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The Statutory Nonenforcement Power

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When first announced, President Barack Obama’s policy of deferred action must have caused many brows to furrow. By what right can the President decide not to enforce the deportation laws? Executives are supposed to execute, not resolve that some laws should be disregarded. The Constitution requires the President to “take care that the laws be faithfully executed.”¹ Allowing people to remain in the United States when the laws indicate that they cannot seems to reflect lax and unfaithful execution.

Robert Delahunty and John Yoo’s article in the *Texas Law Review* supplies scholarly heft to this view.² After offering a learned explanation of why the President lacks a “general . . . nonenforcement power,” they explain that the President may refuse to enforce or follow the law in four circumstances.³ They conclude that none of these circumstances are apposite and fret that the President’s “policy effectively amends existing acts of Congress.”⁴ They also suggest that if the President can choose not to enforce the immigration laws, he can dispense with all the laws.⁵

Yet I cannot help but think that their comprehensive and fair treatment rather clearly shows that the President never dispensed or suspended the deportation statutes. The latter part of their comprehensive article lists four

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1. U.S. CONST. art. II, § 3.

2. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781 (2013).

3. *Id.* at 856.

4. *Id.* at 785, 856.

5. *Id.* at 784.

“defenses” of an executive’s failure to enforce a law: unconstitutional statutes, equitable discretion not to enforce in individual cases, insufficient resources to fully enforce, and a de facto delegation of enforcement discretion.⁶ They claim that none applies to the President’s deferred action program.⁷ I disagree. I think two, perhaps three, of these categories suggest that President Obama has not suspended or dispensed any law. The President may be guilty of having the wrong enforcement priorities, but he has not violated his faithful execution duty.

Let’s consider each defense in turn. I agree with their claim that the President does not violate the Faithful Execution Clause when he refuses to execute laws he believes are unconstitutional. I believe that enforcing such laws would constitute a violation of his oath to defend the Constitution and a defilement of the faithful execution injunction to enforce the laws, one of which is the Constitution itself.⁸ As they point out, this defense is inapplicable to the deferred action program because the President never claimed that the immigration laws are unconstitutional.⁹

Delahunty and Yoo also argue that equitable considerations cannot justify the President’s decision not to enforce the deportation laws as to young people.¹⁰ They seem to believe that equity can only be a defense when the Executive makes decisions at the retail level and not at the wholesale level.¹¹ Because the President is making deportation turn on distinctions shared by potentially millions, he cannot use equitable principles to justify his nonenforcement as to youths.¹²

Yet I do not see why the President’s decision has all the hallmarks of law and not equity. Where the President has discretion not to enforce (discussed in the next paragraph), of course he can announce rules to be used in the exercise of that discretion, rather than leaving enforcement to chance or to the varied enforcement priorities of individual immigration officers. One might say that equity is more equitable if like cases are treated alike. The President’s rules conduce toward ensuring that like cases are treated alike. Professors Delahunty and Yoo’s response is to say that to exercise equity, one has to consider all the particulars of an individual before deciding to not enforce a law against that person.¹³ But this is misguided. The police officer that chooses to let someone off with a warning need not first

6. *Id.* at 835–56.

7. *Id.* at 856.

8. Saikrishna Bangalore Prakash, *The President’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616–17 (2008).

9. *See* Delahunty & Yoo, *supra* note 2, at 837–38.

10. *See id.* at 844–45.

11. *Id.* at 842–43.

12. *Id.* at 844–45.

13. *Id.*

spend hours getting to know the driver in making that nonenforcement decision. He may use simple categories that roughly serve equitable ends, e.g., people speeding on the way to the hospital should not get tickets if they are sick, injured, or otherwise in need of immediate medical care. In any event, the President's policy is far more fine-grained than the equitable "on the way to the hospital" policy described above. I am unsure why the consideration that the President's program requires is not particularized enough for Professors Delahunty and Yoo.

Their last two categories consist of executive discretion afforded by circumstances.¹⁴ Discretion not to enforce a law can come from two sources.¹⁵ First, the enacting Legislature may grant such discretion in its statute, either explicitly or implicitly.¹⁶ Typically, such discretion will be implicit and not explicit. Few statutes will establish a prohibition and then expressly declare that the Executive has discretion regarding enforcement decisions. Instead, executives are apt to infer enforcement discretion from the statute's silence. Returning to the traffic laws, they are widely understood to confer some measure of discretion on police officers. The highway patrol need not ticket every speeder they trap. If legislators desired total, unremitting, and discretionless enforcement, they would have to specify as much in their enacting law. The nonenforcement option is too ingrained in custom to be overcome by a statute that does no more than enact a general prohibition against speeding and admonishes the police to ticket violators.

What I am thinking of here maps onto their fourth defense. Citing Adam Cox and Christina Rodriguez, Delahunty and Yoo admit that one can read the entire immigration system as essentially delegating the details to the Executive.¹⁷ Here they blame Congress and suggest that this is a violation of the delegation doctrine because there is no "intelligible standard" to cabin the enforcement discretion that Congress has conveyed.¹⁸

But if this be a violation of the delegation doctrine, our entire system is unconstitutional because Congress has confidently ceded tremendous discretion to prosecutors, across the length and breadth of federal law. To my knowledge, Congress has never legislated a comprehensive prioritization of all federal statutes, a list that would compel the Executive to expend enforcement resources first on the most important statutes, as identified by Congress.

Moreover, if the problem is a violation of the delegation doctrine, the fault lies with Congress and not the Obama Administration. The actual

14. *See id.* at 845–56.

15. *Id.*

16. *Id.* at 852–53.

17. *Id.* at 851–53.

18. *Id.* at 853.

violation occurs when Congress enacts the laws, not when the President exercises the discretion ceded to him by those laws. The delegation doctrine is about restraining Congress, and while it has secondary effects on the recipients of delegations, it does not condemn those outside Congress who receive delegated authority. Put another way, proponents of a revived delegation doctrine typically do not blame the delegees of legislative power for their exercise of such power; they censure the delegators—the legislators in Congress.

The second source of enforcement discretion flows from the choices made by subsequent legislators with respect to the grant of enforcement resources.¹⁹ Whatever the enacting Legislature may have desired by way of enforcement, if subsequent legislators fail to supply sufficient resources to fulfill the enacting Legislature's expectations, there will be a gap between expected and actual enforcement. When this occurs, the Executive will be unable to enforce as much as the enacting Legislature had hoped. Choices will need to be made about the allocation of scarce resources across the range of scofflaws, real and suspected.

This discretion maps on to Professors Delahunty and Yoo's category of insufficient resources.²⁰ They conclude that the President's deferred action program violates the faithful execution duty.²¹ The President's policy, they suggest, is "so unreasonable that it may be considered unconstitutional."²²

I do not see it as unreasonable. Professors Delahunty and Yoo claim that the Administration has "provided no evidence to substantiate its claim of inadequate resources."²³ But having previously said that Immigration and Customs Enforcement (ICE) "has faced acute resource constraints," it is hard to make sense of their evidentiary demand.²⁴ Moreover, they note that while there are 11.5 million deportable individuals, Congress only supplies resources sufficient to deport 400,000 a year.²⁵ It seems to me that Professors Delahunty and Yoo clearly substantiate the claim of "inadequate resources."²⁶ At most, the Administration can be faulted for failing to advert to the statistics that the professors cite.

The problem of insufficient resources is an endemic feature of the modern federal government. A combination of so many laws, so many

19. *Id.* at 845.

20. I quibble with their claim that an executive's less than complete enforcement requires an "excuse" lest there be a "breach of duty." *Id.* at 845. The Take Care Clause imposes a duty to do one's best ("faithful" execution), a duty fully satisfied by using the resources available to enforce the laws. U.S. CONST. art. II, § 3.

21. Delahunty & Yoo, *supra* note 2, at 850.

22. *Id.* at 847.

23. *Id.*

24. *See id.* at 846.

25. *Id.* at 788 & n.31.

26. *See id.* at 847.

scofflaws, and limited resources necessarily will mean that there will be inadequate resources to enforce all the laws on the books against all those who have violated it. I suppose if we had bigger enforcement budgets, fewer laws, and fewer transgressors, both real and supposed, insufficient resources would not be an issue. But in our real world, money does not grow on trees, Congress has created (too) many legal rules, and men are not angels.²⁷

Their more promising resource argument is that the Administration's deferred action program requires the expenditure of funds on the processing of deferred action applications.²⁸ Moreover, the Administration has not asserted that the resources spent on processing deferred action applications will result in cost savings that could be harnessed to keep deportation levels constant. The end result is that because resources are being expended on deferred action, fewer people will be expelled than otherwise would have been. Their conjecture about the effect on the numbers of deportable immigrants seems almost certainly true.

But here too they are mistaken about what the immigration statutes require. They suppose that Congress wants the Executive to function as a remorseless deportation automaton, with some attention to cost-benefit analysis. Their footnotes suggest that the deferred action program might be permissible if it yields net societal benefits.²⁹ But as noted earlier, Congress (like all assemblies) legislates against the backdrop of executive discretion. Congress expects that the President will not enforce all laws without regard to the circumstances. And members are fully aware that the President will have enforcement priorities within laws and across them. The President might choose to focus on prosecuting youthful violent criminals out of a sense that they are more likely to commit future crimes than are aged offenders. Likewise, the President might choose to concentrate resources on insider traders who commit criminal offenses rather than market manipulators. If Congress wanted no funds to be used to discriminate across those deportable, except where net societal benefits are positive or except where the number of deportable immigrants stayed constant, Congress would have to expressly so provide.

At some level, Delahunty and Yoo seem to agree. They believe that the Administration can target its resources on those who have committed crimes.³⁰ But such targeting will inevitably involve the use of resources that

27. Another way for Congress to ensure more enforcement for particular laws is to create dedicated enforcement budgets. But even this cannot ensure complete enforcement because the dedicated amounts must be sufficient in light of the number of laws and the number of violators. While Congress has supplied a dedicated enforcement budget here, it clearly is insufficient.

28. Delahunty & Yoo, *supra* note 2, at 848–49, 849 n.420.

29. *Id.* at 849 nn.420–21.

30. *Id.* at 846.

could have been used to expel more of the deportable. If an ICE official apprehends an otherwise law-abiding deportable alien in North Dakota and decides not to expel her because ICE determines that the alien is not a criminal, the resources expended to make that judgment necessarily reduce the amount that may be spent on deportations. Alternatively, if ICE only tries to apprehend criminals amongst the class of deportables, it may well be the case that there will be fewer deportations overall. After all, we might suspect that the criminal class is most adept at avoiding apprehension. More generally, we know that the adoption of any enforcement policy that channels enforcement resources to certain sorts of cases will inevitably require the use of some resources to determine whether individuals are part of the favored or disfavored class. With respect to most such decisions, the Executive will be unable to declare that the decision does not lead to less overall enforcement. The police officer that declines to write tickets for those who drive nine miles over the speed limit is not claiming that his nonenforcement does not materially affect the number of tickets written. Instead, the police officer understands that the law implicitly conveys him discretion and chooses to exercise it by forbearing to issue tickets to all violators.

Because Professors Delahunty and Yoo reject the defense from inadequate resources, they claim that the deferred action program is a means of implementing by executive fiat what Congress has rejected.³¹ In effect, the Executive is implementing the DREAM Act into law via his deferred action program, thereby making law. This makes the entire deferred action program appear “pretextual,” they say.³²

But Congress has no more passed the Anti-DREAM Act than it has passed the DREAM Act. In particular, Congress has not decided that the substance of the DREAM Act should not be implemented administratively; far from it. By doing nothing, Congress has left in place the enforcement discretion that existed before the DREAM Act was in the minds of anyone. Congress has not curbed the Executive’s preexisting statutory power to set enforcement priorities. Congress has not said that the Executive must expel any deportable alien it apprehends, without regard to what the Executive believes is the best allocation of scarce enforcement resources.

For different reasons, the President’s exercise of discretion does not mean that the President has enacted the DREAM Act’s substance by executive order. The DREAM Act would have granted permanent residency to aliens; the President’s order does no such thing. It merely provides that the Executive will not, for a period of time, deport certain individuals. Moreover, if the DREAM Act became law, the President could not later

31. *Id.* at 849–50.

32. *Id.* at 850.

choose to deport those who received some legal status. By way of contrast, future presidents are at liberty to deport individuals who previously benefited from President Obama's deferred action. A President Hillary Clinton or Paul Ryan does not need to retain the deferred action program precisely because it is not an exercise of lawmaking but is instead an exercise of executive discretion, something much less stable.

Finally, Professors Delahunty and Yoo's claim that the Administration's defense of the deferred action program is "pretextual" is a bit bewildering because it suggests that there is a deeper, hidden reason for the deferred action.³³ But the Administration has been clear about its desire to use its enforcement discretion in a way that coheres with the sense of many people that the class of youthful deportees should be allowed to stay in the United States.³⁴ Perhaps the Professors mean to suggest that the deferred action program reflects an attempt to satisfy a part of the Democratic coalition and is not merely a decision that sounds in pure public policy. But something similar could be said of many enforcement decisions. A decision to enforce drunk-driving laws more vigorously than speeding laws may reflect a desire to satisfy a constituency (say Mothers Against Drunk Driving) that believes that the former laws are more vital than the latter. Prosecutors make such decisions all the time. They are not above making choices that conduce to their future political fortunes. Presidents and legislators are no different.

When Congress creates too many laws in a world with many violators, much turns on the enforcement resources Congress supplies. Where Congress has allocated insufficient resources to fully enforce its laws, it essentially conveys the President a limited statutory nonenforcement power. The President may decide how best to allocate those scarce resources in immigration enforcement because Congress has not laid down such details in its immigration or appropriation statutes. By deciding whom to enforce the law against, the President necessarily decides not to enforce the law against others, hence the claim that he has a nonenforcement power.

But nothing here is inevitable. Congress made the President's deferred action possible and Congress can eliminate that policy should it so choose. By statute, Congress could tell him to focus on the youthful amongst the pool of deportables; or on those who lack a high school or college degree; or on those who have committed crimes. Or Congress could provide billions more dollars to beef up enforcement actions against those who are in the country

33. *Id.*

34. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to Immigration Dirs. (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (explaining how many young individuals know only America as home and should be afforded prosecutorial discretion if they meet certain criteria).

illegally. And the annual appropriations process makes it possible for Congress to intervene fairly quickly after the President announces a new enforcement priority.