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Faithful Nonexecution

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Faithful Nonexecution

Peter M. Shane¹

Abstract

Rule of law ideals, as well as the ideal of accountable administration, are put at risk not only by agency initiatives that go beyond legal bounds, but also when agencies don't do their assigned tasks. It is not for nothing that the Constitution obliges presidents to take care that the laws be faithfully executed.² The Faithful Execution Clause effectively incorporates into the Constitution the English prohibition on the executive suspension of statutes.³ Yet there is surely no feature of public administration more ubiquitous than the underenforcement⁴ of law. Whether deemed the unfortunate corollary of limited resources or the virtuous exercise of prosecutorial judgment, no one – inside or outside government – expects or even wants the law to be enforced on every plausible occasion. On the contrary, extreme adherence to legal requirements is as likely to be a form of intentional disruption as it is a display of fidelity to office.⁵

The most recent public controversy highlighting the rule of law conundrum surrounding legal non-enforcement involves the Department of Homeland Security's program of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Hyperbolic lower court opinions notwithstanding,⁶ DAPA is all but certainly lawful.⁷ But the issues it raises

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² U.S. Const., Art. II, § 3 (sometimes also called the Take Care Clause).

³ Memorandum from Secretary Jeh Charles Johnson to León Rodriguez, Director, U.S. Citizen and Immigration Services, et al., re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 24, 2014), available at <http://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion>.

⁴ Although they could technically mean somewhat different things, this article uses “non-enforcement,” “underenforcement,” and “non-implementation” interchangeably. I am in all cases referring to agency decisions to forego in whole or in part the execution of what appears to be a statutory mandate.

⁵ Jessica Bulman-Pozen and David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809 (2015).

⁶ *Texas v. United States*, Civ. No. B-14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

about the scope of executive discretion not to enforce the law are serious. Indeed, they would seem especially serious for progressives who are most likely to support government regulatory or benefits programs that could easily be undermined by non-implementation. Non-implementation abuses are especially problematic because our system of checks and balances is not well designed to discipline them. Doctrines of standing, exhaustion, finality and the like may well render federal courts unavailable to cure administrative recalcitrance, and the judicial capacity to instigate action, even if invoked by a proper party in a well-timed lawsuit, is limited.

In response to these concerns, this article sets forth a framework for distinguishing between permissible and impermissible instances of executive underenforcement of the law. It seeks to distinguish, that is, between underenforcement that contradicts the executive obligation to take care that the laws be faithfully executed and underenforcement that is consistent with the executive's faithful execution obligations. It is the latter phenomenon that I am calling "faithful nonexecution." A proper determination whether any instance of underenforcement is faithful or faithless turns out to be highly context-specific.

The analysis proceeds in five parts. Part I illustrates the variety of forms non-implementation of the law appears. It underscores the familiarity of the phenomenon, which is nowhere as unusual as the heated controversy over DAPA might suggest. Part II reviews the kinds of legal challenges that non-implementation is likely to elicit and the hurdles to judicial resolution of those challenges. Part III defends, albeit uneasily, the judicial reviewability of DAPA, but argues that what so far are judicial dicta suggesting the program's illegality are simply wrong. The Justice Department's defense of DAPA actually provides the basis for developing a more generally applicable framework for assessing the legality of executive

⁷ See Part III, below; Peter M. Shane, *Judge Hanen's Misconceptions and the Legality of Deferred Action*, HUFFINGTON POST, Mar. 18, 2015, available at http://www.huffingtonpost.com/peter-m-shane/judge-hanens-misconceptio_b_6880376.html?

initiatives to underenforce the law. That still leaves the question, however, whether courts ought to police underenforcement initiatives for procedural regularity; specifically, when agencies adopt underenforcement policies, should they be required to follow the notice-and-comment procedures of the Administrative Procedure Act?⁸ In Part IV, I argue that, because procedural review may deter agencies from making their underenforcement policies public, the rule of law might be better served by making notice-and-comment voluntary. Part V provides a concluding summary.

⁸ 5 U.S.C. §553(c).