sup> The executive branch would presumably consider such a directive from Congress to be a significant intrusion into Presidential power.<sup>216</sup> Regardless of the validity of that position, there are other reasons why such legislation would be problematic. First, legislation that targets an individual for punishment may run afoul of the constitutional prohibition on bills of attainder.<sup>217</sup> Second, if Congress were to enact such a law, and the executive failed to comply, it is unlikely that a court would be willing to enforce the provision by issuing an order directing the executive branch to initiate a prosecution against a specific individual.<sup>218</sup>

Whether the separation of powers would be violated if Congress used less restrictive means to influence or confine the exercise of enforcement discretion, rather than to use its own officers to enforce the law or compel specific enforcement actions remains less clear. Any such legislation would presumably be evaluated under the standards established by the Supreme Court in *Morrison v. Olson*.<sup>219</sup> *Morrison*, as previously mentioned, involved a constitutional challenge to the independent counsel provisions of the Ethics in Government Act (EGA).<sup>220</sup> The EGA authorized the appointment of an independent counsel to investigate and prosecute high ranking executive branch officials for violations of certain federal laws. Under the statute, the Attorney General was required to conduct a preliminary investigation once he received “specific” and “credible” information alleging that certain executive officials had committed serious federal offenses.<sup>221</sup>

Under the now expired law, if the Attorney General determined that there were “reasonable grounds to believe that further investigation or prosecution [was] warranted” then the law stated that he “shall apply” to a special three-judge panel of the D.C. Circuit for the appointment of an independent counsel.<sup>222</sup> Once appointed, the independent counsel was granted “full power and

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<sup>215</sup> 418 U.S. 683, 693 (1974); *Heckler*, 470 U.S. at 832.

<sup>216</sup> See, e.g., 8 Op. Off. Legal Counsel 101, (1984).

<sup>217</sup> U.S. Const, Art I §9 cl.3 (“No Bill of Attainder or ex post facto Law shall be passed.”). See also, CRS Report R40826, *Bills of Attainder: The Constitutional Implications of Congress Legislating Narrowly*, by Kenneth R. Thomas. A bill of attainder generally has been described as a law “that legislatively determines guilt and inflicts punishment upon an identifiable individual without *provision of the protections of a judicial trial*.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977) (emphasis added). Under a compelled prosecution statute, an individual would arguably only be punished *after* being found guilty in a judicial trial.

<sup>218</sup> *Inmates of Attica*, 477 F. 2d at 375 (“[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning...discretionary decisions of federal prosecuting authorities not to prosecute...”); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965) (“[I]t is well settled that the question of whether and when prosecution is to be instituted is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of this discretion.”); *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D. N.Y. 1961) (“All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting. The remedy for any dereliction of his duty lies, not with the courts, but, with the executive branch of our government and ultimately with the people.”).

<sup>219</sup> 487 U.S. 654 (1988).

<sup>220</sup> 28 U.S.C. §§591 *et seq.*

<sup>221</sup> 28 U.S.C. §591.

<sup>222</sup> 28 U.S.C. §592.

independent authority to exercise all investigative and prosecutorial functions and powers of the [DOJ]” and was removable by the Attorney General “only for good cause.”<sup>223</sup>

Former Assistant Attorney General Theodore Olson argued that by providing an individual, who was not under the President’s control, with the authority to initiate and conduct criminal prosecutions, the law constituted an unconstitutional congressional intrusion into the President’s enforcement power.<sup>224</sup> The court rejected this argument, determining that the law was consistent with the appointments clause; did not impermissibly expand the judicial function; did not infringe upon the President’s removal power; and finally did not violate the separation of powers.<sup>225</sup>

With respect to the separation of powers, the Court determined that the law neither “impermissibly undermine[s]” the powers of the Executive Branch, [n]or ‘disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.’”<sup>226</sup> In reaching this conclusion, the Court placed great weight on the fact that the independent counsel provisions did not “involve an attempt by Congress to increase its own powers at the expense of the Executive Branch.”<sup>227</sup> Congress retained no powers of “control of supervision.” Rather its role was limited to receiving reports and exercising oversight. Although the law clearly “reduce[d] the amount of control or supervision” exercised by the President over the “investigation and prosecution of a certain class of alleged criminal activity,” it did not do so in an impermissible manner.<sup>228</sup> Furthermore, the President retained an adequate “degree of control over the power to initiate an investigation” because the Independent Counsel could be appointed only at the request of the Attorney General, and—“most importantly”—the Attorney General retained the power to remove the counsel for “good cause.”<sup>229</sup> As a result, the court concluded:

Notwithstanding the fact that the counsel is to some degree ‘independent’ and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.<sup>230</sup>

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<sup>223</sup> 28 U.S.C. §594; 28 U.S.C. §596. The role of Congress under the independent counsel law was very limited. Under the law, Congress could not order the appointment of a prosecutor or independent counsel, but majorities of either party within the House or Senate Judiciary Committees could have requested action by the Attorney General. 28 U.S.C. §592(g)(1). The Attorney General was not required to apply for the appointment of an independent counsel in response to such congressional request; and if the Attorney General did not make such application, he or she was directed merely to respond to Congress with the reasons an independent counsel was not appointed. 28 U.S.C. §592(g)(2), (3).

<sup>224</sup> *Morrison*, 487 U.S. at 668-89.

<sup>225</sup> In discussing the removal question, the Court acknowledged that “[t]here is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.” *Id.* at 691. But the court could not “see how the President’s need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.” *Id.* at 691-92. The Court concluded that the “for cause” removal restrictions, did not “sufficiently deprive[] the President of control over the independent counsel” such that it would “interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.” *Id.* at 693.

<sup>226</sup> *Id.* at 695 (citing *CFTC v. Schor*, 478 U.S. 833, 856 (1986)); *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

<sup>227</sup> *Id.* at 694.

<sup>228</sup> *Id.* at 695.

<sup>229</sup> *Id.* at 696.

<sup>230</sup> *Id.*



Justice Scalia's dissent in *Morrison* adopted a much stronger view of executive enforcement powers, holding that the investigation and prosecution of crimes was a "quintessential" and "exclusive" executive function.<sup>231</sup> Scalia would have invalidated the independent counsel provisions, and expressly rejected the majority's conclusion that "the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not 'so central to the functioning of the Executive Branch' as to be constitutionally required to be within the President's control."<sup>232</sup> He went on to assert that:

We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.<sup>233</sup>

*Morrison* may reasonably be interpreted as rejecting the notion that the executive's power over the enforcement of law is the type of core, or exclusive presidential power that is beyond the reach of Congress. The Court explicitly acknowledged, that it was "undeniable that the Act *reduces* the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."<sup>234</sup> That reduction, however, was not in itself unconstitutional. The majority opinion would appear to authorize legislative restrictions on the exercise of executive branch enforcement discretion, so long as Congress does not violate the established limitations previously discussed or otherwise "prevent the executive branch from accomplishing its constitutionally assigned functions."<sup>235</sup>

The *Morrison* standard for evaluating intrusions into the executive's enforcement power has been applied by a number of appellate courts in upholding the qui tam provision of the False Claims Act (FCA).<sup>236</sup> This provision authorizes a private person, known as the relator, to initiate a civil proceeding "in the name of the government" for violations of the FCA.<sup>237</sup> Upon filing a qui tam action, the relator must give notice to the government disclosing all material evidence the relator has gathered.<sup>238</sup> The government then has 60 days to investigate the allegations and determine whether it wishes to take control of the enforcement action or allow the relator to continue to "conduct" the proceeding.<sup>239</sup> If the government chooses to assume responsibility for the enforcement action, the relator may continue as a party, but the DOJ may make enforcement decisions without the approval of the relator, including a decision to dismiss the case or settle the claim.<sup>240</sup>

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<sup>231</sup> *Id.* at 706 (Scalia, J. dissenting). An equally robust approach to prosecutorial discretion and the President's enforcement power was taken by Judge Kavanaugh in his concurring opinion in *In re Aiken County*, 725 F. 3d 255 (D.C. Cir. 2013) (connecting the President's exercise of prosecutorial discretion to the pardon power).

<sup>232</sup> *Id.* at 711.

<sup>233</sup> *Id.* at 710.

<sup>234</sup> *Id.* at 695 (emphasis added).

<sup>235</sup> *Id.* at 695-96.

<sup>236</sup> For a general discussion of qui tam actions see CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle.

<sup>237</sup> 31 U.S.C. §3730.

<sup>238</sup> 31 U.S.C. §3730(b).

<sup>239</sup> 31 U.S.C. §3730(c).

<sup>240</sup> *Id.*

In a series of appellate level cases, the government argued that by granting private parties the authority to initiate a civil action on behalf of the United States, the FCA had violated the separation of powers and unconstitutionally infringed upon the President's enforcement function. Each circuit to review the question ultimately rejected this position, holding generally that the FCA does not impermissibly "interfere" with the President's constitutional functions under the Take Care Clause.<sup>241</sup> In applying the *Morrison* standard, the courts generally focused on the degree of control that the executive branch exercises over the relator, including the government's authority to intervene, place limits on the relators participation, restrict the relators power in discovery, and ultimately to decide whether to settle or dismiss the case. As such, although the provision may "diminish Executive branch control over the initiation and prosecution of a defined class of civil litigation," the Executive retains "sufficient control" over the relator's conduct to insure that the President is able to perform his constitutionally assigned duty.<sup>242</sup>

## Legislative Options to Deter Nonenforcement

Acknowledging the limitations imposed by the separation of powers, the precise scope of Congress's authority to counter agency policies of nonenforcement remains an open question. There may, however, be a number of ways in which Congress can use its legislative powers to encourage the executive branch to enforce laws in a manner reflective of Congress's will.<sup>243</sup> For example, it would appear that Congress may prohibit or require the consideration of certain factors in the decision to initiate an enforcement action, or affirmatively set enforcement priorities reflective of Congress's intent. With respect to permissible factors for consideration, the Court has made clear, in other contexts, that it will reject agency action where the agency has "relied on factors which Congress has not intended it to consider."<sup>244</sup> With respect to setting enforcement priorities, the Supreme Court acknowledged in *Heckler* that congress may set "substantive priorities" for an agency to follow in exercising its enforcement power.<sup>245</sup> Further support for

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<sup>241</sup> *United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 805-807 (10<sup>th</sup> Cir. 2002); *Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 757 (5<sup>th</sup> Cir. 2001)(en banc) ("Any intrusion by the qui tam relator in the Executive's Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which qui tam suits are pursued. Hence, the qui tam portions of the FCA do not violate the constitutional doctrine of separation of powers by impinging upon the Executive's constitutional duty to take care that the laws are faithfully executed under Article II of the Constitution"); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6<sup>th</sup> Cir. 1995); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9<sup>th</sup> Cir. 1993) ("Taken as a whole, and considering the removal issue in particular, the FCA affords the Executive Branch a degree of control over qui tam relators that is not distinguishable from the degree of control the *Morrison* Court found the Executive Branch exercises over independent counsels").

<sup>242</sup> *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754-55 (9<sup>th</sup> Cir. 1993)(emphasis added); *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6<sup>th</sup> Cir. 1994).

<sup>243</sup> Congress arguably has a variety of options available to it in attempting to counter executive nonenforcement. In addition to enacting legislation that confines the discretion to determine whether to initiate an enforcement action in response to a violation of federal law, it could be argued that Congress may also utilize its power of the purse to encourage enforcement by the executive; directly reject, through the Congressional Review Act or otherwise, agency nonenforcement guidance documents; assign enforcement powers to independent agencies that are not subject to Presidential control; amend the APA to clarify that certain administrative nonenforcement decisions are *not* "committed to agency discretion" and subject to judicial review; encourage the assistance of states in the enforcement of federal law; or authorize private citizens to initiate enforcement actions on behalf of the United States. The constitutionality of these proposed alternatives will not be addressed in this report. See also, *U.S. v. Windsor*, 133 S. Ct. 2675, 2704-05 (2013) (Scalia, J., dissenting) ("if majorities in both Houses of Congress care enough about the matter...[Congress has] available innumerable ways to compel executive action without a lawsuit...").

<sup>244</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>245</sup> *Heckler*, 470 U.S. at 833.

Congress's prominent role in setting agency priorities appears in *TVA v. Hill*.<sup>246</sup> There, the Court stated "emphatically" that it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress [] has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."<sup>247</sup> If Congress does utilize its legislative authority to set enforcement priorities or establish factors for consideration in making enforcement decisions, it would appear to be within the judicial authority to ensure executive compliance with those explicit statutory requirements. This would especially be the case in a situation where a stated agency enforcement policy is in direct conflict with the statutory framework.

Whether Congress can *remove* the discretion to initiate an enforcement action by establishing a generally applicable statutory framework that *requires* the executive branch to enforce the law, not against specific individuals, but rather under certain factual scenarios; where certain criteria are met; or where certain aggravating factors are present; may raise concerns. This is especially true in the criminal context, where some courts have made broad statements about the nature of the executive's power to decide whether to bring a criminal prosecution.<sup>248</sup> But these statements have generally occurred in opinions that either focus the power of the *courts* (as opposed to Congress) to interfere in prosecutorial decisions, or that avoid the question of congressional authority by interpreting a statute as insufficient to curtail prosecutorial discretion.<sup>249</sup> Although no court appears to have directly addressed the issue, the Supreme Court did note in *U.S. v. Nixon* that "the Executive Branch has *exclusive* authority and *absolute discretion* to decide whether to prosecute a case."<sup>250</sup> While the value of the *Nixon* dicta is debatable,<sup>251</sup> it nevertheless suggests that congressional attempts to require prosecutions may be problematic.<sup>252</sup>

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<sup>246</sup> 437 U.S. 153, 174 (1978)(holding that Congress intended endangered species "to be afforded the highest of priorities.").

<sup>247</sup> *Id.* at 194. The language from *TVA* pertained to situations when enforcement was "sought" as opposed to nonenforcement.

<sup>248</sup> If a court were to compel a prosecution any number of practical questions would need to be considered:  
Nor is it clear what the judiciary's role of supervision should be were it to undertake such a review. At what point would the prosecutor be entitled to call a halt to further investigation as unlikely to be productive? What evidentiary standard would be used to decide whether prosecution should be compelled? How much judgment would the United States Attorney be allowed? Would he be permitted to limit himself to a strong 'test' case rather than pursue weaker cases? What collateral factors would be permissible bases for a decision not to prosecute, e. g., the pendency of another criminal proceeding elsewhere against the same parties? What sort of review should be available in cases like the present one where the conduct complained of allegedly violates state as well as federal laws? With limited personnel and facilities at his disposal, what priority would the prosecutor be required to give to cases in which investigation or prosecution was directed by the court?

See, *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F. 2d 375, 380 (2<sup>nd</sup> Cir. 1973) (citations omitted).

<sup>249</sup> See *supra* note 196.

<sup>250</sup> 418 U.S. 683, 693 (1974).

<sup>251</sup> See, e.g., *Heckler*, 470 U.S. at 733 (Marshall J. concurring):

The half-sentence cited from *Nixon*, which states that the Executive has "absolute discretion to decide whether to prosecute a case," 418 U. S., at 693, is the only apparent support the Court actually offers for even the limited notion that prosecutorial discretion in the criminal area is unreviewable. But that half-sentence is of course misleading, for *Nixon* held it an abuse of that discretion to attempt to exercise it contrary to validly promulgated regulations. Thus, *Nixon* actually stands for a very different proposition than the one for which the Court cites it: faced with  
(continued...)

The executive branch has previously determined that Congress lacks the authority to compel prosecutions in the criminal context. In its evaluation of whether the criminal contempt statute<sup>253</sup> requires the U.S. Attorney to refer a contempt citation to the grand jury, the DOJ argued that “although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, *the decision not to prosecute* an individual may not be controlled because it is fundamental to the executive’s prerogative.”<sup>254</sup> The DOJ went on to assert that “divesting” a federal prosecutor of the discretion to decide whether to bring a prosecution would “run afoul...of the separation of powers by stripping the Executive of its proper constitutional authority and by vesting improper power in Congress.”<sup>255</sup>

The DOJ position was reached four years prior to the Supreme Court’s important decision on Presidential control over the enforcement of law in *Morrison*. Under *Morrison*, the standard for evaluating the separation of powers concerns associated with a law that arguably intrudes on the President’s personal obligation to “take Care that the laws be faithfully executed” would appear to be whether the law “impermissibly undermine[s] the powers of the Executive Branch,” or “prevent[s] the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>256</sup>

The chief considerations in the *Morrison* analysis appear to have related to “aggrandizement” and “control.” The Court upheld the independent counsel provisions because Congress had not sought to aggrandize its own powers (the independent counsel was “independent” from both the President and Congress), and because the President, through the Attorney General, retained sufficient “supervision” and “control” over actions of the independent counsel.<sup>257</sup> How a court would apply these principles to a law that sought to compel a criminal prosecution upon the occurrence of certain conditions is difficult to determine. It could be argued that by mandating scenarios under which criminal prosecutions must occur, Congress is, in effect, replacing the prosecutor’s discretionary decision of whether to initiate a case, with its own congressional determination. This could be seen as “controlling” the exercise of a discretionary enforcement decision, depriving the President of adequate control over federal prosecutors, and an “aggrandizement” of congressional power, as Congress would have vested power in *itself* to

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(...continued)

a specific claim of abuse of prosecutorial discretion, *Nixon* makes clear that courts are not powerless to intervene.

<sup>252</sup> See, Peterson, *supra* note 213 at 612 (arguing that the Constitution does not permit Congress to compel a criminal prosecution) (“Congress cannot both pass the laws and decide who shall be prosecuted for their violation.”).

<sup>253</sup> 2 U.S.C. §194 (providing that the President of the Senate or the Speaker of the House shall certify the contempt “to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.”)

<sup>254</sup> 8 Op. Off. Legal Counsel 101, 126 (1984).

<sup>255</sup> *Id.* at 127. For a discussion of the myriad issues associated with the criminal contempt provision, including judicial treatment of the U.S. Attorneys obligations under 2 U.S.C. §194 see CRS Report RL34097, *Congress’s Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, by Todd Garvey and Alissa M. Dolan. See, *Ex parte Frankfeld*, 32 F. Supp 915, 916 (D.D.C. 1940) (“It seems quite apparent that Congress intended to leave no measure of discretion to either the Speaker of the House or the President of the Senate, under such circumstances, but made the certification of facts to the district attorney a mandatory proceeding, and *it left no discretion with the district attorney as to what he should do about it. He is required, under the language of the statute, to submit the facts to the grand jury.*”) (emphasis added); But see, *Wilson v. U.S.*, 369 F.2d 198 (D.C. Cir. 1966) (determining the Speakers duty under the statute to be discretionary).

<sup>256</sup> But see, *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.2d 749, 755-56 (holding *Morrison* inapplicable in the civil context).

<sup>257</sup> *Morrison v. Olson* 487 U.S. 654, 685-97 (1988).

determine when and whether prosecutions are to be initiated.<sup>258</sup> To the contrary, a court may be equally likely to decide that such a law is a permissible legislative restriction on the exercise of the initial discretionary decision of whether to initiate a prosecution that neither aggrandizes Congress's power nor subverts Presidential control, as the conduct of the prosecution, once initiated, remains entirely in the hands of the executive branch. Characterized in this manner, Congress has acted to limit, but not remove, executive control over enforcement. *Morrison* and the qui tam cases suggest that it is constitutionally permissible for Congress to "reduce" or "diminish" executive branch control over the initiation of an enforcement action.<sup>259</sup> In addition, constitutional issues may be ameliorated by ensuring that the executive branch retains significant discretion to determine whether the conditions that trigger the mandated prosecution are met.<sup>260</sup>

In the administrative context, *Heckler's* approval of the reasoning in *Dunlop* would appear to approve of legislation that creates a mandatory administrative enforcement framework.<sup>261</sup> Even so, obtaining a court order actually compelling enforcement may be difficult, as was evident in how the *Dunlop* case ultimately concluded. As previously discussed, the Supreme Court stated that the "principle of absolute prosecutorial discretion" was inapplicable in *Dunlop* because Congress had, by statute, required the Secretary to bring an enforcement action if certain "clearly defined" factors were present.<sup>262</sup> In confirming the continued validity of *Dunlop*, the Court in *Heckler* stated that "The statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power."<sup>263</sup> The removal of discretion, the Court held, was a:

decision [] in the first instance for Congress... If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under [the APA] and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law.'<sup>264</sup>

However, the court did not order the Secretary to initiate an enforcement proceeding, but rather directed the Secretary to file a "statement of reasons" as to why no action was brought and

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<sup>258</sup> "It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" *Mistretta v. U.S.*, 488 U.S. 361, 382 (1989). In *Free Enterprise Fund v. PCAOB*, the Court determined that Congress had "deprive[d] the President of adequate control over" the Public Company Accounting Oversight Board (Board) by insulating Board members from Presidential control with dual layers of "for cause" removal protections. The added layer of tenure protection "impaired" the President from "holding his subordinates accountable for their conduct." 561 U.S. 477, 130 S. Ct. 3138, 3154, 3160 (2010).

<sup>259</sup> *Morrison*, at 695 ("It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754-55 (9<sup>th</sup> Cir. 1993) ("Likewise, we do not deny that the qui tam provisions of the FCA to some degree diminish Executive Branch control over the initiation and prosecution of a defined class of civil litigation.").

<sup>260</sup> It is important to reiterate that if the executive branch failed to comply with such a law, it is unlikely that a court would directly order a federal prosecutor to commence a specific prosecution. Thus, while such a law may be within Congress's authority to enact, it may not be within the courts authority to enforce.

<sup>261</sup> The Secretary retained significant discretion to determine whether the precondition to the required enforcement action was met. The Secretary's obligation was only triggered where he determined that there was "probable cause" to believe that a violation occurred. *Dunlop v. Bachowski*, 421 U.S. 560, 563 n.2 (1975).

<sup>262</sup> *Heckler*, 470 U.S. at 834.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 834-35.

directed the district court to review that document to determine whether the nonenforcement decision was “arbitrary and capricious.”<sup>265</sup> The court further directed that if the district court “determines that the Secretary’s statement of reasons adequately demonstrates that his decision not to sue is not contrary to law, the ... suit fails and should be dismissed.”<sup>266</sup> The court then noted that if the district court came to the opposite conclusion, new concerns under the separation of powers may arise, stating:

The district court may, however, ultimately come to the conclusion that the Secretary’s statement of reasons on its face renders necessary the conclusion that his decision not to sue is so irrational as to constitute the decision arbitrary and capricious. There would then be presented the question whether the district court is empowered to order the Secretary to bring a civil suit against the union to set aside the election. We have no occasion to address that question at this time. It obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary. We prefer therefore at this time to assume that the Secretary would proceed appropriately without the coercion of a court order when finally advised by the courts that his decision was in law arbitrary and capricious.<sup>267</sup>

In a footnote, the Court noted the union’s argument that the separation of powers does not “countenance a court order requiring the executive branch, against its wishes, to institute a lawsuit in federal court.”<sup>268</sup> The Court stated only that “[s]ince we do not consider at this time the question of the court’s power to order the Secretary to file suit, we need not address [the separation of powers] contentions.”<sup>269</sup> On remand, the district court found the provided statement of reasons to be inadequate to justify the agency inaction, but again, did not order the Secretary to initiate an enforcement action. Instead it simply directed a reconsideration of the agency decision and prohibited the Secretary from using a method of determining whether a violation occurred that the court found to be inconsistent with congressional intent.<sup>270</sup>

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<sup>265</sup> *Dunlop*, 421 U.S. at 572-73.

<sup>266</sup> *Id.* at 574.

<sup>267</sup> *Id.* at 575-76.

<sup>268</sup> *Id.* at 576 n.12.

<sup>269</sup> *Id.*

<sup>270</sup> *Bachowski v. Brennan*, 405 F. Supp. 1227 (W.D. PA 1975).