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## Category Errors and Executive Power

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# Category Errors and Executive Power

*Jonathan H. Adler*<sup>\*</sup>

## INTRODUCTION

Over the past several years, the Obama Administration has taken multiple actions to blunt the impact of federal law upon the private sector. In the context of implementing the Affordable Care Act and the Clean Air Act, the Administration has asserted not only the authority to determine when, and how stringently, to enforce relevant provisions, but also the authority to waive or delay legal obligations enacted by Congress. These actions, among others, have prompted accusations that the Administration is exceeding the proper bounds of executive authority.<sup>1</sup> The ensuing debate—and litigation—over these actions has generated a good deal of confusion about the nature and scope of executive power.

Commentators have often misunderstood or mischaracterized the nature of the acts taken and their potential legal justifications, blurring the distinction between permissible executive discretion over matters of enforcement with broader discretion to adjust legal benefits and burdens. Specifically, some have sought to defend as exercises of enforcement discretion actions that are better characterized as efforts to “suspend” or alter legal obligations imposed by duly enacted legislation. This illustrates confusion about the nature of executive power and the different sorts of actions the executive branch takes in the course of implementing and enforcing federal law.

It is undisputed that the executive branch may exercise discretion when deciding how federal law is to be enforced, particularly when it comes to prosecuting those who violate federal law. Such enforcement discretion is only one type of discretion that the executive branch may exercise, however. Not every decision to reduce the burden imposed by federal law can be characterized as an exercise of enforcement discretion. While the President has substantial authority to determine how, when, and even whether federal law is to be enforced, the President has no inherent authority to waive legal

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<sup>1</sup> See generally Andrew Prokop, *How Barack Obama Is Expanding Presidential Power—And What It Means for the Future*, VOX (Sept. 9, 2014), [www.vox.com/2014/9/9/5964421/obama-lawsuit-republicans-abuse-of-power](http://www.vox.com/2014/9/9/5964421/obama-lawsuit-republicans-abuse-of-power). For more specific accusations, see *The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before H.R. Comm. on the Judiciary* (Dec. 3, 2013), <https://judiciary.house.gov/hearing/the-president-s-constitutional-duty-to-faithfully-execute-the-laws-2>.

requirements or suspend the law. Nonenforcement and suspension are not the same thing.

The purpose of this brief essay is to provide some clarity in the muddled discussion over executive power. Specifically, the aim is to help clarify what sorts of actions taken by the executive branch can be properly characterized as “enforcement” actions—where the President’s inherent authority to exercise prosecutorial discretion applies—and what sorts of actions cannot. Specifically, this essay seeks to explain why some particularly controversial actions—such as the Administration’s decision to delay the so-called employer mandate imposed by the Affordable Care Act<sup>2</sup> (ACA) and to “tailor” the application of federal regulations governing greenhouse gas emissions under the Clean Air Act<sup>3</sup> (CAA)—are not properly understood as exercises of enforcement discretion, and are therefore unlawful unless they can be justified on other grounds.

Part I of this essay lays out some basic principles about the nature of executive power generally, and enforcement discretion in particular. Part II analyzes the Obama Administration’s repeated decisions to delay and modify the employer mandate. Part III turns to the Administration’s attempt to “tailor” CAA emission thresholds that trigger regulatory requirements so as to facilitate the regulation of greenhouse gases. The essay then concludes.

## I. EXECUTIVE POWER AND ENFORCEMENT DISCRETION

Article II of the Constitution provides that “the executive Power shall be vested in a President of the United States of America.”<sup>4</sup> It further provides that the President has a constitutional obligation to “take Care that the Laws be faithfully executed.”<sup>5</sup> Accordingly, the President has both the power and the obligation to enforce federal law.

Under Article II, the executive branch enforces and executes the law, but it does not legislate. “All legislative Powers” granted in the Constitution are “vested” in Congress.<sup>6</sup> Federal agencies, while generally a part of the executive branch, are creatures of the legislature in that they only have that authority which Congress has delegated to them.<sup>7</sup> Such delegations can only occur in statutes that have satisfied the requirements of bicameralism and

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<sup>2</sup> Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2012) [hereinafter *Affordable Care Act*].

<sup>3</sup> Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

<sup>4</sup> U.S. CONST. art. II, § 1.

<sup>5</sup> U.S. CONST. art. II, § 3.

<sup>6</sup> U.S. CONST. art. I, § 1.

<sup>7</sup> See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

presentment, and the executive branch must implement such laws within the relevant statutory boundaries.<sup>8</sup>

Once federal laws are enacted the executive branch maintains discretion over how the laws are to be enforced.<sup>9</sup> The need for such discretion should be readily apparent.<sup>10</sup> The executive branch cannot pursue each and every instance of lawbreaking. Resources are necessarily limited. Congress regularly enacts laws that exceed the ability of federal agencies to enforce in their entirety and in every applicable instance. In a world in which so much behavior is regulated (and even criminalized<sup>11</sup>), the cause of justice is not furthered by trying to pursue and punish each instance of potentially unlawful behavior to the ultimate extent—if such were even possible.<sup>12</sup>

Enforcement discretion entails the decision to direct and allocate limited resources and set priorities. When seeking to enforce the law, the executive branch must necessarily make choices about who to investigate, who to charge, and what punishments or penalties to seek. As the Supreme Court explained in *Heckler v. Chaney*, when enforcing a statute, the executive must determine not only “whether a violation has occurred,” but also “whether agency resources are best spent on this violation or another,” the likelihood that a prosecution will be successful, and whether a given enforcement action “best fits the agency’s overall policies.”<sup>13</sup> Resolving such questions necessarily involves a degree of discretion, and such discretion is generally understood to be a core element of executive power.<sup>14</sup> As such, it is largely (though not completely) insulated from legislative direction or judicial review.<sup>15</sup>

While the executive branch’s enforcement discretion is broad, it is not unlimited. It does not entitle administrative agencies to disregard statutory

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<sup>8</sup> See *In re Aiken County*, 725 F.3d 255, 257 (D.C. Cir. 2012).

<sup>9</sup> See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014) (“[S]ome degree of enforcement discretion is a natural incident of the core executive function of applying general laws to particular cases.”).

<sup>10</sup> See *id.* at 681 (“The constitutional structure “presumes, and indeed depends on, prosecutorial charging discretion.”); *id.* at 673 (noting enforcement discretion is “central to the operation of both the federal criminal justice system and the administrative state”).

<sup>11</sup> See generally HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013).

<sup>12</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“An agency generally cannot act against each technical violation of the statute it is charged with enforcing.”).

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

<sup>15</sup> *Id.* (noting that enforcement discretion is presumptively immune from judicial review). Note, however, that such decisions are “only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” *Id.* at 832–33.

provisions that are deemed unwise or inconvenient, let alone the authority to waive legal obligations that are written into federal law.<sup>16</sup> The power to decline to indict or prosecute is not the power to waive an underlying legal obligation or prohibition.<sup>17</sup> The latter is not so much non-enforcement as it is suspension, and the executive branch has no such power.<sup>18</sup> The constable's authority to decide not to arrest every lawbreaker is not the power to suspend the law. Nor is the prosecutor's authority to decline to seek an indictment the authority to create an exception to an otherwise valid statutory scheme.<sup>19</sup>

Whereas the executive branch can decide not to prioritize the enforcement of specific statutory provisions, it cannot waive or eliminate legal obligations that duly enacted laws impose on government agencies or private actors. An agency's authority to allocate resources in accord with the executive branch's policy choices does not allow it to disregard unwanted statutory mandates. Policy disagreement, or a belief that there is a better way to effectuate federal policy than that which has been enacted into law, does not authorize the executive branch to go its own way.<sup>20</sup> As the Department of Justice Office of Legal Counsel has succinctly explained, "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences."<sup>21</sup>

The key point here is that not all actions taken by the executive branch to implement or execute the laws enacted by Congress are properly characterized as "enforcement," and thus not every discretionary policy choice made by the executive branch may be characterized as an exercise of enforcement discretion. When the President is making choices about whom to prosecute, and on what basis, that is an exercise of the enforcement power.

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<sup>16</sup> See Price, *supra* note 9, at 676 (The executive branch "exceeds its proper role, and enters the legislature's domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations.").

<sup>17</sup> See *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2012) ("Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition.") (emphasis in original).

<sup>18</sup> The power to suspend statutory obligations, as distinct from the power to decline to prosecute, was considered and rejected at the Constitutional Convention. See Price, *supra* note 9, at 692–93.

<sup>19</sup> See, e.g., *Cook v. FDA*, 733 F.3d 1, 8 (D.C. Cir. 2013) (contrasting enforcement discretion with the authority to "make an exception" to a statutory requirement).

<sup>20</sup> See *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2012) ("[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress.").

<sup>21</sup> *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 39 Op. O.L.C. 6 (Nov. 19, 2014) (The OLC memorandum continues by noting that "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering.").

When the President is making other decisions about how to implement or operationalize a complex regulatory scheme, this is *not* an exercise of the enforcement power. The executive branch's power here is necessarily constrained by the nature of the grant of authority from Congress.<sup>22</sup> Such discretion may be broad, but it is a question of what a statute provides.<sup>23</sup> And when the executive seeks to prevent the application of a legal provision that is self-executing—one that applies to private conduct on its own terms whether or not the executive branch seeks to enforce it—this is best characterized as suspension, which is unlawful unless authorized by Congress.<sup>24</sup> Claims of enforcement discretion cannot excuse an administrative agency's disregard of relevant statutory text or an attempt to waive statutory requirements.

## II. THE EMPLOYER MANDATE

In enacting the Affordable Care Act, Congress gave the executive lots to execute.<sup>25</sup> The statute obligated many federal agencies throughout the executive branch to perform a wide range of functions so that the law's various reforms and regulatory measures could take effect.

Whether due to a lack of resources, the law's inartful drafting,<sup>26</sup> or political concerns about its effects, federal agencies have repeatedly failed to implement the ACA as it was enacted by Congress.<sup>27</sup> There are numerous instances in which federal agencies have sought to waive relevant ACA requirements or to implement the law in a manner that does not conform to the relevant statutory text and authority granted by Congress.<sup>28</sup>

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<sup>22</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007) (agency decision is arbitrary and capricious when based on “reasoning divorced from the statutory text”); *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (“Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”).

<sup>23</sup> See *Massachusetts*, 549 U.S. at 535 (administrative agency “must ground its reasons for action or inaction in the statute”).

<sup>24</sup> See *Price*, *supra* note 9, at 677 (“Without a clear statutory basis, an executive waiver of statutory requirements is a presumptively impermissible suspension of federal law.”).

<sup>25</sup> See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111–148) (2010), [www.ncsl.org/documents/health/Regulations.pdf](http://www.ncsl.org/documents/health/Regulations.pdf) (“[I]t seems likely that there will be a great deal of regulatory activity relating to the many provisions in PPACA for years, or even decades to come.”).

<sup>26</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (noting the ACA “contains more than a few examples of inartful drafting”); see also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 76–79 (2015) (describing the turmoil that surrounded the ACA's enactment).

<sup>27</sup> See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PENN. L. REV. (forthcoming 2016).

<sup>28</sup> *Id.*; see also Andy Grewal, *Lurking Challenges to the ACA Tax Credit Regulations*, 98 DAILY TAX REP. J-1 (May 21, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2598317](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598317); Jonathan H. Adler, *The Ad Hoc Implementation and Enforcement of Health Care Reform*, in *LIBERTY'S NEMESIS* (D. Reuter & J. Yoo eds., 2016).

A particularly conspicuous example of the Obama Administration seeking to waive a legal requirement under the guise of enforcement discretion is the decision to delay the effective date, and then modify the application of, the employer mandate. The ACA imposes a “shared responsibility” requirement obligating employers with more than fifty employees to provide qualifying health insurance.<sup>29</sup> Employers who fail to comply with this “employer mandate” are required to pay a penalty or “tax” that can reach \$2,000 per employee beyond the thirtieth employee (i.e., a firm with fifty employees would pay the penalty on twenty).<sup>30</sup> This provision exposes larger employers to substantial penalties if they fail to offer qualifying health insurance to their employees.

Section 1513 of the ACA expressly provides that this mandate, and the accompanying tax liability, was to “apply to months beginning after December 31, 2013.”<sup>31</sup> In other words, this provision of the law was due to take effect at the start of 2014. In July 2013, however, the Department of the Treasury announced in a blog post that it would delay the employer mandate by a year.<sup>32</sup> The stated reason for this delay was “the complexity of the requirements” imposed on employers and “the need for more time to implement them effectively.”<sup>33</sup> Later that month the Internal Revenue Service (IRS) published a guidance detailing the “transition relief” to be afforded employers from the employer mandate and associated information reporting requirements.<sup>34</sup>

Seven months later, in February 2014, Treasury Department announced further delays of and modifications to the employer mandate.<sup>35</sup> Specifically, Treasury declared that the mandate would be delayed until 2016 for firms with fewer than one hundred employees. In addition, Treasury announced that firms with over one hundred employees would only need to provide qualifying insurance to seventy percent of their full-time employees in 2015, and ninety-five percent of employees thereafter, in order to avoid the statutory penalties. The Administration not only waived the effective date for the employer mandate, it also invented a new set of staggered requirements

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<sup>29</sup> See Affordable Care Act, 26 U.S.C. § 4980H(a)–(c) (2012).

<sup>30</sup> *Id.*

<sup>31</sup> See Affordable Care Act, Pub. L. No. 111–148, § 1513(d), 124 Stat. 119, 256 (2010) (“The amendments made by this section shall apply to months beginning after December 31, 2013.”).

<sup>32</sup> See Mark Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, TREAS. NOTES (July 2, 2013), [www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx](http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx).

<sup>33</sup> *Id.*

<sup>34</sup> See *Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)*, NOT-129718-13, I.R.S. (July 9, 2013), [www.irs.gov/pub/irs-drop/n-13-45.pdf](http://www.irs.gov/pub/irs-drop/n-13-45.pdf).

<sup>35</sup> See *Shared Responsibility for Employers Regarding Health Coverage*, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

for firms. Again, agency officials said their intent was to help employers adjust to the law's requirements, though some observers saw more political motivations.<sup>36</sup>

In justifying these delays, the Treasury Department claimed that it has broad authority to offer "transition relief" in implementing a complex law like the ACA. Specifically, Department officials claimed delaying the effective date of the employer mandate was an ordinary exercise of its "longstanding authority to grant transition relief when implementing new legislation."<sup>37</sup> Outside commentators suggested that this was nothing more than a "sensible adjustment[] to phase-in enforcement, not a refusal to enforce."<sup>38</sup> It is true that the Treasury Department's decision was not a "refusal to enforce" the employer mandate. It was something far more—and far more difficult to justify.

In delaying the employer mandate, the Treasury Department did not assert the authority to delay enforcement of the law so much as it asserted the authority to waive the law's requirements altogether. To defend this as enforcement discretion is not only to get the wrong answer. It reflects a failure to ask the right question, as the power to decline to enforce is not the power to delay a statutorily imposed obligation. This is not a matter of enforcement discretion at all.

When Congress provides that a given legal requirement takes effect on a date certain, that is when the legal requirement takes effect. Such provisions of law are, in effect, self-executing.<sup>39</sup> If, as the Administration has claimed, the employer mandate penalty is a tax, that tax liability for non-complying employers began to accrue at the start of 2014. As Congress did not delegate the executive branch authority to waive or delay this requirement, there was no authority for these delays.

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<sup>36</sup> See, e.g., Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST (Feb. 10, 2014), [www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb\\_story.html](http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html) ("[M]any across the ideological spectrum viewed them as an effort by the White House to defuse another health-care controversy before the fall midterm elections.").

<sup>37</sup> See Letter from Mark Mazur, Assistant Secretary of the Treasury for Tax Policy, to Representative Fred Upton, Chairman of the Committee on Energy and Commerce, H.R. (July 9, 2013), [https://perma-archives.org/warc/6Z3L-Z4B9/id\\_/file:/6Z3L-Z4B9/cap.pdf](https://perma-archives.org/warc/6Z3L-Z4B9/id_/file:/6Z3L-Z4B9/cap.pdf).

<sup>38</sup> *Executive Overreach in Domestic Affairs Part I—Health Care and Immigration: Written Statement of Simon Lazarus Hearing Before the H.R. Judiciary Comm. Exec. Overreach Task Force* (Mar. 15, 2014), <https://judiciary.house.gov/wp-content/uploads/2016/03/Lazarus-03.15.2016-1.pdf>.

<sup>39</sup> See *Atkins v. Parker*, 472 U.S. 115, 144 n.21 (1985) (noting "it is 'essential' to distinguish 'self-executing feature[s] of [a] statute' from actions taken subsequently to implement the legislative command") (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 533 (1982)). See also Adam M. Samaha, *Self-Executing Statutes in the Administrative State*, in *THE TIMING OF LEGAL INTERVENTION* (Frank Fagan & Saul Levmore eds., forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2720309](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720309).



Whatever the stated reason for the delays, nothing in the ACA authorizes the executive branch to waive the application of the employer mandate penalties. The text of the ACA is quite clear. It provides that the employer mandate provisions “shall apply” after December 31, 2013.<sup>40</sup> Other provisions of the ACA reinforce the significance of this effective date. For example, the ACA expressly provides for the amount of the employer penalty to be assessed in 2014, and then provides for the penalties to be adjusted for inflation in subsequent years.<sup>41</sup>

Under the guise of enforcement discretion, the IRS has the ability to offer some relief to those who may have difficulty meeting newly imposed legal obligations. For instance, the IRS has the authority to decline to seek penalties for failing to meet administrative requirements and perhaps even to waive a reporting deadline, for all practical purposes, by refusing to seek penalties against those who miss the deadline. Such actions are fundamentally different from seeking to eliminate an accrued tax liability or waive a self-executing legal requirement. Refusing to enforce a statutory provision is different from claiming a statutory provision does not apply or has no legal force.

Although the Treasury Department claimed the delay was nothing more than a routine exercise of “longstanding authority to grant transition relief when implementing new legislation,”<sup>42</sup> the Department failed to identify an applicable precedent. The Department cited numerous instances where such authority was used, but in none of the cases cited did the Department purport to grant prospective relief to a statutorily imposed liability on private parties without express statutory authorization. The Treasury Department cited cases in which the IRS waived potentially applicable penalties or allowed deferred payment of tax liabilities, but these are easily distinguishable.<sup>43</sup>

The employer mandate delay was not an exercise of enforcement discretion, nor was it the sort of transitional relief the IRS has engaged in before. It was a naked effort to suspend a statutory obligation, as even some legal commentators who are generally supportive of the Administration’s ACA implementation efforts acknowledged. Writing in the *New England Journal of Medicine*, University of Michigan law professor Nicholas Bagley

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<sup>40</sup> See Affordable Care Act, Pub. L. No. 111–148, § 1513(d), 124 Stat. 119, 256 (2010) (“The amendments made by this section shall apply to months beginning after December 31, 2013.”).

<sup>41</sup> See 26 U.S.C. § 4980H(c)(5).

<sup>42</sup> See Letter from Mark Mazur, Assistant Secretary of the Treasury for Tax Policy, to Representative Fred Upton, Chairman of the Committee on Energy and Commerce, H.R. (July 9, 2013), [https://perma-archives.org/warc/6Z3L-Z4B9/id\\_/file:/6Z3L-Z4B9/cap.pdf](https://perma-archives.org/warc/6Z3L-Z4B9/id_/file:/6Z3L-Z4B9/cap.pdf).

<sup>43</sup> See Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENGL. J. MED. 1967, 1969 (2014) (The precedents relied upon by the Treasury Department provide “slim support for a sweeping objection that will relieve thousands of employers from a substantial tax for as long as 2 years.”).

noted the employer mandate delay appeared “to exceed the scope of the executive’s traditional enforcement discretion” and cannot be justified as an exercise of executive branch authority to prioritize limited agency resources.<sup>44</sup>

The Administration’s authority to delay and alter the employer mandate has been challenged in federal court, but it is uncertain whether any court will reach the merits of these claims. In cases filed to date, federal courts have been skeptical that private firms and the U.S. House of Representatives have suffered the sort of injury necessary to support Article III standing. Whether or not these challenges are ultimately deemed justiciable, the argument against the lawfulness of the employer mandate delay is, on the merits, quite strong. Regrettably, it is not an isolated example.

### III. TAILORING UNDER THE CLEAN AIR ACT

The effort to delay the enforcement of the employer mandate was not the only instance of the Obama Administration seeking to blunt the impact of federal law on private parties by altering the scope or effect of relevant legal obligations under the guise of executive discretion. The Administration also sought to relieve private firms of obligations to control greenhouse gases (GHGs) under the CAA,<sup>45</sup> only to be rebuked by the Supreme Court.

The CAA imposes a comprehensive regulatory regime on the emission of designated air pollutants. Greenhouse gases are covered by the CAA due to the Supreme Court’s 2007 decision in *Massachusetts v. EPA*.<sup>46</sup> In response to that decision, the United States Environmental Protection Agency (EPA) began to take steps to regulate such emissions, making a formal finding that greenhouse gases cause or contribute to air pollution that may be anticipated to endanger public health and the environment<sup>47</sup> and adopting regulations governing such emissions from mobile sources.<sup>48</sup> The EPA also concluded that the Court’s conclusion that GHGs are air pollutants under the Act required it to regulate emissions from stationary sources as well.<sup>49</sup> But this

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<sup>44</sup> *Id.* at 1968.

<sup>45</sup> Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

<sup>46</sup> 549 U.S. 497 (2007). For a critique of the *Massachusetts* decision, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

<sup>47</sup> Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

<sup>48</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,323 (May 7, 2010).

<sup>49</sup> See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010); see also *Coalition for Resp. Reg., Inc. v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012) (noting that under the EPA’s “longstanding interpretation of the CAA” regulation of mobile source GHG emissions “automatically triggered” regulation of stationary source emissions). This interpretation of the CAA was rejected by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2439 (2014).

created a problem, as it would have required the EPA to do too much.

The relevant provisions of the CAA require the regulation of all facilities that emit more than set levels of covered pollutants, either 250 or 100 tons per year.<sup>50</sup> These thresholds make perfect sense for traditional air pollutants, such as sulfur dioxide. Applied to GHGs, however, these thresholds increase the universe of regulated facilities many times over—so much so that the resulting regulatory obligations would grind operations of the EPA and state permitting agencies to a halt.<sup>51</sup> According to the EPA’s estimates, applying the statutory thresholds to greenhouse gases would have cost the government alone over \$15 billion.<sup>52</sup> Given the extreme impracticality of seeking to apply the CAA in this way, the EPA asserted the authority to narrow the scope of its authority.<sup>53</sup> Specifically, it redefined the statutory thresholds for regulation under the relevant provisions of the Act, substituting 75,000 and 100,000 tons per year for 100 and 250 tons per year, and reserved the authority to redefine these thresholds further as circumstances allow.<sup>54</sup> This rule—the so-called tailoring rule was challenged in court.

The EPA’s view that focusing its regulatory efforts on the largest emitters of GHGs made policy sense was consistent with the agency’s resources and staffing levels, but it was not what the relevant provisions authorized. If, as the EPA claimed, it was required to treat GHGs as air pollutants under these provisions of the Act, it had to apply the thresholds Congress provided.

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<sup>50</sup> See 42 U.S.C. § 7479(1) (1990). 42 U.S.C. § 7661(2) adopts the definition provided in 42 U.S.C. § 7602(j) defining a “major” source as “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.” For regulation of hazardous air pollutants, 42 U.S.C. § 7661(2) incorporates the even more stringent definition contained in 42 U.S.C. § 7412.

<sup>51</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292, 55,294 (Oct. 27, 2009). As the EPA explained:

If PSD and Title V requirements apply at the applicability levels provided under the CAA, many small sources would be burdened by the costs of individualized PSD control technology requirements and permit applications. In addition, State permitting authorities would be paralyzed by enormous numbers of these permit applications; the numbers are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities.

*Id.*

<sup>52</sup> *Id.* at 55,302. Industry groups estimated that the costs of applying the relevant statutory thresholds would have been even greater than the EPA suggested. See, e.g., *A Regulatory Burden: The Compliance Dimension of Regulating CO<sub>2</sub> as a Pollutant*, U.S. CHAMBER OF COM. (Sept. 2008).

<sup>53</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009).

<sup>54</sup> See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

Here again, claims about enforcement discretion did not help the Administration. This is because the Clean Air Act obligates regulated facilities to obtain permits in order to operate. If they do not have permits, they are violating the law. Enforcement discretion would authorize a decision by the EPA to go easy on smaller unpermitted facilities, and perhaps even to ignore them altogether given resource constraints, but that is not what the EPA sought to do. Rather, the agency sought to relieve facilities of any legal obligation whatsoever—to lift the obligation to obtain a permit and, it is important to note, the exposure to citizen suits lack of a permit can produce.

Here again, the Administration claimed an authority to ease in burdens, and act transitionally, phasing in the regulatory requirements imposed by the statute. According to the EPA, it was acting in a step-by-step manner and hoped, eventually, to impose its regulations on all facilities within the statutory thresholds. Here again there was no delegation of authority to take such steps.

The EPA's actions survived review in the D.C. Circuit,<sup>55</sup> but not in the Supreme Court.<sup>56</sup> Writing for a five-justice majority, the late Justice Scalia explained why the EPA's assertion of authority could not be justified as a traditional exercise of executive authority or enforcement discretion.<sup>57</sup>

First, Justice Scalia noted that when an agency asserts the authority to withhold the effect of a statute—to delay a requirement or narrow the range of a statutory provision's application—the agency is engaged in aggrandizing its own power. Further, he noted, agency authority to interpret ambiguous statutory provisions does not include the power to rewrite such provisions. The court reaffirmed that an agency interpretation of ambiguous statutory text must still be reasonable and consonant with the statutory text.

An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always “give effect to the unambiguously expressed intent of Congress.” . . . It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the “bounds of its statutory authority.”<sup>58</sup>

The Court also made clear that an agency's enforcement discretion does not allow it to alter underlying legal obligations, and that not even the

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<sup>55</sup> See *Coalition for Resp. Reg., Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam).

<sup>56</sup> See *Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427 (2014).

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

<sup>58</sup> *Id.* at 2445 (citations and quotations omitted).

Solicitor General was willing to try and argue otherwise:

The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA's enforcement discretion. The Tailoring Rule is not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act.<sup>59</sup>

This ruling is important not only because it constrained the EPA's attempt at self-aggrandizement, but because it reaffirms the limits of executive authority, and reaffirms that good policy reasons for seeking to limit the scope or cost of a statute are insufficient to justify administrative efforts to rewrite a statute.

#### CONCLUSION

To conclude, let us return to where we started, with basic principles about the nature of executive power. The Executive Branch has broad enforcement discretion, but this is discretion about how to *enforce* the law; it is not authority to rewrite the law or alter the way in which the law itself applies to private parties. Administrative agencies often have the authority to alter the benefits and burdens created by a given statutory scheme. Yet because agencies only have that authority which has been delegated to them by Congress, they only have the power to make such alterations insofar as such authority has been granted by Congress. What this means is that where a law imposes significant burdens, and policymakers conclude that such burdens are excessive (or politically inconvenient), our constitutional structure leaves responsibility for enacting a fix to Congress in the first instance.

To say that the Administration lacked the authority to delay the employer mandate or tailor the regulatory thresholds for greenhouse gases is not to say that either step would have represented unsound policy. Insofar as the ACA's employer mandate is problematic, or the precise numerical thresholds embodied in the CAA are impractical when applied to greenhouse gases, it is up to the legislature to enact or authorize a fix. Unilateral efforts to rewrite or alter the application of properly enacted laws aggrandize executive power. They also facilitate the evasion of responsibility by the legislature.

The effort to assert unilateral executive authority in these cases has broader implications than these immediate controversies. The assertion of unilateral authority to delay the employer mandate, for instance, could set a

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<sup>59</sup> *Id.* (emphasis in original).

dangerous precedent for agency action in the future.<sup>60</sup> If so, it would mark a dramatic shift in the separation of powers. As Bagley explains:

[T]he Obama Administration's claim of enforcement discretion, if accepted, would limit Congress's ability to specify when and under what circumstances its laws should take effect. That circumscription of legislative authority would mark a major shift of constitutional power away from Congress, which makes the laws, and toward the President, who is supposed to enforce them.<sup>61</sup>

In this regard, far more is at stake in the confusion over the nature of enforcement discretion than the Obama Administration's ability to implement high profile administration initiatives. Should this confusion not be corrected, it could facilitate a dramatic expansion of executive power, and any such expansion could have significant implications for years to come.

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<sup>60</sup> See Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1144–45 (2015).

<sup>61</sup> Bagley, *supra* note 43, at 1969.