Hearing Before
The United States Senate
Committee on the Judiciary:

The Nomination of Loretta Lynch to be Attorney General of the United States

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Prepared Statement
of

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Mr. Chairman, Ranking Member Leahy, Members of the Committee: I thank you for the opportunity to testify at this momentous Hearing. The Committee has rightly chosen to explore not just the qualifications of the nominee but also the proper role of the office of Attorney General. I myself take no position on the ultimate question of whether Loretta Lynch should be confirmed. Rather, I offer some observations on the proper role of the Attorney General, and some comments, alas, on the ways in which, during the tenure of Eric Holder, this Administration has fallen short of its constitutional obligations.

I. Advising The President

You have explored at length the Attorney General's weighty responsibility to supervise the various components of the Department of Justice. But, as you know, the most important responsibility of the Attorney General is not the supervision of the tens of thousands who work beneath her; it is the solemn counsel that she gives to the one who works above. Her most important job is to give sound legal advice to the President of the United States.

This is the one obligation that is imposed upon the Attorney General, as "principal Officer," by the Constitution itself. Under Article II, "The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[1] Congress echoed this constitutional obligation from the beginning, when it created the office of Attorney General: "[T]here shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful

[1] U.S. CONST. art. II, § 2, cl. 2.

execution of his office; whose duty it shall be . . . to give his advice and opinion upon questions of law when required by the President of the United States . . . ."[2] And today, the statutory obligation is the same: "The Attorney General shall give his advice and opinion on questions of law when required by the President."[3]

The most important dimension of this function is to advise the President on the scope of his executive powers and duties.[4] And this aspect of the job is much harder than it sounds. The President may ask his Attorney General: "May I do X?" or "How may I do Y?" And the Attorney General should rightly explore all legal options for the President to achieve his goals. But at the end of the day, if no legal options are available, the Attorney General must be prepared to say: "No, Mr. President, you have no constitutional power to do that."

The fortitude—the rectitude—required to say "no" to the President is perhaps the single most important job criterion for Attorney General of the United States.[5] And I am afraid that it is particularly important now, in an Administration that is inclined to press the outer bounds of executive power.

In particular, the President is obliged to "take Care that the Laws be faithfully executed,"[6] but in the past six years, he has instituted several controversial policies that are, I believe, in serious tension with this solemn obligation. Pursuant to authority delegated by the Attorney General, the Office of Legal Counsel[7] has produced at least a few dubious[8] opinions[9] countenancing some of these policies. And, at least as far as we know, there has been no word of protest from the current Attorney General.

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[2] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.
[3] 28 U.S.C. § 511.
[4] David J. Barron, Acting Assistant Attorney General, Memorandum for Attorneys of the Office of Legal Counsel Re: Best Practices of OLC Legal Advice and Written Opinions (July 16, 2010), http://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf ("From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities.").
[5] Ideally, the need to say "no" should arise very infrequently, but when it does, nothing could be more important. Perhaps the proudest day in the history of the Office was October 20, 1973, when Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus said "no" to President Nixon and resigned. *See* Douglas E. Kneeland, *Nixon Discharges Cox For Defiance; Abolishes Watergate Task Force; Richardson And Ruckelhaus Out,* N.Y. TIMES, Oct. 21, 1973, http://www.nytimes.com/learning/general/onthisday/big/1020.html; Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm.
[6] U.S. CONST. art. II, § 3.
[7] DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, http://www.justice.gov/olc/opinions-main ("The authority of the Office of Legal Counsel to render legal opinions derives from the authority of the Attorney General …. [T]he Attorney General has delegated to the Office of Legal Counsel responsibility for … assisting the Attorney General in the performance of his function as legal adviser to the President.").
[8] *See, e.g.*, Michael J. Glennon, *The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion*, HARV. NAT'L SECURITY J. (Apr. 14, 2011). *available at* http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion-2/; Jack L. Goldsmith, *Office of Legal Counsel Opinion on Libya Intervention*, LAWFAREBLOG.COM (Apr. 7, 2011, 1:32 PM), http://www.lawfareblog.com/2011/04/office-of-legal-counsel-opinion-on-libya-intervention/;.David B.

For the balance of my testimony, I will discuss the content of the President's Take Care Clause obligation, and I will try to put some of these recent controversial policies in this proper constitutional context.[10] I hope that the Committee will thoroughly explore the nominee's conception of faithful execution of the laws, and her resolve to advise the President when he risks running afoul of this constitutional obligation.

II. The Take Care Clause

The relevant clause of the Constitution is the Take Care Clause: "*The President ... shall take Care that the Laws be faithfully executed.*"[11] To put these recent controversies in constitutional context, it is essential to understand the meaning and purpose of this Clause. As always, it is best to begin by parsing the constitutional text.

First, notice that this Clause does not grant power but rather imposes a duty: "The President … *shall* take Care…"[12] This is not optional; it is mandatory. Second, note that the duty is personal. Execution of the laws may be delegated, but the duty to "*take Care* that the Laws be faithfully executed"[13] is the President's alone. Third, notice that the President is not required to take care that the laws be "completely" executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them "faithfully." Finally, it is important to remember the historical context of the clause: English kings had claimed the power to suspend laws unilaterally,[14] but the Framers expressly rejected that practice. Here, the executive would be obliged to "take Care that the Laws be faithfully executed."[15]

With these principles in mind, it is possible to view recent controversies through the proper constitutional lens. For this purpose, I shall focus on three recent examples—though, sadly, there are many others that one could choose. I shall focus on the

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Rivkin Jr. & Elizabeth Price Foley, *Obama's Immigration Enablers*, WALL ST. J., Nov. 24, 2014, *available at* http://www.wsj.com/articles/david-rivkin-and-elizabeth-price-foley-obamas-immigration-enablers-1416872973.

[9] *See* Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Sec'y of Homeland Security and the Counsel to the President, 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 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf; Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Attorney General, Authority to Use Military Force in Libya (Apr. 1, 2011), http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf.

[10] In what follows, I draw substantially from my testimony a year ago before the House Judiciary Committee. *See The President's Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Prof. Nicholas Quinn Rosenkranz).

[11] U.S. CONST. art. II, § 3.

[12] *Id.* (emphasis added).

[13] *Id.* (emphasis added).

[14] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED, 302–03 (1st ed. 1908 & reprint 1919).

[15] U.S. CONST. art. II, § 3. *See also* Michael W. McConnell, *Op-Ed: Obama Suspends the Law*, WALL ST. J. (July 8, 2013), http://online.wsj.com/article/SB10001424127887323823004578591503509555268.html.

President's unilateral decision to suspend certain provisions of the Affordable Care Act, on the President's unilateral abridgement of the Immigration and Nationality Act, and on the IRS's targeting of the President's political adversaries.

III. ObamaCare Suspension

On July 2, 2013, just before the long weekend, the Obama Administration announced via blog post that the President would unilaterally suspend the employer mandate of ObamaCare[16]—notwithstanding the unambiguous command of the law. The statute is perfectly clear: It provides that these provisions become effective on January 1, 2014.[17] The blog post—written under the breezy Orwellian title "Continuing to Implement the ACA in a Careful, Thoughtful Manner"—makes no mention of the statutory deadline.[18]

This blog post raises the question of what it means to "take Care that the Laws be faithfully executed." Certainly, the adverb "faithfully" gives the President broad discretion about how best to deploy executive resources and how best to execute the laws. And the precise scope of this discretion may be the subject of legitimate debate. But this breathtaking blog post was not a mere exercise of prosecutorial discretion or a necessary calibration of executive resources. This was a wholesale suspension of law, in the teeth of a clear statutory command to the contrary. Whatever it may mean to "Take Care that the Laws be faithfully executed," it simply cannot mean declining to execute a law at all.

As if the suspension weren't enough, President Obama's comments about it on August 9, 2013—claiming that "the normal thing [he] would prefer to do" is seek a "change to the law"[19]—added insult to constitutional injury. Indeed, the President seemed annoyed when *The New York Times* dared to ask him the constitutional question.[20] As for Republican congressmen who questioned his authority, Mr. Obama said only: "I'm not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers."[21] Mr. Obama made no mention of, for example, Iowa Sen. Tom Harkin—a Democrat, a lawyer and one of the authors of ObamaCare—who asked exactly

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[16] Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY (July 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. The Obama Administration suspended implementation of 26 U.S.C. § 6055, 26 U.S.C. § 6056, and 26 U.S.C. § 4980H.

[17] The Patient Protection and Affordable Care Act, Pub.L. 111-148, § 1502(e), 124 Stat. 119, 252 (March 23, 2010) ("The amendments made by this section shall apply to calendar years beginning after 2013."); *id.* § 1513(d), 124 Stat. at 256 ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

[18] *See* Mazur, *supra* note 7.

[19] President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference.

[20] *See* Jackie Calmes & Michael D. Shear, *Interview with President Obama*, N.Y. TIMES (July 27, 2013), http://www.nytimes.com/2013/07/28/us/politics/interview-with-president-obama.html?pagewanted=all&_r=0.

[21] *Id.*

the right question: "This was the law. How can they change the law?"[22] Senator Harkin's point, of course, is that a change like this is inherently legislative; it requires an amendment to the statute itself.

But the President has been distinctly ambivalent about any such amendment. At the time, he made a point of saying that he would like to "simply call up the Speaker" of the House to request a "change to the law" that would achieve his desired delay.[23] But the truth, as the President knows, is that he wouldn't even have needed to pick up the phone: On July 17, 2013, the House of Representatives passed the Authority for Mandate Delay Act (with 229 Republicans and 35 Democrats voting in favor).[24] This would have authorized President Obama's desired suspension of the law.[25]

But President Obama did not actually welcome this congressional ratification. To the contrary, this bill—which stood to fix the constitutional problem that he himself had created—the President deemed "unnecessary".[26] Indeed, he actually threatened to veto it.[27] In this case, it appeared that the President would actually prefer to flout the law as written, rather than support a statutory change that would achieve his desired result. This seems an almost willful violation of the Take Care Clause.

IV. Immigration and Nationality Act Suspension

The second example, immigration, is almost an exact mirror of the first. In the ObamaCare context, the President suspended an Act of Congress—a statute that was duly passed by both Houses of Congress, and which he himself had signed into law. In the immigration context, the situation is the opposite. Rather than declining to comply with a duly enacted statute, the President has decided to comply meticulously—with a bill that never became a law.

Congress has repeatedly considered a statute called the DREAM Act, which would exempt a broad category of aliens from the Immigration and Nationality Act (INA).[28] The President favored this Act, but Congress repeatedly declined to pass it.[29] So,

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[22] Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/us/politics/house-gop-pushes-delay-on-individual-mandate-in-health-law.html.

[23] President Barack Obama, Remarks by the President in a Press Conference, (Aug. 9, 2013), http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference.

[24] *See* Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013). For final vote results for H.R. 2667, see http://clerk.house.gov/evs/2013/roll361.xml.

[25] *See* Authority for Mandate Delay Act, H.R. 2667, 113th Cong. (2013).

[26] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, (July 16, 2013), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2668r_20130716.pdf.

[27] *Id.*

[28] *See* Elisha Barron, *The Development, Relief, and Education for Alien Minors (Dream) Act*, 48 HARV. J. ON LEGIS. 623, 633 (2011); 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 TEX. L. REV. 781, 783-784, 789 (2013).

on June 15, 2012, the President announced that he would simply not enforce the INA against the precise category of aliens described in the DREAM Act.[30] He announced, in effect, that he would behave as though the DREAM Act had been enacted into law, though it had not.[31]

Once again, the President does have broad prosecutorial discretion and broad discretion to husband executive resources. But in this case, it is quite clear that the President is not merely trying to conserve resources. After all, his Solicitor General recently went to the Supreme Court to forbid Arizona from helping to enforce the INA.[32] And exempting as many as 1.76 million people from the immigration laws goes far beyond any traditional conception of prosecutorial discretion.[33] More to the point, this exemption has a distinctly legislative character. It is not a decision, in a particular case, that enforcement is not worth the resources; rather it is a blanket policy which exactly mirrors a statute that Congress declined to pass.[34] To put the point another way, the President shall "take Care that the *Laws*"—capital "L"—"be faithfully executed"—not those bills which fail to become law. Here, in effect, the President is faithfully executing the DREAM Act, which is not law at all, rather than the Immigration and Nationality Act, which is supreme law of the land. The President cannot enact the DREAM Act unilaterally, and he cannot evade Article I, section 7,[35] by pretending that it passed when it did not.

The President's most recent immigration policy, which effectively exempts several million more people from the Immigration and Nationality Act, is explicitly justified in the same way. The President complains that Congress has failed to enact his chosen policy into law, and this failure, he says, gives him license to decline to enforce

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[29] The Dream Act of 2011 did not move past the committee stage in either the House or the Senate. *See* Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Congress (2011); Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Congress (2011).

[30] President Barack Obama, Remarks by the President on Immigration (June 15, 2012), http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

[31] *See id.*; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[32] *See* Brief for Respondent United States at 26, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182). The Solicitor General argued that "Arizona's attempt to punish violations of federal law intrudes on exclusive federal authority."

[33] JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION: DEMOGRAPHIC PROFILE OF THE DREAMERS POTENTIALLY ELIGIBLE UNDER THE DEFERRED ACTION POLICY 1 (2012), *available at* http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

[34] *See* Memorandum from Janet Napolitano, *supra* note 22. *See also In re Aiken Cnty.*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J.) ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.").

[35] U.S. CONST. art. I, § 7 (requiring bicameralism and presentment for a bill to become a law).

the immigration laws as written.[36] But the Take Care Clause has no such exception:[37] "The President shall take care that the Laws"—even the ones he dislikes—"be faithfully executed."[38]

Indeed, the President himself made this exact point, eloquently, just a few years ago:

> America is a nation of laws, which means I, as the President, am obligated to enforce the law…. With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed… There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.[39]

More recently, in response to a heckler, the President expressly denied that he has "a power to stop deportation for all undocumented immigrants in this country."[40] He reiterated:

> [W]e're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal that you want to achieve.[41]

What the President did not explain is how his current immigration policy is consistent with that principle.

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[36] *See* President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) (transcript available at http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration) ("[I]t would be the law . . . . [b]ut for a year and a half now, Republican leaders in the House have refused to allow that simple vote. . . .").

[37] *See, e.g.*, Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544; Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545558; Editorial Board, *President Obama's unilateral action on immigration has no precedent*, WASH. POST, Dec. 3, 2014, *available at* http://www.washingtonpost.com/opinions/president-obamas-unilateral-action-on-immigration-has-no-precedent/2014/12/03/3fd78650-79a3-11e4-9a27-6fdbc612bff8_story.html ("Republicans' failure to address immigration also does not justify Mr. Obama's massive unilateral act . . . [it] flies in the face of congressional intent").

[38] U.S. CONST. art. II, § 3.

[39] President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall.

[40] President Barack Obama, Remarks by the President on Immigration Reform—San Francisco, CA (Nov. 25, 2013), http://www.whitehouse.gov/the-press-office/2013/11/25/remarks-president-immigration-reform-san-francisco-ca.

[41] *Id.*

V. IRS Targeting

The third example is troubling in a different way. As is now well known, the IRS subjected Tea Party organizations to Kafkaesque scrutiny and delay, particularly in the run-up to the last election. A House Oversight Committee hearing revealed that the IRS Chief Counsel's Office had played a key role.[42] The Committee rightly zeroed in on this fact, because the Chief Counsel is one of only two political appointees at the IRS,[43] appointed by President Obama[44] and confirmed by the Senate.[45] But what was missing from the hearing—and what has been missing from the commentary throughout—is the constitutional context of this scandal.

The President has, of course, been at pains to distance himself from this scandal. But, again, recall that the duty to "take Care" is personal. Execution of the laws may be delegated; indeed, the Clause clearly contemplates that other officers—like the IRS Chief Counsel—will do the actual executing. But the duty to "*take Care* that the Laws be faithfully executed" is the President's alone. For this reason, what the President knew and when he knew it is, in a certain sense, beside the point; the right question is what he *should* have known. It will not do for the President to say (erroneously) that the IRS is an "independent agency" or to say (implausibly) that he learned about IRS targeting "from the same news reports" as the rest of us.[46] Not knowing what an executive agency is up to—let alone not knowing that the IRS is, in fact, a bureau of an executive agency that answers to the President—is not taking care that the laws be faithfully executed. If the President was negligent in his supervision of the IRS (or somehow unaware that it was subject to his supervision), then he failed in his duty to take care.

Now, again, it is true that the President is not required to take care that the laws be "completely" executed; that would be impossible given finite resources. The President does have power to make enforcement choices—however, he must make them "faithfully." If the President lacks the resources to prosecute all bank robbers, he may choose to prosecute only the violent bank robbers; but he cannot choose to prosecute only the Catholic bank robbers.[47] Invidious discrimination is not faithful execution.

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[42] Written Testimony of Carter Hull, Before the House Oversight and Gov't Reform Comm. (July 18, 2013), http://oversight.house.gov/wp-content/uploads/2013/07/Hull-Testimony-Final.pdf.
[43] *See* 26 U.S.C. § 7803(b)(1).
[44] Press Release, The White House: Office of the Press Sec'y, President Obama Announces More Key Treasury Appointments (Apr. 17, 2009), http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-treasury-appointments.
[45] Press Release, U.S. Dep't of the Treasury, William J. Wilkins Confirmed as Chief Counsel for the Internal Revenue Service, Assistant General Counsel for Treasury (July 28, 2009), http://www.treasury.gov/press-center/press-releases/Pages/tg245.aspx.
[46] *See* President Barack Obama, Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference, (May 13, 2013), http://www.whitehouse.gov/the-press-office/2013/05/13/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint-. The IRS is part of the Department of Treasury, not an independent agency. *See* 26 USC § 7803 (placing the IRS Commissioner in the Department of the Treasury, and making him removable at the will of the President).
[47] *See Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987).

Discriminatory enforcement on the basis of religion would have horrified the Framers of the Constitution. But there is one kind of discrimination that would have worried them even more—the one kind that could undermine the entire constitutional structure: political discrimination. *The single most corrosive thing that can happen in a democracy is for incumbents to use the levers of power to stifle their critics and entrench themselves*.[48] This is devastating to a democracy, because it casts doubt on the legitimacy of all that follows. Ensuring that this does not happen is perhaps the single most important imperative of the President's duty to take care that the laws be faithfully executed. If he gives only one instruction to his political appointees, it should be this: *do not discriminate on the basis of politics in your execution of the laws*.

This, sadly, is the gravamen of the IRS scandal. Congress enacted a neutral provision of the tax code, but an executive agency enforced it non-neutrally, discriminating on invidious grounds. It discriminated against the Tea Party,[49] the most potent political force that the President's party faced in the mid-term elections. It discriminated against those who "criticize how the country is being run."[50] For good measure, it reportedly discriminated against those "involved in … educating on the Constitution and the Bill of Rights."[51] And it did all this while an embattled incumbent President was running for re-election.[52]

The President may, alas, urge his supporters to "punish our enemies"[53]; but he cannot stand oblivious while the IRS does just that. He may, alas, berate the Supreme Court for protecting political speech[54]; but he cannot turn a blind eye while the IRS muzzles his critics with red tape. He may, alas, call right-leaning groups a "threat to our democracy"[55]—but the real, cardinal threat is unfaithful execution of the laws.

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[48] *See* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1998).
[49] TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (May 14, 2013), https://docs.google.com/viewer?url=http://www.washingtonpost.com/blogs/wonkblog/files/2013/05/201310053fr-revised-redacted-1.pdf&chrome=true [hereinafter INAPPROPRIATE CRITERIA].
[50] *Id.* at 6, 35.
[51] *Id*. at 30, 38. *See also* Nicholas Quinn Rosenkranz, *Targeting the Constitution*, VOLOKH CONSPIRACY (Sep. 23, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/23/targeting-the-constitution/.
[52] *See* INAPPROPRIATE CRITERIA, *supra* note 45, at 6–10.
[53] Eddie Sotelo, *Interview with the President of the United States Barack Obama*, UNIVISION RADIO (Oct. 25, 2010), *transcript available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html.
[54] President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.
[55] President Barack Obama, Remarks by the President and the Vice President at a DNC 'Moving America Forward' Rally in Philadelphia, Pennsylvania (Oct. 10, 2010), http://www.whitehouse.gov/the-press-office/2010/10/10/remarks-president-and-vice-president-a-dnc-moving-america-forward-rally-.

Conclusion

The President has a personal obligation to "take Care that the Laws be faithfully executed."[56] The word "faithfully" is, perhaps, a broad grant of discretion, but it is also a real and important constraint. The President cannot suspend laws altogether. He cannot favor unenacted bills over duly enacted laws. And he cannot discriminate on the basis of politics in his execution of the laws. The President has crossed all three of these lines.

Again, I take no position on the ultimate question of whether Loretta Lynch should be confirmed. But I do hope that the Committee will thoroughly explore her views about the President's obligation to "take Care that the Laws be faithfully executed."[57] Above all, I hope that the nominee would, if necessary, tell the President when his proposed policies would run afoul of this solemn constitutional obligation.

[56] U.S. CONST. art. II, § 3.
[57] *Id.* (emphasis added).