THE SHIFTING CONSEQUENCES OF LEGALITY: RETHINKING MISCONDUCT IN THE PUBLIC SECTOR

ANDREW F. POPPER[1]

INTRODUCTION

*"Has the whole world gone crazy? Am I the only one around here who gives a sh*t about the rules?"*[2]

Is illegality passé? That can't be right. The commission of a crime entails the possibility of incarceration, fines, and potentially the loss of life—powerful deterrents.[3] On the civil side, transgressions of legal norms, illegal acts, have a less certain outcome, but sanctions for such acts can be severe and deter misconduct.[4] Deterrence breaks down when sanctions are irregular or nonexistent, when unlawful acts are neither sanctioned nor detrimental to those who engage in those acts. This becomes a matter of

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1. Andrew F. Popper is a Professor of Law at American University Washington College of Law and teaches in the torts and administrative law fields. Prior to his career in legal education, he served in the United States Marine Corps and, after his Honorable Discharge, transitioned to service under Military Assistance Command, Vietnam, Studies and Observations Group (MACV-SOG) where he had multiple deployments during the course of the war in Vietnam. Professor Popper would like to thank the Washington College of Law and my research assistants, Hannah Jacobs, Kayla Schwein, Daniel Rub, and Lilia Zylstra, for their hard work on this essay.

2. This was the lament of Walter Sobchak as portrayed by John Goodman in The Big Lebowski. THE BIG LEBOWSKI, Amazon Prime, at 0:18:33 (Polygram Filmed Entertainment 1998). While one would not expect to see these words, uttered by the actor John Goodman in the role of Walter Sobchak near the beginning of the cult movie, *The Big Lebowski*, they capture a sentiment, a frustration, is at the heart of this essay.

3. For example, on the first day of his second term in office, President Trump issued a flood of executive orders and memoranda, including one executive order with a ringing endorsement of the death penalty: "Restoring the Death Penalty and Protecting Public Safety." *See* Exec. Order No. 14,164, 90 Fed. Reg. 8463 (Jan. 20, 2025).

4. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 425–27 (1994) (arguing that while deterrent effect varies based on the area of tort law and other factors, the notion that deterrence is a real and intended consequence of the civil justice system is valid); WILLIAM POSNER & RICHARD LANDES, THE ECONOMIC STRUCTURE OF TORT LAW 11 (1987) ("[T]here is widespread agreement that the imposition of tort liability on professionals . . . and on business and other enterprises does affect behavior, does deter—some think too much!" (footnote omitted)).

greater moment when the illegal act involves a public official[5] and is visible to the public without apparent consequences.[6]

A primary goal of this essay is to assess and rethink civil illegality. The goal is not to condemn a president or anyone else, but rather to explore actions that are ostensibly illegal but appear to have few or no immediate consequences.[7] When that happens, the adverse effect on deterrence is diminished, potentially at a national level.[8]

A second goal of this essay is to explore a few remedial possibilities for illegal acts of public officials. What are the options for those harmed by such actions to pursue redress? Recent events detailed in this essay suggest that remedies are modest at best. Since it seems that the current legislative, judicial, or executive branches of our government are not anxious to sanction or even address illegal acts,[9] and since the government has only those three branches, one might declare the fair sky shielding our democracy is falling, and no one is left to pick up the pieces. Were that so,

5. Michael Waldman, *Breaking the Law*, THE BRIEFING (Feb. 4, 2025), https://www.brennancenter.org/our-work/analysis-opinion/breaking-law (looking at current actions alleged to be in violation of legal norms).

6. Patrick G. Eddington, *Illegal Actions, Missing Consequences*, THE BULWARK (Feb. 3, 2025), https://www.thebulwark.com/p/illegal-actions-missing-consequences-trump-second-term-executive-power (providing a short list of presidential misdeeds followed by an assessment of certain actions in 2025 that raise questions of legality).

7. *Cf.* James M. Banner Jr., *A History of Presidential Misdeeds*, 66 AMERICAN HERITAGE, at *1 (February/March 2021), https://www.americanheritage.com/history-presidential-misdeeds.

8. *See Tone at the Top: Exploring the Impact of Leadership Attitudes and Behaviors on Culture*, U.C. BERKELY EXEC. ED., https://executive.berkeley.edu/thought-leadership/blog/tone-top (last visited Feb. 2, 2026) ("Leaders have a profound impact on shaping the culture of their organizations. Every action and attitude creates ripples throughout the company and serves as the foundation upon which a company's mission, purpose, and vision are built.").

9. *See* Maya Sen, *Why Federal Courts are Unlikely to Save Democracy from Trump's and Musk's Attacks*, HARVARD KENNEDY SCHOOL, ASH CENTER (Feb. 12, 2025), https://ash.harvard.edu/articles/why-federal-courts-are-unlikely-to-save-democracy-from-trumps-and-musks-attacks/.

it would be both a sorry commentary on our legal system and an oversight of considerable proportion.

However, while Congress and the Supreme Court[10] seem tongue-tied on occasion when such events cross their threshold, the legal system itself is alive and well.[11] Lawsuits have been filed challenging allegedly unlawful activities; despite attempts to intimidate judges (and the size and strength of the Department of Justice that defends such claims), in the last year, more than 150 cases have resulted in sanctions or stays of executive action.[12] These cases are brought by lawyers in the private sector and by those in public interest entities. Thus, any negative critique that boils down to the claim that illegal acts are going unsanctioned fails to consider the power and impact of the million or so legally trained people—including those, in all likelihood, taking a small part of their valuable time to read this essay—who are willing to live up to their oath, pursue justice in its many and varied forms, and, hopefully, do so with the grace and dignity justice demands.

We are, in the aggregate, the capable guardians of this democracy. It is up to all lawyers, judges, legal scholars, and law students to live up to

10. Devon Ombres, *The President and Constitutional Violations: Will the Federal Courts Contain the President's Power Grabs?*, CENTER FOR AMERICAN PROGRESS, (May 20, 2025), https://www.americanprogress.org/article/the-president-and-constitutional-violations-will-the-federal-courts-contain-the-presidents-power-grabs/ (describing how in the first round of cases to reach the Supreme Court, conservative members of the Court are relying on technical and narrow grounds to avert a confrontation with the current administration)

11. *Cf.* Emma Schartz, et al., *The Trump Administration Has Been Sued 650 Times. Track These Cases.*, N.Y. TIMES, *https://www.nytimes.com/interactive/2026/us/trump-administration-lawsuits.html* (last visited on Feb. 16, 2026, at 13:16 ET) (providing up-to-date coverage of legal actions filed in the last year addressing allegedly illegal actions of the executive).

12. *Id.* (finding that of the 650 cases tracked, there are 150 cases where courts have stayed the action and found in favor of those challenging that activity).

their oath, insist on fairness, and push for the just and best results for those interests and individuals they represent within the bounds of the law. This requires passionate advocacy for client interests and compassion for those on the other side of any case or legal arguments. This does not require angry outbursts or ad hominem attacks on opposing counsel.[13] Shakespeare had some great advice for lawyers: "[D]o as adversaries do in law, [s]trive mightily, but eat and drink as friends."[14] Attorneys who are adversaries in contested matters would benefit from this snippet of wisdom. Sometimes it seems we lose sight of the fact that we are not our clients. We over-identify and lose objectivity, and, as a result, are seen as uncivil and, frankly, engaged in a very low-level form of lawyering.

If our public officials govern by force and retribution, by threats and political blackmail, that provides a model for lawlessness and liberates the worst of us to act with impunity. We can do better, but before we do, let us be clear (or as clear as possible) on illegality.[15] While the phrase "against the law" is used broadly in public discourse, it is more of a cultural reference than a precise legal conclusion. It is common phraseology, and as such, it has multiple and often conflicting meanings.

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13. Kevin Rector, *Trump's First-Year Actions Sparked a Fiery Legal War, and Stunning Rebukes from Judges*, L.A. TIMES (Jan. 11, 2026), https://www.latimes.com/politics/story/2026-01-11/trumps-first-year-actions-sparked-fiery-legal-war-stunning-rebukes-from-judges.

14. WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act I, sc. 2, FTLN 0839–40. Criticizing opposing counsel on the courthouse steps isn't just unprofessional; it sends a message to the watching world that part of life—and advocacy—is to use gross and offensive smear tactics. *See* Ivy B. Grey & Kate Callahan, *The Misleading Allure of the Aggressive Lawyer*, WORDRAKE, www.wordrake.com/resources/the-misleading-allure-of-the-aggressive-lawyer (last visited Feb. 2, 2026).

15. There are many ways in which our legal system contemplates unlawful and illegal acts. *See* PETER G. BERRIS & MICHAEL A. FOSTER, CONG. RSCH. SERV., R48177, COMPONENTS OF FEDERAL CRIMINAL LAW 1 (2024), https://www.congress.gov/crs-product/R48177 (exploring this concept through a focus on criminal justice).

The same can be said about "breaking rules" and similar terminology, and the impact of such transgressions on the social order.[16]

Unlike the phrase "rule of law,"[17] "illegality" is a more precise term. The expectation, when the term is used, is that there is a statute, regulation, or in the parlance of the legal profession, a case or cases on point that leave no question about the existence of a transgression of a defined legal standard. Accordingly, this essay focuses on activity that is illegal, meaning it is in contravention of clearly defined standards. In thinking through the question of legality of presidential actions in recent years, there was no lack of examples to aid the quest.[18]

Linguistics aside, the aforementioned terms presumptively incorporate a morality construct. While blame and moral condemnation are unavoidable parts of human nature, morality and shaming are not the goals of the essay. The notion of immorality subsumes too many different cultural, ethnic, theological, and literary uses and understandings to be of much use. Even less precise are the terms "right" and "wrong"; they are probably used more than any of the terms mentioned above, but they are

16. Bruce Frohnen, *Lawless America: What Happened to the Rule of Law*, THE IMAGINATIVE CONSERVATIVE (Sept. 25, 2012), https://theimaginativeconservative.org/2012/09/lawless-america-rule-of-law.html ("Law tends to rule, and justice to be done, when culturally rooted, rational expectations are upheld. Conversely, injustice tends to be done, and law tends to be undermined, by violations of customary expectations. Unjust expectations certainly exist.").

17. Robert A. Stein, *What Exactly Is the Rule of Law?* 57 HOU. L. REV. 185, 186 (2019) ("Without a clear definition, the rule of law is in danger of coming to mean virtually everything, so that it may in fact come to mean nothing at all.").

18. *See* George Ochenski, *The Law vs. the Lawless: A Showdown at the MAGA Corral*, DAILY MONTANAN: COMMENTARY (Feb. 14, 2025), https://dailymontanan.com/2025/02/14/the-law-vs-the-lawless-a-showdown-at-the-maga-corral/ ("As the illegal executive orders roll out, the countermanding lawsuits roll in. Every day more judges side with the citizens all across the nation and there's no end in sight since 'the showdown' is now whether or not the highest office in the nation is subject to the Constitution and laws which the rest of us must both respect and abide.").

bound in personal judgments as opposed to anything remotely resembling legal imperatives.[19]

These introductory comments are made to avoid misunderstanding this essay. The many actions discussed that are characterized as illegal are just that: violations of a clearly defined norm. Activities by public officials that raise questions of solely morality are not the intended targets.

I. ACTIONS AGAINST THE LAW: ARE THEY NOT ILLEGAL?

Just why our elected representatives and senior governmental officials are willing to support and implement decisions that require actions that contravene legal norms is best left to political scientists and psychologists. However, as to motive, fear of reprisals and repercussions, as well as an allegiance to a political juggernaut, may explain some of the reasons that rational actors in government are willing collaborators.[20] When those actions are at the direction of a president,[21] those in positions of power and public responsibility who are closest to the acts seem willing

19. Sarah Skwire, *Legal and Illegal Are Not Right and Wrong*, FOUND. FOR ECON. EDUC.: COMMENTARY, (Sept. 18, 2017), https://fee.org/articles/legal-and-illegal-is-not-right-and-wrong/ ("[U]nlike laws—which ought to be thin enough and general enough to apply to (as close as possible) all of us (as often as possible) all of the time—moral reasoning about what is right and wrong, should be thick and specific. It should be contextual—about the time and circumstance and the people involved—in a way that laws should not be.").

20. Elizabeth Bumiller, *'People are Going Silent': Fearing Retribution, Trump Critics Muzzle Themselves,* N.Y. TIMES, (Mar. 6, 2025), https://www.nytimes.com/2025/03/06/us/politics/trump-democracy.html.

21. If the executive branch believes an act is wrongfully labeled as illegal and thus goes forward with the act, it may not be a transgression of the "[m]orality of [l]egality," but there is no easy label for such acts given the "flood of recent actions from the executive branch that do not show a ton of respect for the [m]orality of [l]egality." Cass Sunstein, *The Morality of Legality*, SUBSTACK: CASS SUNSTEIN (May 26, 2025), https://casssunstein.substack.com/p/the-morality-of-legality.

to ignore them or remain silent rather than to object or counteract such behavior.[22]

Regardless of motive, it would be irresponsible to ignore the obvious: A meaningful number of actions by government officials prompted or directed by the executive branch are illegal and are being carried out as if they were perfectly normal, i.e., legal.[23] Though many of those actions are not consistent with the laws governing this country, is there a decent reason to think that, in times of great strife, illegal acts are essential? Looking back 250 years, one could argue that we are tolerant of illegality because of the manner in which this country was formed.

II. COULD THE BIRTH OF THIS NATION BE PREDICATED ON ILLEGAL ACTS?

Legality is not an absolutist construct—context matters. The exercise of discretion is essential before jumping to the conclusion that anything illegal is, by definition, a wrongful act that must be sanctioned. Consider the American Revolution, which, like most revolutions, required unimaginable courage and bravery and was, by definition, an unlawful act. Those acts were justified by the curtailment of liberty interests and

22. *See* Giselle Ruhiyyih Ewing, *'We Are All Afraid': Murkowski Says Fear of Retaliation From Trump Administration Is 'Real'*, POLITICO (Apr. 17, 2025, at 11:15 EDT), https://www.politico.com/news/2025/04/17/lisa-murkowski-trump-retaliation-00295852.

23. The extraordinary difficulty of changing the Constitution presents a dilemma for the executive branch: Take no action and forgo what seems in the best interests of the country, or go forward with an action knowing full well it is constitutionally improper. Richard Albert, *The Case for Presidential Illegality in Constitutional Amendment*, 67 DRAKE L. REV. 857, 871–74 (2019) (illustrating this phenomenon using the case of France).

fundamental rights.[24] Following shots fired at Lexington and Concord in 1775—a transgression of British law—came a declaration of war, a proclamation of rights, and the Declaration of Independence.[25]

The Declaration lists the grievances—the unacceptable acts undertaken at the direction of King George III—that made separation from Great Britain essential.[26] The Revolution was the response to intolerable affronts to basic freedoms properly attributed to the leader of the British Empire, George III. At that point in the evolution of government in Great Britain, the reigning monarch was, in every sense of the word, the unitary executive of England.[27] Thus, 250 years ago, King George was above the law, immune from culpability for harms he might cause and guided only by personal morals and preferences.[28]

The premise that a king or queen could do no wrong, *rex non potest peccare*,[29] was predicated on centuries of law and tradition as well as the personal wealth and power possessed by the ruling monarch, including unquestionable control of military decisions and resources.[30] Today, the

24. Matt Danzico & Kate Dailey, *Is the US Declaration of Independence Illegal?*, BBC NEWS (Oct. 19, 2011), https://www.bbc.com/news/magazine-15345511. There is at least one place for going forward with acts that are illegal; in fact, the American Revolution was an unending demonstration that in the face of unthinkable oppression of fundamental rights, the balance tips to justify an unlawful response.

25. *Lexington and Concord: The Shot Heard 'Round the World,* AM. BATTLEFIELD TR., (Apr. 7, 2025), https://www.battlefields.org/learn/articles/lexington-and-concord-shot-heard-round-world.

26. THE DECLARATION OF INDEPENDENCE para. 3–29 (U.S. 1776).

27. Paul Matzko, *King George III or Donald Trump? Reading the Declaration of Independence in 2019*, CATO INST., https://www.cato.org/blog/king-george-iii-or-donald-trump-reading-declaration-independence-2019 (July 3, 2019) (describing the American Revolution as a response to "a sweeping and tyrannical expansion of royal authority over against legislative authority" in the colonies).

28. For a modern comparison, see *United States v. Trump*, 603 U.S. 593 (2024), which grants a president immunity for most acts that occur in the course of a presidency.

29. 1 WILLIAM BLACKSTONE, COMMENTARIES *238 (1765).

30. Reginald Parker, *The King Does No Wrong—Liability for Misadministration,* 5 VAND. L. REV. 167, 167 (1952).

power of the monarchy in Great Britain has been diluted; over the years, the role and power of Parliament increased to the point that monarchical authority is now mostly ceremonial.[31] This essay is written at a moment in time when the reverse is taking place—there is a movement away from the constraints on power of the presidency contemplated by the framers of our government to the assertion of power in the White House constrained solely by the personal morals of a president.[32] Recently, President Donald J. Trump echoed that view of minimal power constraints.[33]

Opposition to the all-powerful unitary executive at the heart of the American Revolution led to a governmental structure—a system of checks and balances—outlined in the Constitution.[34] Although one cannot know precisely what was on the minds of the framers of the government in 1789, it is a safe bet that they intended for the direct or incidental powers of the presidency not to include the all-encompassing incidents of power embodied in the British unitary executive model at the time.[35]

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31. Dan McLaughlin, *How the British Monarchy Lost Its Pow*er, NAT'L REVIEW (Jan. 23, 2021), https://www.nationalreview.com/2021/01/how-the-british-monarchy-lost-its-power/ (tracing the progression to a reformed government in Great Britain where absolute monarchical power was no longer present).

32. *See* David E. Sanger, Tyler Pager, Katie Rogers & Zolan Kanno-Youngs, *Trump Lays Out a Vision of Power Restrained Only by 'My Own Morality'*, N.Y. TIMES (Jan. 8, 2026), https://www.nytimes.com/2026/01/08/us/politics/trump-interview-power-morality.html ("President Trump declared . . . his power as commander in chief is constrained only by his 'own morality,' brushing aside . . . other checks on his ability to use military might to . . . invade or coerce nations around the world.").

33. *Id.* (asserting that personal moral judgement is the sole constraint on presdidential power).

34. John Knight, *Be a King George*, J. AM. REVOLUTION, https://allthingsliberty.com/2019/04/be-a-king-george/ (Apr. 11, 2019) (tracing the role of George III leading to the Revolution and ultimately a Constituion that established three co-equal branches of government).

35. Trace M. Maddox, "*No Superior But God": History, Post Presidential Immunity, and the Intent of the Framers*, 81 WASH. & LEE L. REV. ONLINE 333, 354 (2024) (exploring sovereign immunity, the origins of "the King can do no wrong," and concluding that the founders avoided replicating that model of government).

Given this history, one might think that the power vested in the presidency in the United States would be completely walled off from any semblance of the unitary executive theory, but that is not the case, as reflected in Supreme Court decisions over the last century.[36] There is a more-than-shadowy similarity between the actions of that earlier unitary executive, King George III, which led to the Revolution, and certain recent actions of the White House. Consider the partial listing of the grievances from the Declaration set out below and the references to their present-day counterparts: "[The King has] refused his Assent to Laws,"[37] "obstructed the Administration of Justice,"[38] "made Judges dependent on his Will alone,"[39] "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people,"[40] "kept among us, in times of peace,

36. *See, e.g.*, Myers v. United States, 272 U.S. 52, 228 (1926) (holding the power to remove certain inferior officers without cause is incident to the power of the presidency); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010) (finding PCAOB board members who set public policy are wrongfully "double protected" and can be removed by a president without showing cause); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 213 (2020) (granting the president the right to fire a single administrator serving as director of CFTC who affects public policy without cause); Trump v. United States, 603 U.S. 593, 600 (2024) (holding that Article II of the Constitution grants a president immunity for core activities of the presidency).

37. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776); *see, e.g.*, Kyle Cheney, *More Than 220 Judges Have Now Rejected the Trump Admin's Mass Detention Policy,* POLITICO (Nov. 28, 2025, at 07:00 AM EST), https://www.politico.com/news/2025/11/28/trump-detention-deportation-policy-00669861 (discussing the idea that mass detention is a refusal to assent to our laws).

38. THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776)*; see, e.g.*, Elaine Kamarck, *Laying Out the Obstruction of Justice Case Against President Trump*, BROOKINGS: COMMENTARY (Aug. 22, 2018), https://www.brookings.edu/articles/laying-out-the-obstruction-of-justice-case-against-president-trump/ (considering interference in the peaceful transition of power to be an obstruction of justice).

39. THE DECLARATION OF INDEPENDENCE para. 11(U.S. 1776); *see, e.g.*, Jay Willis, *Trump's New Judges Have Nothing Bad to Say About January 6,* BALLS AND STRIKES (Jan. 7, 2025), https://ballsandstrikes.org/legal-culture/trump-judges-january-6/ (suggesting judges risk failed nominations or removal when they disagree with the President's point of view on a specific issue).

40. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776); *see, e.g.*, Heidi Altman, *ICE Is Detaining Indiscriminately. And Releasing Almost No One*, NAT'L IMMIGR. L. CTR. (Oct. 21, 2025), https://www.nilc.org/articles/ice-is-detaining-indiscriminately-and-releasing-almost-no-one/; *Exposing DOGE's Dark Dealings,* H. COMM. ON OVERSIGHT & GOV'T REFORM DEMCORATS, https://oversightdemocrats.house.gov/news/exposing-doges-dark-dealings (last visited Feb. 2, 2026); Justin Doubleday, *Trump Injects DOGE Into Agency Regulatory Decisions*, FED. NEWS NETWORK (Feb. 21, 2025) https://federalnewsnetwork.com/management/2025/02/trump-injects-doge-into-

Standing Armies without the Consent of our legislatures,"[41] "cut[] off our Trade with all parts of the world,"[42] "abdicated Government,"[43] and "excited domestic insurrections amongst us."[44]

To repeat, this article is not a condemnation of executive actions but rather an exploration of those acts. If they are instances of illegality, why has the reaction to them been so tepid? After all, it requires little imagination to link historic grievances that led to the Revolution and their present-day counterparts.[45] What is one to make of illegality?

III. GETTING TO A ROUGH CONSENSUS ON ILLEGALITY

agency-regulatory-decisions/ (arguing that authorizing DOGE agents to enter various federal agencies to fire many employees without cause would be tantamount to harassment).

41. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776); *see, e.g.*, Harold Hongju Koh & Michael Loughlin, *The President's Legal Authority to Commit Troops Domestically Under the Insurrection Act*, AM. CONST. SOC'Y (June 1, 2020), https://www.acslaw.org/wp-content/uploads/2020/09/Koh_Loughlin-IB-Final_PDF_upload.pdf (arguing sending Marines into major cities in violation of the Posse Comitatus Act as an improper use of standing armies);

42. THE DECLARATION OF INDEPENDENCE para. 18 (U.S. 1776); *see, e.g.*, Elizabeth Goitein, *How the President Is Misusing Emergency Powers to Impose Worldwide Tariffs,* BRENNAN CTR. FOR JUST. (May 13, 2025), https://www.brennancenter.org/our-work/research-reports/how-president-misusing-emergency-powers-impose-worldwide-tariffs (describing presidential decisions to impose tariffs on almost all major trading partners); see also Learning Resources, Inc. v. Trump, 146 S. Ct. 628, 642–43(2026) (holding that in the absence of congressional authorization or a national emergency, neither the Constitution nor the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701(a), give a president unilateral power to impose tariffs of varying amounts on a broad range of countries).

43. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776); *see, e.g.*, Rosa DeLauro, *The Trump Administration Plot to Destroy Public Education*, AM. PROSPECT (Jan. 13, 2026), https://prospect.org/2026/01/13/trump-mcmahon-department-education-dismantle-disabilities-act/ (viewing eliminating government agencies without congressional approval as a form of abdication).

44. THE DECLARATION OF INDEPENDENCE para. 34 (U.S. 1776); *See, e.g.*, Michael Klarman, *Who was Responsible for January 6th?*, HARV. ADVANCED LEGAL INITIATIVE: SOC. IMPACT REV. (Jan. 28, 2021), https://www.sir.advancedleadership.harvard.edu/articles/who-was-responsible-for-january-6th (discussing President Trump's stated purpose of disrupting voting of the Electoral College).

45. This essay is by no means the first to suggest a comparison between certain actions of President Trump and the grievances in the Declaration of Independence. *See, e.g.*, Richard B. Grose, *We Have Been Here Before: Reading the Declaration of Independence in 2025*, ROOM, https://analytic-room.com/essays/we-have-been-here-before-by-richard-b-grose/ (last visited Feb. 2, 2026) (tracking Declaration of Independence grievances with current executive actions); Steve Pincus, *Trump's Rejection of America's Founding Principles*, PROJECT SYNDICATE (July 4, 2025), https://www.project-syndicate.org/commentary/trump-rejects-declaration-of-independence-free-trade-immigration-internationalism-by-steve-pincus-2025-07; Ilya Somin, *Trump vs. the Declaration of Independence*, THE VOLOKH CONSPIRACY (July 4, 2025), https://reason.com/volokh/2025/07/04/trump-vs-the-declaration-of-independence/.

At a minimum, before we throw in the towel and lapse into theoretical and doctrinal doublespeak, let us be honest about what is taking place. In the last year, events at odds with a fair reading of the Constitution, statutes, and case law—central tenets of our legal system—were (and are) taking place, changing core aspects of governance, as if those actions are legal.[46] They are not. Even the characters in *Alice's Adventures in Wonderland*[47] or Orwell's *1984*[48] might have been troubled by governmental actions that are clearly at odds with existing legal standards taking place without Congress or the Supreme Court appearing to be particularly concerned.[49] Even stranger, the current polls tell us that a considerable segment of the population finds these actions not just inconsequential but welcome.[50] That a particular action is illegal does not seem to trouble a very substantial number of the public.

Could it be that there is acceptance of the premise that if there is what seems to be a good outcome, that is all that matters? If that is true—that unlawful means are justified if the ends profit the majority—it is fair to wonder why we work so hard to understand and implement our system of laws that have been the bedrock of our democracy for the last 250 years. After all, unless we have been in a collective trance for eons, the United

46. Marc A. Thiessen, *The 10 Worst Things Trump Did In 2025*, (Dec. 31, 2025), https://www.washingtonpost.com/opinions/2025/12/31/donald-trump-2025-worst-list-marc-thiessen/.
47. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (London, Macmillan & Co. 1865).
48. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Secker & Warburg 1949).
49. Schartz et al., *supra* note 11.
50. Nate Cohn, Ruth Igielnik & Irineo Cabreros, *President Trump's Approval Rating: Latest Polls*, N.Y. TIMES (Feb. 2, 2026), https://www.nytimes.com/interactive/polls/donald-trump-approval-rating-polls.html (displaying poll data reflecting that, at the time this article was started, roughly 41% of the public approved of President Trump's activities).

States is not Wonderland, and our democracy is not some Orwellian construct functioning in a world gone mad.

Illegality *will* matter should you get a traffic ticket for driving over the speed limit. That said, should it not matter when a president issues an executive order that commands an agency or other arm of government to engage in an action that is illegal? Can presidents toss off requirements of a statute or the independent nature of an agency by calling it "so-called," as in "so-called independent agency" or "so-called requirements of diversity and equity"?[51]

Perhaps the problem is that the point of view in this essay is off the mark, and what seems illegal or inconsistent with an accurate reading of our legal system is actually not condemned. Before going further, let us test the premise. What follows are questions to see if your understanding of illegality is the same as the understanding reflected in this essay: Is an action illegal if it transgresses clear mandates found in a statute in the United States Code? The Code of Federal Regulations? Standards articulated by the Supreme Court or lower courts? A promulgated substantive or legislative rule or ordinance? And does the failure to conform with the plain meaning of the Constitution constitute an illegal act? These are not trick questions—the stock in trade of too many law professors.

51. Exec. Order No. 14,215, 90 Fed. Reg. 10447 (Feb. 18, 2025).

The answer to each is yes. If you disagree, you probably will not enjoy what follows in this essay. At the risk of being unduly presumptuous, if you disagree, you should not consider a career as a judge, lawyer, or member of a congressional judiciary committee—and if you have a law degree, you might demand a refund from the law school that granted it.

More importantly, what is the consequence of ignoring or regularizing acts of undisputed illegality? What happens to a democracy if illegal acts are seen as standard operating procedure?[52] Is that a starting point for anarchy or an invitation to blindly accepting an authoritarian regime—or both? Just consider that, by definition, in anarchic regimes, property is never safely owned and liberty is an illusion.[53]

IV. THE PRESIDENCY AND THE QUESTION OF ILLEGAL COMMANDS

Are presidential actions by definition *legal* because they were undertaken by a president? Assuming we agree on some general parameters of illegality, are there exceptions to illegality that surface because they are embraced by a president? Half a century ago, President Richard M. Nixon declared that he had the power to cleanse illegality—and explained his theory in a jaw-dropping moment during his infamous

52. Steven Levitsky & Lucan A. Way, *The Path to American Authoritarianism: What Comes After Democratic Breakdown*, FOREIGN AFFAIRS (Feb. 11, 2025), https://www.foreignaffairs.com/united-states/path-american-authoritarianism-trump ("U.S. democracy will likely break down during the second Trump administration, in the sense that it will cease to meet standard criteria for a liberal democracy: full adult suffrage, free and fair elections, and broad protection of civil liberties.").

53. *See generally* Uri Gordon, ANARCHY ALIVE!: ANTI-AUTHORITARIAN POLITICS FROM PRACTICE TO THEORY (Pluto Press 2007) (Gordon's seminal work, a far-reaching text exloring the social, political, and economic foundations of anarchism describing, inter alia, a future where notions of ownership and due process are subordinated in an ultra-libertarian disorder bording on nihilism).

1977 interview with David Frost.[54] Asked if the acts in which he engaged as part of the Watergate cover-up were unlawful, he responded: "When the president does it, that means it's not illegal."[55] That claim ignored the Supreme Court's unequivocal rejection of that theory three years earlier.[56]

Nearly half a century later, however, the topic resurfaced, this time cast in terms of a president's personal accountability.[57] Starting in 2019, the Supreme Court set out to explain the depth and range of presidential immunity. In *Trump v. Mazars*,[58] the Court decided that a president was not necessarily obligated to respond to a subpoena issued by a congressional committee as opposed to one issued by a court.[59] In 2020, the Court held in *Trump v. Vance*[60] that when it comes to the basic obligations of all persons to respect and comply with lawful subpoenas issued in a criminal case, a president is neither immune nor excused from participating in an ongoing enforcement action.[61] Both cases make no reference to the magical power to which President Nixon alluded, i.e., that somehow, because the president declares a practice lawful, it is.

54. *Transcript of David Frost's Interview with Richard Nixon*, TEACHING AM. HIST., https://teachingamericanhistory.org/document/transcript-of-david-frosts-interview-with-richard-nixon/ (last visitied May 5, 2026) (interview conducted in 1977).
55. *Id.*
56. *See* United States v. Nixon, 418 U.S. 683, 703–07 (1974) (holding that although a president must be granted the right to protect confidential information that could affect national security or public welfare, broadly defined, a president does not have absolute immunity).
57. Saikrishna Bangalore Prakash, *The Fearless Executive, Crime, and the Separation of Powers,* 111 VA. L. REV. 1, 23 (2025).
58. 591 U.S. 848 (2020).
59. *Id.* at 869–71.
60. 591 U.S. 786 (2020).
61. *Id.* at 791.

A sign that Nixon might not have been entirely off the mark surfaced in 2024 when the Court held in *Trump v. United States*[62] that a president had "absolute immunity" for "core constitutional powers" and "presumptive immunity" for other undefined presidential actions.[63] In simple terms, a president cannot be found liable or culpable for certain acts, including those that are undisputedly illegal. However, let us be clear that this does not mean those actions are suddenly legal. They are, and will continue to be, recognized transgressions of legal standards—illegal acts—for which the president gets a free pass. In her dissent in *Trump*, Justice Sotomayor lamented that "[t]he Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. Ironic, isn't it? The man in charge of enforcing laws can now just break them."[64]

In effect, the Court's decision means that a president can engage in illegal conduct without legal sanctions, with the exception of the possibility of impeachment. That qualifier is important because the action is still criminal—or perhaps a high crime or misdemeanor—[65] but the sole remedy for that malfeasance is impeachment by the House of Representatives followed by a trial in the Senate, not in the courts.

62. 603 U.S. 593 (2024).
63. *Id.* at 642.
64. *Id*. at 684 (Sotomayor, J., dissenting).
65. U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

The distinction between immunity and illegality is not subtle. Immunity can free a president (or any person with immunity, such as a diplomat)[66] from an enforcement action in a criminal case. That does not change the fact that the alleged misconduct is illegal. It does not create an exception or defense in the same way that a presidential pardon absolves a person from being sanctioned for a particular crime. Pardoning a person for a crime does not render lawful the activity in which they engaged. It eliminates accountability for the pardoned—and that is all. Thus, those who carry out a president's directive to perform an illegal act can be liable for the commission of a crime unless pardoned.

Article II sets out, in rather imprecise terms, the duties, obligations, and powers of the President. By oath, the President must "preserve, protect and defend the Constitution,"[67] "appoint [principal officers and] Judges of the Supreme Court,"[68] and "take Care that the Laws be faithfully executed."[69] It would appear that this oath resolves the matter; a president who is supposed to faithfully execute the laws, one would think, would also be required to comply with the laws that the president is charged to enforce. After *Trump v. United States*, that premise is on life support.[70]

66. *See generally* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 (establishing the framework for diplomatic interaction, immunity, and privileges between independent nations). For a more complete discussion of the details of diplomatic immunity, see U.S. DEP'T. OF STATE, OFFICE OF FOREIGN MISSIONS, DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES (2019), https://www.state.gov/wp-content/uploads/2019/09/19-04499-DipConImm_v2_web.pdf.

67. U.S. CONST. art. II, § 1.

68. U.S. CONST. art. II, § 2 (requiring the Senate's advice and consent).

69. U.S. CONST. art. II, § 3.

70. 603 U.S. 593, 642 (2024) (holding that presidential immunity applies to many unlawful acts for which a president cannot be prosecuted and which, if engaged in by others, could result in their conviction and punishment).

IV. EXAMPLES OF SEEMINGLY ILLEGAL ACTS

Given the constitutional imperatives set out above, the next step is to look at several recent presidential acts and pose the simple question of whether the act, initiated by a president, is illegal (without asking whether a president is personally liable for the action).

A. *Can a president direct an attack on a foreign sovereign nation with weapons of war without congressional action?*

Since the Constitution vests in Congress the power to declare war, the answer is no.[71] The president has "no power to 'initiate or declare a war' unilaterally"—"[t]he power to declare war obviously lies with Congress."[72] This assessment of presidential power is separate from the more complex problem of the use of the Alien Enemies Act of 1798,[73] which gives the president power to take military action in the event of invasion or insurrection. The Act accords the president latitude in determining, without congressional action, that an invasion or insurrection has occurred. It is difficult to see an attack on a foreign sovereign, e.g., Venezuela and Iran,[74] as anything but an act of war unless those countries

71. *See* U.S. CONST. art. I, § 8, cl. 11.
72. *See* W.M.M. v. Trump, 154 F.4th 207, 258 (5th Cir. 2025) (Oldham, J., dissenting), *reh'g en banc granted, opinion vacated*, 154 F.4th 319 (5th Cir. 2025) (quoting The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862)).
73. ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24).
74. *See* CTR. FOR PREVENTIVE ACTION, *U.S. Confrontation With Venezuela*, COUNCIL ON FOREIGN REL.: GLOB. CONFLICT TRACKER (Feb. 4, 2026), https://www.cfr.org/global-conflict-tracker/conflict/instability-venezuela; Kelsey Davenport, *Israel and U.S. Strike Iran's Nuclear Program,* ARMS CONTROL ASS'N: ARMS CONTROL TODAY, (July/Aug. 2025), https://www.armscontrol.org/act/2025-07/news/israel-and-us-strike-irans-nuclear-program; Following the congressionally unauthorized military action in Venezuela, another military action was initiated in March of 2026, with the bombing of various targets in Iran, again without congressional authorization. Katherine Yon Ebright, *Trump's Iran Strikes are Unconstitutional,* BRENNAN CTR. FOR JUST. (Mar. 2, 2026), https://www.brennancenter.org/our-work/analysis-opinion/trumps-iran-strikes-are-unconstitutional.

have mounted an attack on the United States, but reasonable minds can and do differ on this.[75]

B. Can a president direct or authorize the arrest and detention of people without a warrant when those arrests and detentions are seemingly based on race, nationality, or unsubstantiated suspicion solely on the premise that these persons are not citizens and thus not entitled to constitutional protection?

Again, the answer is no.[76] Even so, such arrests have been documented in 2025, without any semblance of due process, involving the following individuals:

> U.S. citizens, Minors, Green card holders and others with legal status (like Temporary Protected Status), DACA recipients, Journalists, Veterans and their immigrant family members (including U.S. citizen veterans), People whose cases have been terminated by a judge, People with disabilities — for whom ICE then denies basic accommodations, Medically vulnerable individuals, including those with brain tumors and cancer, Pregnant people and nursing mothers, Grandmothers while gardening, People with U.S. citizen children, triggering a child mental health crisis in the U.S., Long-time residents, High school students going to volleyball practice, walking the dog, reporting to their immigration court hearings, and one just weeks from graduation.[77]

The notion that the public is protected from lawless detention or harm caused by the federal government seems obvious at first blush, but it is fair to question just how obvious it is given the events referenced above.[78] Lest there be any question about this, the Court answered this question in 1892 and has not deviated from that finding, holding that it applies to all lawless

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75. Mariel Ferragamo, U*.S., Israel Attack Iranian Nuclear Targets—Assessing the Damage,* COUNCIL ON FOREIGN REL. (June 25, 2025), https://www.cfr.org/article/us-israel-attack-iranian-nuclear-targets-assessing-damage.

76. To be clear, the Fifth Amendment guarantee of due process pertains to all persons, not just to citizens. U.S. CONST. amend. V, cl. 4. As Justice Scalia made clear, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 306 (1993) (citing The Japanese Immigrant Case, 189 U.S. 86, 100–01 (1903)).

77. Altman, *supra* note 40.

78. Cheryl W. Thompson, *Man Shot Dead by Federal Immigration Officers in Minneapolis*, NPR (Jan. 24, 2026), https://www.npr.org/2026/01/24/nx-s1-5687276/man-shot-dead-minneapolis.

acts whether undertaken by the various states or the federal government: "The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice."[79]

Rather than dissecting each of these actions and trying to figure out which are legal arrests and which are not, suffice it to say that arresting citizens and others lawfully present without a warrant or probable cause can constitute an unconstitutional and thus illegal act unless the arresting officer has probable cause to believe that a crime has been or is about to be committed.[80]

C. Can a president abolish or neutralize a congressionally created regulatory agency without judicial or legislative action?

One would think a government agency created by Congress cannot be abolished without congressional action. Thus, the simple answer to this question is no; "the President must make political and value judgments about how to enforce the law, but the President must not act ultra vires or act as a lawmaker by suspending validly enacted laws."[81]

While a president has the responsibility to "take Care that the Laws be faithfully executed,"[82] the Constitution grants Congress, not the

79. Logan v. United States, 144 U.S. 263, 295 (1892). For a scathing order condemning the current lawlessness and mandating the release of a detained 5-year-old, *see* Arias v. Noem, No. SA-26-CV-415-FB, 2026 WL 255706, at *1 (W.D. Tex. Jan. 31, 2026) ("Observing human behavior confirms that for some among us, the perfidious lust for unbridled power and the imposition of cruelty in its quest know no bounds and are bereft of human decency. And the rule of law be damned.").
80. Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (finding that while the Fourth Amendment generally requires a warrant before an arrest is made, in the presence of overt signs of criminality—that a crime has been or is about to be committed—a law enforcement officer can "stop and frisk" a person without a warrant prior to an arrest).
81. Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. 1325, 1335 (2021)
82. U.S. CONST. art. II, § 3.

president, the power to do what is necessary to serve and protect the "general Welfare"[83] of the country and to undertake those steps "necessary and proper" to protect those interests.[84] That grant of authority forms the foundation for the creation and dissolution of federal agencies. Notably, Article II of the Constitution does not give a president a similar power.

The temptation to allow political force to guide agency action is understandable. A president who campaigns on a deregulatory agenda might be inclined to fire relevant actors in an independent agency or, by executive order, declare the agency defunct. However, at least for now,[85] those actions are illegal. "[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . . [W]e hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences."[86]

D. As a corollary to the above, can a president create an agency of government without congressional action?

83. U.S. CONST. art. I, § 8; *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 574, 596 (1984) (noting that each branch of government has specified responsibilities, "Congress may legislate, …Supreme [Court] may adjudicate, and only the President may see to the faithful execution of the laws" but each branch requires federal agencies to implement those tasks); s*ee also* Ilan Wurman, *The Necessary and Proper Clause and the Law of Administration*, 93 GEO. WASH. L. REV 1196, 1200 (2025) (labeling the Necessary and Proper Clause as the source of Congress's power to structure administration).
84. U.S. CONST. art. I, § 8.
85. *See* Slaughter v. Trump, 791 F. Supp. 3d 1, 14 (D.D.C.), *cert. granted before judgment*, 146 S. Ct. 18 (2025) (concluding that despite the Supreme Court's emergency stay in *Trump v. Wilcox*, *Humphrey's Executor* remains binding precedent).
86. Lincoln v. Vigil, 508 U.S. 182, 193 (1993).

The President has done so at least twice in 2025, first with the ill-fated Department of Government Efficiency (DOGE),[87] and then with the newly formed Board of Peace. The Executive Order creating the Board of Peace[88] references Section 1 of the International Organizations Immunities Act,[89] which requires that U.S. involvement in an international organization can be done only "pursuant to any treaty or under the authority of any Act of Congress . . . ." Congress has not authorized the Board of Peace, at least as of the time of this writing.[90]

The short-lived DOGE directed the firing of thousands of public servants, accessed mountains of personal information in violation of basic privacy laws, and, for roughly six months, between January and June 2025, functioned as a governmental agency with extraordinary power, all without the congressional authorization required to create an agency of that nature.[91] Without going into details, suffice it to say, DOGE is on the wane and slowly vanishing.[92] It was not legally constituted, and yet it acted with force and with consequence to thousands of federal workers. From this, one might ask, "Did it matter that DOGE was illegally constituted?"

87. Exec. Order No. 14158, 90 Fed. Reg. 8441 (Jan. 29, 2025) (creating DOGE).
88. Exec. Order No. 14375, 91 Fed. Reg. 2837 (Jan. 22, 2026).
89. International Organizations, Pub. L. No. 79-291, § 1, 59 Stat. 669, 669 (1945) (codified at 22 U.S.C. § 288).
90. *See* 22 U.S.C. § 288; Michael Mattler, *Expert Q&A on the Charter of the Board of Peace and the Role of Congress*, JUST SECURITY (Jan. 23, 2026), https://www.justsecurity.org/129489/qa-charter-board-of-peace/.
91. Courtney Rozen, *Exclusive: DOGE 'Doesn't Exist' with Eight Months Left on its Charter*, REUTERS (Nov. 24, 2025), https://www.reuters.com/world/us/doge-doesnt-exist-with-eight-months-left-its-charter-2025-11-23/ (noting that DOGE, despite the lack of legal formation, ordered the firing of thousands of federal worker, and while it claimed it saved billions of dollars in federal spending, it has not produced any credible report to substantiate that claim – a task that would be essential to any real agency of government).
92. *Id.*

At the time this essay was written, the answer to that appears to be no—but shouldn't it matter? We condemn actions by agencies and organizations that are ultra vires; why give the executive branch a free pass for acts that are ultra vires?[93]

E. Can a president misdirect or refuse to use funds as directed by Congress?

Probably not. Under Section 1013 of the Impoundment Control Act of 1974,[94] the president must indicate the intention to defer a congressional appropriation by sending a "special message" to Congress.[95] In that message, the president is required to justify the deferral and specify its amount, intended length, and probable fiscal consequences. Under the Act, if either House of Congress passes an "impoundment resolution" disapproving the "proposed" deferral, the president is required to make the funds available for that defined obligation.[96]

In *Hooe v. United States*,[97] decided in 1910, the Court was asked to assess whether an executive agency, the Department of the Interior, could change or modify a decision of Congress regarding rental values.[98] The

93. Vincent Nolette, Olivia Guarna & Daniel J. Metzger, *Examining the Remarkable Rise of Ultra Vires Claims Against the Executive Branch*, COLUM. L. SABIN CTR. FOR CLIMATE CHANGE L. BLOG (July 1, 2025), https://blogs.law.columbia.edu/climatechange/2025/07/01/examining-the-remarkable-rise-of-ultra-vires-claims-against-the-executive-branch/ (tracing the history and caselaw to demonstrate that ultra vires acts by the executive are indeed unlawful and attributing the dramatic increase in cases accusing the President of exceeding his constitutional authority to a host of factors, including an attempted expansion of executive power or a change to plaintiffs' litigation strategies).
94. Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332–39 (codified as amended at 2 U.S.C. §§ 681–88).
95. 2 U.S.C. § 684(a).
96. New Haven v. United States, 809 F.2d 900, (D.C. Cir. 1987).
97. 218 U.S. 322 (1910).
98. The dispute between the Secretary of the Interior and a landowner first emerged in 1908 in the United States Court of Claims regarding the nature of "full compensation" for the rent of a building. *See* Hooe v. U.S., 43 Ct. Cl. 245, 254 (1908). Rather than an assessment of fair rental values, the case involved a more basic issue: Did the Secretary have the power to act in a manner inconsistent with existing congressional mandates?

Court made clear that the spending power is delegated expressly to Congress, not the executive, and relied on the underlying Court of Claims decision, which stated the following:

> Under the Constitution, Congress holds the purse strings of the Government, and we do not think that by evasion or indirection any officer of the Government can deprive that body of this important privilege. Mr. Justice Story, in his *Commentaries on the Constitution*, in discussing this privilege of Congress, said: "The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation."[99]

More recently, this concept was reinforced by Justice Kavanaugh when he was a judge on the D.C. Circuit Court of Appeals:

> Our analysis begins with settled, bedrock principles of constitutional law. 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 . . . . 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.[100]

Justice Kavanaugh goes on to make sure political impulses do not stand in the way of congressional intention: "To reiterate, the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress."[101]

Another indication that courts can get involved when agency inaction stands in the way of implementing a statutory imperative comes from the *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense*

99. *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (Cambridge 1833)); *see* Hooe v. U.S., 218 U.S. 322, 335–36 (1910).
100. In re Aiken County, 725 F.3d 255, 259 (D.C. Cir. 2013).
101. *Id.* at 260.

Council, Inc.,[102] where the Court set out circumstances in which seemingly unreviewable matters could be reviewed. Review of inaction would be allowed in cases where the allegations include "constitutional constraints or extremely compelling circumstances . . . ."[103] The Court held that review might be barred—and the decision of the agency committed to agency discretion—but only if there is "nothing in the APA, [the relevant statute], the circumstances of [the] case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permit[ing]" review.[104] These exceptions are expansive and make clear that courts *can* play a role in reviewing agency inaction that is allegedly in contravention of a statute[105] or the Constitution. This was reiterated in *Lincoln v. Vigil*, as discussed in subsection (d) above,[106] and made crystal clear in *Loper-Bright v. Raimondo*[107] discussed later in this essay.

F. Can a president fire a government official in an independent agency who, by statute, cannot be fired without just cause?

While the Supreme Court is pondering this question at present, the answer as of the preparation of this essay is no. *Humphrey's Executor v. United States*[108] makes clear that while the president can remove a

102. 435 U.S. 519 (1978).
103. *Id.* at 543.
104. *Id.* at 548.
105. 18 U.S.C. § 201(b)(1)(A)–(C). Subsections (A) through (C) deal with bribery and other forms of misconduct. *Id.* Specifically, subsection (C) defines as illegal actions that are designed "to induce [a] public official or person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person . . . ." *Id.* § 201(b)(1)(C).
106. *Infra* note 86 and accompanying text.
107. 144 S. Ct. 2244 (2024) (overruling the *Chevron* doctrine that required reviewing courts to defer to permissible agency action, allowing reviewing courts to substitute their judgement on the best or most reasonable interpretation of the statute the agency is implementing).
108. 295 U.S. 602 (1935).

principal officer in an executive agency without cause, that power does not exist in an agency Congress created to be independent.[109]

Humphrey's Executor involved an effort by the White House to steer the Federal Trade Commission (FTC) in a direction consistent with President Roosevelt's New Deal program. Discontent with the decisions made by Commissioner Humphrey, FDR sent him a letter with this rather clear message: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the [FTC],"[110] making clear that a policy disagreement was his grounds for firing the Commissioner. Humphrey passed away while fighting his removal, but his executor took up his claim that, as a commissioner at an independent federal agency, he could only be fired for cause and a policy disagreement was not cause.

The key to the case, and for the next 90 years, was in the nature of the FTC:

> The commission is to be *nonpartisan*; and it must, from the very nature of its duties, act with entire *impartiality*. It is charged with the enforcement of no policy except the policy of the law. Its duties are *neither political nor executive*, but predominantly quasi-judicial and quasi-legislative. . . . [I]ts members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.[111]

The goal, the Court made clear, was to ensure that commissioners could act based on legal standards, carefully screened data and information, and

109. *Id.* at 619.
110. *Id.*
111. *Id.* at 624 (emphasis added) (citation modified).

expertise, instead of political considerations. Referencing the legislative history, the Court found that the FTC

> was not to be subject to anybody in the government, but only to the people of the United States; free from political domination or control or the probability or possibility of such a thing; to be separate and apart from any existing department of the government—*not subject to the orders of the President.*[112]

While earlier cases had equivocated on the nature of independent agencies,[113] *Humphrey's Executor* settled the matter. The FTC, like most regulatory commissions, was and is (at the moment) an independent agency, meaning that removing a commissioner without cause—often defined with terms such as inefficiency, neglect of duty, malfeasance, incompetence, or misconduct—would be unlawful.

Not long after taking office, President Trump began using the term "so-called independent agency" followed by attempts to fire commissioners at various independent agencies, including the FTC, the Federal Reserve, and the Consumer Product Safety Commission.[114] *Trump v. Slaughter*,[115] likely to be decided at the conclusion of the Supreme Court's spring 2026 term, may be the case that tests the premise that it is essential to have select independent agencies with decision makers who cannot be fired without cause.[116] However, until that is decided, the firings

112. *Id.* at 625 (emphasis added) (citation modified).
113. Myers v. U.S., 272 U.S. 52 (1926).
114. *See* Harvey L. Reiter, *The Likely Weakened Role of "Independent Agencies" in a Post-Humphrey's Executor World*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 17, 2026), https://www.yalejreg.com/nc/the-likely-weakened-role-of-independent-agencies-in-a-post-humphreys-executor-world-by-harvey-l-reiter/.
115. 146 S. Ct. 18 (2025) (granting certiorari before judgment).
116. Ann Marimow, *Highlights of the Supreme Court Argument on Firing Independent Agency Heads*, N.Y. TIMES (Dec. 8, 2025), https://www.nytimes.com/live/2025/12/08/us/trump-supreme-

of commissioners in 2025 are at odds with well-established precedent—and that would seem to make them unlawful.

How principal officers—and for that matter, inferior officers—are fired is not, at present, up to the president. "[A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress."[117] The wisdom of this perspective predates *Humphrey's Executor* and was recognized before the turn of the twentieth century, at the birth of the modern regulatory state, as a necessary means to avoid time-consuming controversies, political harassment, and worse.[118]

V. DEFENDING ILLEGALITY BY LEGERDEMAIN AND STRAINED RECONCEPTUALIZATION

In a democracy, an unlawful action is not justified solely because it achieves some legitimate purpose; process matters.[119] Ideally, good process should produce the best ends.[120] Illegal actions should not be

court-presidential-power#supreme-court-trump-presidential-power; Amy Howe, *Court Seems Likely to Side with Trump on President's Power to Fire FTC Commissioner*, SCOTUSBLOG (Dec. 8, 2025), https://www.scotusblog.com/2025/12/court-seems-likely-to-side-with-trump-on-presidents-power-to-fire-ftc-commissioner/.

117. Ex parte Siebold, 100 U.S. 371, 397–99 (1879); *see also* Morrison v. Olson, 487 U.S. 654, 674 (1988).

118. *Supra* note 117.

119. The notion that the ends justify the means surfaced first and thereafter achieved notoriety in Niccolò Machiavelli's *The Prince*:

> [I]n the actions of all men, and especially of princes, which it is not prudent to challenge, one judges by the result. For that reason, let a prince have the credit of conquering and holding his state, the means will always be considered honest, and he will be praised by everybody; because the vulgar are always taken by what a thing seems to be and by what comes of it; and in the world there are only the vulgar, for the few find a place there only when the many have no ground to rest on . . . . NICCOLÒ MACHIAVELLI, THE PRINCE, Ch. 18 (G&D Media 2019) (1513).

120. Just what are the best ends, what is in the public interest, is in many ways in the eye of the beholder. *See* Jodi L. Short, *In Search of the Public Interest,* 40 YALE J. ON REGUL. 759, 759, 762 (2023) ("[T]he public interest standard provides a vessel for agencies to infuse policymaking with the moral and ethical commitments of the community . . . [and that] opens the door to the arbitrary exercise

excused simply because they achieve a campaign promise.[121] And yet, the aforementioned transgressions of existing rules of law have occurred—and neither Congress nor the courts seem inclined to stop them.[122]

Although clever labels have been used to justify the type of actions described above, the labels are a cover for action to achieve an end when the means—the process, precedent, and plain meaning of statutes, or the clear meaning of Article II of the Constitution—produce a result that is at odds with the goals of the White House.

Two examples of labels used to justify actions that are at odds with precedent are the unitary executive theory and the major questions doctrine (MQD). The former is employed to justify presidential actions that go far beyond anything contemplated in Article II,[123] and the latter is

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of tyrannical state power. . . . Legal scholars have decried the public interest standard as 'vacuous,' 'empty,' and 'so vague that it can mean whatever [regulators] say it means on any given day.'" (footnotes omitted)).

121. Sarah Krieger, *The Price of Cruelty: How Trump's Mass Deportation Agenda Endangers Us All*, NAT'L IMMIGR. L. CENTER (Oct. 3, 2025), https://www.nilc.org/articles/the-price-of-cruelty-how-trumps-mass-deportation-agenda-endangers-us-all/ (explaining that mass deportation, driven by a campaign promise, "is being carried out through indiscriminate and often violent raids . . . resulting [in] family separations and disappearances of community members to inhumane prisons here and abroad," and that "[t]he only coherent policy goal . . . when it comes to immigration is its relentless pursuit of cruelty").

122. *See infra* Part VI (a)–(e).

123. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,* 122 HARV. L. REV. 2070, 2077 (2009) (arguing that this is little more than a way to force action "in strict accordance with the President's priorities"); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 516 (2018) ("'Presidential administration' is morphing into autocracy."). As noted earlier in this essay, the American Revolution was the result of many forces, but at its core, the war was ignited by outrage over the various edicts (regarding tariffs or taxation and governance in the colonies) issued by George III, King of England, a national leader possessed of the nearly absolute power implicit in the term "unitary executive." *Supra* notes 26–30 and accompanying text. By divine right or otherwise, the unitary power of the monarchy was absolute. However, not long after losing the whole of the United States as a consequence of the American Revolution, Parliament trimmed the power of the king considerably, deciding that unitary executive power presented too grave a risk of bad governance. Archibald S. Foord, *The Waning of "The Influence of the Crown"*, 62 ENG. HIST. REV. 484, 486–88, 498–500 (1947).

used to account for the Court's deviation from precedent and conventional legal authority when its majority is set on an outcome that runs contrary to the common meaning of a statute.[124] When that happens, when precedent stands in the way, the Court has arrogated to itself the power to impose a new meaning or interpretation of what Congress meant when the statute or principle in question was first promulgated.[125] These labels silently embrace the notion that the ends do justify the means, regardless of conformity with the rule of law,[126] regardless of individual and civil rights, and regardless of precedent and statutory authority. They seek to make legal the illegal. Though one would like to think the Court is committed to the very foundation of the separation of powers, which would suggest the Court is not a legislative body, the MQD does not reflect a commitment to anything close to that foundation.

> [With] all the talk about the people's will, the major questions doctrine [MQD] is ultimately about vesting the power to make policy in the least diverse, least responsive branch of the federal government—a branch which conservatives have dedicated years and resources to reshaping. The Court has a choice to make. It can continue down this path, as it has done in the past until its actions are so out of touch with the will of the people that it calls its own legitimacy into question. The negative impact of these kinds of decisions on the Court's standing with the public are already evident. Alternatively, it can allow the political controversies of the day to be addressed through the people's elected representatives …providing restrained input when actions stray outside constitutional bounds.[127]

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124. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1065–69 (2023) (suggesting the doctrine is little more than the Court arrogating to itself unlimited discretion when it comes to statutory interpretation).

125. Eric J. Spitler, *The Supreme Court's Major Questions Doctrine: Implications for Responding to Financial Crises*, 27 N.C. BANKING INSTIT. 1, 58–62 (2023) (arguing that the MQD is at odds with the plain meaning of separation of powers).

126. Blaine Fix, *So, What Actually Is the Rule of Law?*, CORN. J. L. & PUB. POL'Y (Apr. 26, 2021), https://publications.lawschool.cornell.edu/jlpp/2021/04/26/so-what-actually-is-the-rule-of-law/ (discussing, in a succinct and well documented help paper by a Cornell law student, the origin of the phrase "rule of law" and its antecedents).

127. Spitler, supra note 121, at 61 (footnotes omitted).

Although the concentrated power premise at the heart of the unitary executive theory may simplify questions regarding presidential power, that approach turns checks and balances on its head and is at odds with a plain reading of presidential power and responsibility set out in Article II of the Constitution.[128] The job of a president is to take care that the laws are faithfully executed, not to make law, create agencies, change clear meanings of judicial decisions, and more. The Constitution grants no such thing. It makes clear that "all legislative Powers herein granted shall be vested in a Congress of the United States" and in matters of law, all powers are "vested in one Supreme Court."[129] That Congress and the Court would bow to executive power and give the president the same power as King George III is a patent abdication of explicit constitutional text. If this path continues, a path strewn with illegal interpretations of the Constitution, democracy—a government of the people—becomes an illegitimate label. A more proper label for a government with a unitary executive is "monarchy"[130] or "autocracy."[131]

The notion that the Constitution contemplated an executive with overriding power, including the power to act in a manner clearly

128. Peter Shane, *The Unbearable Lightness of the Unitary Executive Theory*, REGUL. REV. (Mar. 3, 2025), https://www.theregreview.org/2025/03/03/shane-the-unbearable-lightness-of-the-unitary-executive-theory/;
Christine Kexel Chabot, *Rejecting the Unitary Executive* 2025 UTAH L. REV 1001, 1010 (2025);
Alan Schoenberger, *The Unitary Executive Theory Is Plainly Wrong and Anti-American: Presidents Are Not Kings*, 85 ALB. L. REV. 838, 856 (2022).
129. U.S. CONST. art. I, § 1; art. III, § 1.
130. *The Monarchy*, THE CONST. SOC'Y, https://consoc.org.uk/the-constitution-explained/the-monarchy/ (last visited Feb. 4, 2026).
131 Robyn Elrick, *What is Autocracy: Definition, Examples, How to Defeat It,* LIBERTIES (Aug. 27, 2024), https://www.liberties.eu/en/stories/autocracy/45141 ("An autocracy is a system of government based on the whims of a single ruler or group with absolute power.").

inconsistent with congressional decisions[132] is, in the opinion of many, incorrect. In the words of Professor Cass Sunstein: "[T]he framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper."[133]

A president's job is to "faithfully execute" the laws, not flout them. Executing the law does not include taking steps to make enforcement of the various civil rights statutes unlikely given the personnel actions at the Civil Rights Division.[134] It does not include abolishing the Agency for International Development[135] and sections of the Department of Education[136] (both congressionally created agencies) without the necessary congressional action. And it does not include endorsing the practice of arresting and detaining people without warrants or probable

132 *See* Deacon & Litman, *supra* note 124 (portraying the major questions doctrine as a shortcut to ignoring precedent by allowing political activity outside of the legislative process affect the outcome of cases).

133. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV., 1, 2 (1994).

134. *See Justice Connection on the Dismantling of DOJ's Civil Rights Division,* JUST. CONNECTION, https://www.thejusticeconnection.org/press-dismantling-doj-civil-rights-division/ (last visited Feb. 4, 2026) (describing steps taken that appear to dismantle in meaningful part the Civil Rights Division at DOJ); Ryan Lucas, *70% of the DOJ's Civil Rights Division Lawyers are Leaving Because of Trump's Reshaping*, N.P.R. (May 19, 2025), https://www.npr.org/2025/05/19/g-s1-66906/trump-civil-rights-justice-exodus; Sam Levine, *Over 200 Ex-Staffers Decry Destruction of DOJ Civil Rights Arm: 'America deserves better'*, THE GUARDIAN (Dec. 9, 2025), https://www.theguardian.com/us-news/2025/dec/09/justice-department-civil-rights-division-decry-trump.

135. *See* Press Release, Gregory W. Meeks, Ranking Member of the House Foreign Affs. Comm., Statement on Trump Administration's Unconstitutional Abolishing of USAID (Mar. 28, 2025), https://democrats-foreignaffairs.house.gov/2025/3/meeks-statement-on-trump-administration-s-unconstitutional-abolishing-of-usaid; Fatma Tanis & Lila Fadel, *USAID Officially Shuts Down and Merges Remaining Operations with State Department*, NPR (July 1, 2025), https://www.npr.org/2025/07/01/nx-s1-5451372/usaid-officially-shuts-down-and-merges-remaining-operations-with-state-department.

136. Rosa DeLauro, *The Trump Administration Plot to Destroy Public Education*, THE AM. PROSPECT (Jan. 13, 2026), https://prospect.org/2026/01/13/trump-mcmahon-department-education-dismantle-disabilities-act/; Juan Perez Jr. *Trump Administration Launches Plan to Dismantle Education Department*, POLITICO (Nov. 18, 2025), https://www.politico.com/news/2025/11/18/trump-administration-sets-out-massive-education-department-restructuring-plan-00656464.

cause based solely on nationality or race.[137] Instead, Article II and the oath of office are more properly characterized as a primary obligation and a restraint to "preserve, protect and defend the Constitution of the United States….[,] take Care that the Laws be faithfully executed…[,]"[138] and provide clear definitions and limits. The drafters at the Constitutional Convention could have slipped in a phrase like "any and other acts deemed in the best interest of the People, the Republic, or the country," but they did not do so. Article II acts as a limit on authority and cannot be read as an open invitation for the president to do whatever they want to do. Notwithstanding those constraints, the President recently presented a different view of presidential power, stating that "the only constraint to his power as president of the US is 'my own morality, my own mind … It's the only thing that can stop me….'"[139] Respectfully, that notion of presidential power goes beyond any coherent interpretation of the Constitution.

The nearly limitless power inherent in the unitary executive model is a dangerous misinterpretation at best.[140] The American Revolution was a war against unlimited unitary executive power in the British monarchy.[141]

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137. Altman, *supra* note 40.
138. *Id.*
139. May Yang, '*I Don't Need International Law': Trump Says Power Constrained Only By 'My Own Morality',* N.Y. TIMES (Jan. 8, 2026), https://www.theguardian.com/us-news/2026/jan/08/trump-power-international-law.
140. Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future,* SUP. CT. REV. 2020 83, 83–84 (2021), (detailing the use of the unitary executive theory in Supreme Court cases).
141. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The …unlimited executive power that … most impressed the forefathers was the prerogative exercised by George III [made clear by] the description of its evils in the Declaration of Independence….").

Nothing in the oft-quoted Federalist Papers[142] supports such an interpretation, and yet the Court (claiming it is engaged in strict construction of the Constitution) has decided that Article II includes immunity for almost anything a president does while in office.[143]

The grant of sweeping immunity for any official acts in office readily translates into "the king can do no wrong," which is the opposite of the goals of the founders of the United States and the drafters of the Constitution.[144] After all, "the Constitution was [written] to control and limit the powers of the presidency, not provide nearly limitless authority"[145] nor make legal the arbitrary exercise of governmental power.[146]

Powers unassigned in the Constitution do not drift over to Article II but rather to the several states via the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[147] It is the states, not the federal government, that are to govern in all areas except those specifically enumerated in the Constitution.

VI. THE ALLURE OF THE OUTLAW

142. THE FEDERALIST PAPERS (Alexander Hamilton, James Madison & John Jay).
143. Langford v. United States, 101 U.S. 341, 343 (1879) (the British construct that the king can do no wrong has no place in our history –"We do not understand that…English maxim has an existence in this country.").
144. Ombres, *supra* note 10.
145. The idea that the Federalist Papers support the notion of unitary executive power and therefore immunity from doing wrong is hard to understand since they seem to say the exact opposite. *See* THE FEDERALIST NO. 69, at 230 (Alexander Hamilton) (offering a "[c]omparison [b]etween the President and the King of Great Britain on the [o]ne [h]and, and the Governor of New York on the [o]ther").
146 *See* Steven D. Schwinn, *How the Constitution Constrains Presidential Overreach Against the States*, STATE COURT REP. (June 9, 2025), https://statecourtreport.org/our-work/analysis-opinion/how-constitution-constrains-presidential-overreach-against-states.
147. U.S. CONST. amend. X.

How different presidents understand the responsibilities and limits of their power is often unclear without some kind of indication of how a president views that power. For example, in a campaign appearance at the Sioux Center in Iowa on January 23, 2016, President Trump said: "I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn't lose any voters."[148] This comment invites an image of the President as above the law, the political beneficiary of clearly illegal conduct—or even an admired outlaw.[149] This image has not dissuaded members of the House or Senate, or apparently a large number of voters, from supporting the executive's actions that obviously do not conform to law and precedent.[150] Apparently, the refusal or failure to "faithfully … execute the laws" may be seen as a positive factor with congressional representatives and many members of the public.[151]

In the nineteenth century, the common term for those who act with impunity—not bound by legal standards—was "outlaw," some of whom achieved considerable notoriety.[152] Presumably, they were admired by

148. Colin Dwyer, *Donald Trump: 'I Could . . . Shoot Somebody, And I Wouldn't Lose Any Voters'*, NPR (Jan. 23, 2016 5:00 PM ET), https://www.npr.org/sections/thetwo-way/2016/01/23/464129029/donald-trump-i-could-shoot-somebody-and-i-wouldnt-lose-any-voters.

149. Aaron Blake, *Many Republicans Are okay with Trump ignoring the law to target enemies*, WASH. POST (Dec. 12, 2024), https://www.washingtonpost.com/politics/2024/12/12/trump-retribution-targeting-political-enemies-polling/.

150. Emily Ekins & Jonathan Haidt, *Donald Trump Supporters Think about Morality Differently than Other Voters. Here's How*, CATO INST. (Feb 5, 2016), https://www.cato.org/commentary/donald-trump-supporters-think-about-morality-differently-other-voters-heres-how#.

151. *See, e.g*. Daniel Dale, *Donald Trump voters: We like the president's lies*, UNIV. NOTRE DAME TRUTH & POLITICS (Fall 2020), https://sites.nd.edu/truth-and-politics/donald-trump-voters-we-like-the-presidents-lies/.

152. *See* Darren, *15 Most Notorious Historical Outlaws,* HISTORY COLLECTION (May 25, 2025), https://historycollection.com/15-most-notorious-historical-outlaws/#. A century later, Billy the Kid and Jesse James are still the subject of multiple fictionalized accounts, often humanizing them, recasting each in caring or heroic roles. *See, e.g.*, BILLY THE KID, (MGM+, aired 2022–2025).

those who believed acting outside the law was a sign of courage or an embrace of the spirit of freedom inherent in one vision of the American psyche.[153]

That fascination with outlaws was not limited to the nineteenth century.[154] Popular culture produces an unending flow of data that glorifies those who declare themselves not bound by legal standards.[155] However, the list of glorified outlaws[156] has never before included the President of the United States, members of Congress, or any other public officials.[157]

The job of all public officials is to achieve goals established by legislatures in statutes or pronounced by courts through a uniform application of the appropriate legal standards. When public officials sidestep or openly disrespect the legal standards they are charged to implement, they model illegality or outlaw ethics. Instead of modeling compliance with legal standards, outlaw behavior and ideology invite lawlessness and dramatically undercut the regulatory goal of voluntary compliance.[158] When the behavior of leaders affirms illegality, it is not hard to imagine the advent of a period of anarchy.

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153. Roger D. McGrath, *The Great American Outlaw*, CHRONICLES (Feb. 2010), https://chroniclesmagazine.org/view/the-great-american-outlaw/.

154. The apparent allure of outlaws is sufficient to support an entire line of twenty-first century clothing. OUTLAWED ETHICS, https://outlawedethics.com (last visited Feb. 3, 2026 8:00 PM EST) (attire emblazoned with the words 'Outlawed Ethics').

155. *See generally* Greg Lastowka, *Property Outlaws, Rebel Mythologies, and Social Bandits*, 20 CORN. J. OF L. & PUB. POL'Y 377, 377 (2010) (discussing the book *Property Outlaws*, which argues that not all legal wrongs are harmful to society).

156. Darren, *supra* note 152.

157. *Id.*

158. Michael Bang Petersen, Mathias Osmundsen & Kevin Arceneaux, *The "Need for Chaos" and Motivations to Share Hostile Political Rumors*, 117 AM. POL. SCI. REV. 1486, 1503 (2023), https://www.cambridge.org/core/journals/american-political-science-review/article/need-for-chaos-and-motivations-to-share-hostile-political-rumors/7E50529B41998816383F5790B6E0545A (those who resent and distrust government and favor raw individualism are not likely to comply with the most basic mandates of the legal system).

The current uncertainty that underlies all of this can boil down to the meaning and worth of legality and the rule of law. This is a free country. People have endless options in terms of their behavior. For most, those options have limits borne of a sense of justice and fairness, of fundamental values in the Constitution, of equal protection, and of due process. However, not everyone shares those values,[159] and at present, that list could include a president and members of Congress.[160]

VII. REMEDIES AND THEIR LIMITS

Although the President's comment claiming he could shoot a person on Fifth Avenue without consequences was not a threat and more a throwaway line in a campaign demonstrating the strength of his base, the stark nature of the hypothetical may suggest that somewhere in the belief structure of the President or his advisors lies the following premise: The fact that an action is illegal does not mean it has consequences. Obviously, since current unchecked illegality continues, the mere possibility of a consequence is not the deterrent one might hope. Still, they are worthy of comment.

Professor David S. Price sets out one such limitation on presidential power regarding enforcement. "[W]ithout congressional action expanding

159. Dr. Lewis Brogdon, *Devouring Itself: Nihilism and the Fall of the American Empire,* INST. FOR BLACK CHURCH STUD. (June 5, 2025), https://institute.bsk.edu/devouring-itself-nihilism-and-the-fall-of-the-american-empire/ ("Today, we are not merely witnessing political dysfunction or economic instability. We are watching the slow disintegration of a society that can no longer tell the truth about itself, a society where the myth of moral greatness is crumbling under the weight of its own contradictions.").

160. Michael Waldman, *Breaking the Law: Just weeks in, the Trump administration has violated rules, laws, and the Constitution,* BRENNAN CTR. FOR JUST. (Feb. 4, 2025), https://www.brennancenter.org/our-work/analysis-opinion/breaking-law; Darren, *supra* note 152.

executive discretion, the President's nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders."[161] Nonenforcement, then, is not a universal or unlimited right of the executive. However, in 2025, there were numerous examples of illegal acts of this nature. For example, noncompliance with rules regarding spending, i.e., refusing to release funds authorized and appropriated by Congress for a specific purpose, happened in 2025.[162] The solution to this form of anticipated executive overreach is the Constitution and the hope that the "faithfully execute" clause is understood by its obvious meaning. If the clause is ignored by the White House and thereafter, the Supreme Court, the risk of unconstitutional validation of an untoward expansion of presidential power is very real. As this essay has discussed, there was, and now is, good reason for that concern.[163]

These policies are central to the nature of presidential power, and acting in contravention of them is illegal—but does that mean the actions will be withdrawn or the actors sanctioned? Historically, the answer is yes. The 1838 decision, *Kendall v. U.S ex rel Stokes*,[164] states this limitation on

161. Zachary S. Price, *Enforcement Discretion and Executive Duty,* 67 VAND. L. REV. 671, 675 (2014).
162. David Super & Sam Berger, '*Pocket Rescissions' Are Illegal,* CTR. ON BUDGET AND POL'Y PRIORITIES (July 30, 2025), https://www.cbpp.org/research/federal-budget/pocket-rescissions-are-illegal ("The Trump Administration has been engaging in a wholesale attack on Congress's spending power by refusing to provide legally required funding for programs and activities it does not support. This is known as 'impoundment[,]' . . . [and the acts are in violation of] The Impoundment Control Act").
163. Mandamus and use of military force without congressional approval, authorizing detention without due process, eliminating federal agencies without congressional approval to name a few.
164. 37 U.S. 524 (1838).

presidential power: "To contend that the obligation[s] imposed on the President to see the laws faithfully executed[] implies a power to forbid their execution, is a novel construction of the constitution, and [is] entirely inadmissible."[165] That theme is further echoed in *Youngstown Sheet & Tube Co. v. Sawyer*:[166]

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[167]

Using this mandate, a president's refusal to approve allocated funds and redirect them to other purposes more suitable to the president's political goals is ultra vires. In *Train v. City of New York*,[168] the President decided to withhold authorized funds with congressional input. The Court rejected that assertion of power:

> [T]he . . . letter of the President and the Administrator's consequent withholding of authorized funds cannot be squared with the statute. . . . We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation.[169]

Professor Mary Cheh at George Washington Law made clear that

> [when] a court . . . order[s] an executive official to perform a certain act, *Marbury* seemed to lay down a clear and dramatic marker. If the act in question was one as to which the president or his subordinates had constitutional or legal discretion, no mandamus would lie. If,

165. *Id.* at 613.
166. 343 U.S. 579 (1952).
167. *Id.* at 637–38 (Jackson, J., concurring).
168. 420 U.S. 35 (1975).
169. *Id.* 45–47; U.S. Const. art. II, § 3 (the president's obligation to "take Care that the Laws be faithfully executed").

> however, the act was a 'specific duty that is assigned by law,' legal redress [is] proper.[170]

Two centuries later, the D.C. Circuit followed that interpretation: "[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement[s] with Congress."[171] And yet, the judicial response to nonenforcement is unenthusiastic at best and most assuredly infrequent. In a nutshell, "[f]ederal courts rarely conduct meaningful judicial review of agency inaction."[172]

The jurisprudence of inaction is limited, making it more difficult to label as unlawful,[173] even though agency inaction has a quality of illegality. Inaction can be seen as defiance, a conscious decision to refuse to do what Congress has set out to be done, and in that light, it is an abdication of responsibility. Even when inaction appears to be an abdication, courts are loath to interfere with agencies often on the premise that an agency needs discretion to direct resources where, in the judgment of the agency, they are most needed.[174]

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170. Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on* Marbury v. Madison*, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 254 (2003) (referencing Marbury v. Madison, 5 U.S. 137, 166 (1803)).

171. In re Aiken County, 725 F.3d 255, 260 (D.C. Cir. 2013).

172. Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction,* 101. GEO. L. J. 1337, 1381 (2013).

173. *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985) (finding that the refusal of the FDA to intervene in the off-label use of drugs in a capital punishment challenge was unreviewable and vested to agency discretion); Flyers Rts. Educ. Fund, Inc. v. FAA, 864 F.3d 738, 743 (D.C. Cir. 2017) ("Because [Plaintiff] challenges the Administration's decision not to engage in rulemaking—the Administration's *inaction*—our review is "extremely limited."); WildEarth Guardians v. EPA, 751 F.3d 649, 653 (D.C. Cir. 2014) ("[A Court] will overturn the agency's decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency") (citation omitted).

174. Jentry Lanza, *Agency Underenforcement as Reviewable Abdication*, 112 NW. U. L. REV. 1171, 1179 (2018); *see also* Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on*

In addition to judicial reluctance to get involved noted above, there are standing barriers brought about by the Court's 2021 decision in *Transunion v. Ramirez*.[175] After underscoring the need for a personal and concrete harm, the Court added a historic flair, holding that a plaintiff must claim an injury within the "rights of individuals."[176] The Court went on to instruct that "[f]ederal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches. . . . And federal courts do not issue advisory opinions," but limit their jurisdiction to "matters 'of a Judiciary Nature.'"[177] Based on that language, it is not hard to imagine that one wishing to avoid accountability for illegal acts would argue that only common law claims extant in 1803 would be justiciable in a federal court, though the Court did not go that far. From a jurisdictional perspective, challenges to allegedly illegal actions of the executive in federal court will be, well, more challenging than one might think.

Because agency inaction is, for the most part, nonreviewable, agency abdication consisting of a simple refusal to carry out existing statutory mandates may seem outside the ambit of judicial review. It bears noting that the prohibition barring judicial review of agency inaction is not

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Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 266–67 (2003).

175. 594 U.S. 413 (2021).

176. *Id.* at 423 (citing Marbury v. Madison, 1 Cranch 137, 170 (1803)).

177. *Id.* at 423–24 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 430 (M. Farrand ed. 1966).

absolute. As the Court noted in *Heckler v. Cheney*,[178] it is 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."[179]

There is a further exception when the action is not a statutory mandate[180] but rather a constitutional obligation. This was addressed in 1890 in *In re Nagle*,[181] where the Court found that if the agency inaction involves "the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of government under the constitution."[182] In that instance, the Court would review the inaction and not simply defer to the agency or the executive's choice to ignore an obligation.

Issues have surfaced recently that will test whether the admonition in *In re Neagle* is respected since there are those who assert that,

> Trump's second term has been characterized by relentlessly testing (and often overriding) the legal and constitutional limits of presidential authority. A mountain of legally dubious executive orders, a number of ethically questionable actions, and countless examples of executive overreach have blurred the line on where presidential power starts and ends.[183]

178. 470 U.S. 821 (1985).
179. *Id.* at 832–33.
180. Arguably, 18 U.S.C. § 201(b)(1)(C) covers illegality and public officials would apply to acts that "induce [a] public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person . . . ." An example of this would be encouraging a public official to compromise the integrity of the electoral process, an allegation that appears in the Bill of Impeachment from the first term of President Trump. Thomas Jipping, *Trump Impeachment Hinges on Whether He Had "Corrupt Intent" in Taking Lawful Actions*, HERITAGE FOUND. (Dec. 20, 2019), https://www.heritage.org/political-process/commentary/trump-impeachment-hinges-whether-he-had-corrupt-intent-taking-lawful.
181. 135 U.S. 1 (1890).
182. *Id.* at 64.
183. CAMPAIGN LEGAL CTR., *Can President Trump Do That?* (Jan. 20, 2026), https://campaignlegal.org/CanTrumpDoThat; *see* Ombres, *supra* note 10.

While those allegations are not yet resolved, there are 600 or so cases filed in the last year or so in which issues of this nature arise.[184] *Loper Bright Enterprises v. Raimondo*[185] makes clear that the power of reviewing courts to override agency action or inaction, as opposed to deferring to agency decision-making, is now part of our jurisprudence.[186] Presumably district courts and circuit courts now bear responsibility for reviewing agency action that is inconsistent with applicable statutes.[187]

In 2025, the administration, through the Department of Justice, attacked individual judges responsible for decisions inconsistent with the position or goals of the executive.[188] It is a fair guess, given the alignment of Justices, that in overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[189] the Court took a position that would lead to liberating courts to curtail or lessen the burden of regulation.[190] If that was the goal, *Loper-Bright* may have an opposite effect: liberating courts to insist that agencies do their jobs. Time will tell whether the considerable license given to courts reviewing agency decisions in *Loper-Bright* will be

184. Schartz et. al., *supra* note 11.
185. 603 U.S. 369 (2024).
186. *Id.* at 398–399.
187. *Id.* at 371 ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits").
188. Mattathias Schwartz, *Judge Who Ruled Against Trump Administration Cleared of Justice Dept. Complaint* (Feb. 1, 2026), https://www.nytimes.com/2026/02/01/us/politics/judge-boasberg-ethics-complaint-trump.html (reporting on the attack on Judge Boasberg that ultimately failed); DEMAND JUSTICE, *Fact Sheet: The Trump Administration's Most Egregious Threats Against Judges and the Courts* (May 29, 2025), https://demandjustice.org/wp-content/uploads/2025/06/Admin-Attacks-Factsheet.pdf.
189. 467 U. S. 837 (1984).
190. *See id.* at 859–66 (holding that appellate courts reviewing agency decision should defer to agency judgements when the agency is interpreting an ambigous statute and the agency interpretation is permissible). On the premise that this reviewing standard imposed too great a limit on the ability of courts to do a responsible job in reviewing agency decisions, the *Chevron* decision and the deference doctrine it created was overruled in *Loper-Bright*, 603 U.S. 369 at 413–17.

used to compel agencies to perform those tasks set out for them by Congress. If that turns out to be one of the main effects of *Loper-Bright*, in retrospect, *Loper-Bright* may affirm the caution "be careful what you ask for."[191] Naturally, the Supreme Court can undo actions of district and circuit courts, but doing that wholesale would essentially undo the decision in *Loper-Bright.*

The above concerns are almost sure to surface in the next few years, since a number of those appointed to head major federal agencies have a well-established deregulation bent.[192]

Another assessment of such a limited judicial response to agency inaction is that it is akin to the exercise of prosecutorial discretion. While that term almost always applies to discretion vested to prosecutors in the criminal justice field,[193] an analogy to inaction by federal agencies is useful. For the most part, as with criminal prosecution, courts are loath to interfere with agency (civil) decisions regarding priorities and use of

191. There is no agreement on the origin of this precaution. It may emanate from *Aesop's Fables*, *see* Randy Beeman, *Be Careful What You Wish For, Lest It Come True*, (July 19, 2024), https://www.glassjacobson.com/blog/be-careful-what-you-wish-for-lest-it-come-true/ (referencing that fictional work's morality lessons in the context of the Federal Reserve's decisionmaking), or the fables themselves, *see* John Horgan, *Aesop's Fables*, WORLD HIST. ENCYCLOPEDIA (Mar. 8, 2014), https://www.worldhistory.org/article/664/aesops-fables/ (noting the works were dated roughly 600 B.C.), or from the NEW TESTAMENT, *ACTS* 5:17-42 (highlighting themes of obeying God rather than man). Either way (and there are other sources), the warning may come to fruition for those who pushed hard to get rid of *Chevron*, thinking it would satisfy a deregulatory agenda. Loper-Bright gives courts–presumably that includes District and Circuit courts–license to rethink an agency decision–and that would include an agency decision not to act which, rather than vested solely to the discretion of the agency can now be up to any court reviewing agency action.

192. Ian Kullgren, *Trump Picks Tasked With Helping Gut or Eliminate Their Own Agencies*, BLOOMBERG GOV'T (Feb. 27, 2025 3:00 AM EST), https://news.bgov.com/bloomberg-government-news/trump-picks-tasked-with-helping-gut-or-eliminate-their-own-agencies.

193. Cassandra J. Barnum, CONG. RSCH. SERV., LSB11326, FEDERAL PROSECUTORIAL DISCRETION: A BRIEF OVERVIEW (Feb 13, 2026), https://www.congress.gov/crs-product/LSB11326 (noting that although Congress has enacted statutes imposing substantive requirements on prosecutors, courts have construed those laws narrowly to avoid intruding on executive discretion, and that Congress retains viable influence over prosecutorial decisionmaking through traditional powers such as oversight and appropriations).

resources—but there are exceptions, including the decision in *Massachusetts v. EPA*.[194]

In the first decade of the twenty-first century, multiple states took action by filing petitions, pursuant to § 553(e),[195] to address mounting concern over greenhouse gases and the EPA's resistance to take action in that area. These claims compelled the EPA to issue rules to curtail the harm being inflicted by these gases or at least explain why it was not taking any action.[196] When the EPA denied the petitions with legally dubious explanations, the case went up to the Supreme Court.[197]

On the merits of EPA's defense of its denials, it argued, *inter alia*, that inaction was solely within its discretion, reasoning that it had other priorities, that greenhouse gasses were not necessarily within the purview of the Clean Air Act,[198] and, in one unexpected cognitive distortion, that there was no use in getting involved because so many other countries were polluting the atmosphere.[199] Though it must have pained them to do so, the Court made clear that greenhouse gasses, e.g., carbon monoxide and

194. 549 U.S. 497 (2007).
195. Administrative Procedure Act, 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule").
196. Massachusetts v. EPA, 549 U.S. at 521 (pointing out the EPA's acceptance of the NRC report that identified environmental changes that have inflicted serious harm and contributed to rising sea levels).
197. *See* Administrative Procedure Act, 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule"); 5 U.S.C. § 555(e) ("notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person . . . the notice shall be accompanied by a brief statement of the grounds for denial").
198. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671q (1970)).
199. THERAPIST AID, *Cognitive Distortions* (2023), https://www.therapistaid.com/worksheets/cognitive-distortions (explaining that a "cognitive distortion" is false logic, usually used when dealing with children, and boils down to 'the other kids are doing it, why am I getting punished').

dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride,[200] surely seemed to be within the reach of the Clean Air Act and that the existence of other countries' environmental misdeeds is not an acceptable basis for EPA inaction.

While not the most potent directive to get going on greenhouse gasses, the Court rejected the EPA's arguments:

> Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment . . . . Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time . . . .In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore "arbitrary, capricious, . . . or otherwise not in accordance with law.[201]

Massachusetts v. EPA, decided nearly twenty years ago, has not generated a host of invasions into the discretion of agency actors who refuse to act. Thus, the baseline admonition cautioning noninterference with agency decision-making in *Heckler v. Chaney*[202] still stands as a powerful roadblock when those aggrieved by agency inaction seek recourse in Article III courts. Does that mean that a governmental agency or entity's refusal to act is legal? Not at all. It may mean instead that the consequences of illegality are not what one might think.

VII. MANDAMUS AND AGENCY INACTION

200. Center for Sustainable Systems, UNIV. OF MICH. 2025. "Greenhouse Gases Factsheet." Pub. No. CSS05-21 https://css.umich.edu/publications/factsheets/climate-change/greenhouse-gases-factsheet.
201. *Massachusetts*, 549 U.S. at 534 (quoting Administrative Procedure Act, § 7607(d)(9)(A)).
202. 470 U.S. 821 (1985).

Focusing on the reviewability of inaction or abdication (when confronted with illegality) does not provide much guidance on how courts deal with the stark reality that an agency is only doing a part of its job. However, when the inaction, or abdication, of statutory responsibility compromises fundamental public interests and cuts off essential resources only an agency can provide, assuming the refusal to act involves a task that is mandated by statute and nondiscretionary, the historic remedy is the quest for the illusive writ of mandamus.[203]

The writ is rarely granted based on some of the same reasoning extant with agency inaction. Courts are reticent to interfere in an area generally vested to agency discretion unless the agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[204] In such instances where the refusal to act constitutes a failure to address a statutory "specific, unequivocal command," the writ may be the appropriate remedy[205] unless the inaction in question involves judgments that are purely discretionary as opposed to compulsory.[206] Even if those requirements are met, there are three seemingly simple jurisdictional imperatives: "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there

203. *See* Mandamus Act, 28 U.S.C. § 1361 ("Action to compel an officer of the United States to perform his duty").
204. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (quoting Adams v. Richardson, 480 F.2d 1159 (1973) (en banc)).
205. ICC v. New York, N.H. & H.R. Co., 287 U.S. 178, 204 (1932).
206. *See, e.g.*, Baptist Mem'l Hosp. v. Sebelius, 603 F.3d 57, 59 (D.C. Cir. 2010) (holding that the Secretary of Health and Human Services was not obligated to reopen or reconsider the denial of Medicare benefits).

is no other adequate remedy available to plaintiff."[207] And even then, courts seem skittish about issuing the writ for many reasons.[208]

When a court does issue a writ of mandamus or other form of equitable relief, the question surfaces on the geographical scope of the writ. Are writs of mandamus limited to a defined area (e.g., a city or state), or can they be broader (the broadest, of course, being nationwide)? In *Trump v. CASA, Inc.*,[209] issued in June 2025, the Court greatly limited such injunctions or writs, finding that "[a] universal injunction can be justified only as an exercise of equitable authority, yet *Congress has granted federal courts no such power*."[210] The Court looked to the Judiciary Act of 1789,[211] the enabling legislation that established the court system envisioned in Article III of the Constitution, and found it was silent on nationwide injunctive relief.[212] It then looked at eighteenth and nineteenth century jurisprudence to determine if, in the United States, nationwide injunctions were more common at a time when U.S. courts were divided into courts of law and courts of equity (where equitable relief was more

207. Lovitky v. Trump, 949 F.3d 753, 759 (D.C. Cir. 2020) (quoting Baptist Mem'l Hosp., 603 F.3d at 62 (internal quotation omitted)).
208. *See generally* Faith Proper, *Mission (Im)possibility: Determining When Mandamus is an Appropriate Remedy to Address Agency Delay or Inactio*n," 72 FLA. L. REV. 933 (2020) (focusing on legal challenges in the health care field, the note traces an array of problems parties face when seeking issuance of the writ).
209. 606 U.S. 831 (2025).
210. *Id.* at 841 (emphasis added).
211. ch. 20, 1 Stat. 73.
212. CASA, 606 U.S. at 839, 841, 856, 858; *see also Landmark Legislation: Judiciary Act of 1789*, FED. JUD. CENT., https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789-0 (last visited Feb. 3, 2026 14:30 EST).

prevalent), and discerned that there was no indication that such injunctions were in common use.[213]

Beyond the Court's assessment that Article III courts, excluding the Supreme Court, do not have congressional authority to order universal injunctions, it looked to British jurisprudence on injunctive relief, as modern courts derive their authority based on "equitable remedies 'traditionally accorded by courts of equity' at our country's inception."[214] In its inquiry, the Court discovered that "[n]either the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the founding."[215]

Seeking a writ of mandamus is always an option even if the odds are slim to none. There is possible strategic value in a court's denial of the writ. One can always stand on the courthouse steps after losing the quest and advise the press and social media that the court refused to act in a dire situation. Denial of the writ, when characterized as the last resort, can also open political doors—hopefully, a person clearly wronged by an illegal act of the executive will find support in some corner of Congress.

VIII. CONTEMPT

Beyond judicial oversight and mandamus, it is worth taking a quick look at the contempt power (or lack thereof) of courts. Once a court

213. *See* CASA, 606 U.S. at 856 ("Nothing like a universal injunction was available at the founding, or for that matter, for more than a century thereafter. Thus, under the Judiciary Act, federal courts lack authority to issue them."); *see generally* Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L. REV. 21 (1919).
214. CASA, 606 U.S. at 832 (citation omitted).
215. *Id.* at ; *see* Kittle, *supra* note 213, at 27.

declares an action or practice illegal, ideally, those engaged in the practice will cease that activity or practice. When they do not, what recourse do courts have to enforce their decisions—and who will carry out that effort?[216]

The short answer is that courts determine legality but do not have the resources nor the clear constitutional grounding to enforce their rulings. Courts must rely on the executive branch for enforcement because it has the power and duty to see that the laws are faithfully executed. As the executive, it is obligated to ensure the faithful execution of our courts. Naturally, that becomes rather dicey when the unlawful acts are undertaken by a president or at the direction of the executive itself to others in the executive branch of government.

Does that leave courts with no real enforcement power and render judges paper tigers? Not necessarily. Contempt of court can result in incarceration of offenders, a powerful incentive to comply with court orders. Willful disobedience of a court order is a predicate to a contempt determination,[217] even if it turns out the order was later found to be erroneous.[218] Thus, the authority to use contempt is clear—but while the will and legal standing to do so is evident, is it effective?

Though infrequent, contempt findings have considerable impact on behavior. "[E]ven though contempt findings are practically devoid of

216. Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (explaining the contempt power exists to allow the "preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts" (quoting Ex parte Robinson, 86 U.S. 505, 510 (1873))).
217. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).
218. *See* United States v. United Mine Workers of Am., 330 U.S. 258, 294 (1947).

sanctions, they nonetheless have a shaming effect that gives them substantial if imperfect deterrent power."[219] Moreover, contempt findings have recently played an important role in addressing illegal or unauthorized actions by federal officials,[220] performing the historic function of contempt.[221] The following includes some more recent examples:

> A New York court held [the] President . . . in civil contempt and fined him $110,000 in total — $10,000 a day for each day his legal team failed to submit explanations for not turning over documents . . .
> [I]n 2019, [the] Secretary of Education Betsy DeVos was found in contempt for violating a court order to stop collecting on loans owed by students defrauded by for-profit colleges [and] fined the Department of Education $100,000 . . .
> [A] judge ordered the arrest of a Kentucky county clerk who had disregarded a court order to resume issuing marriage licenses, which her office . . . suspended to . . . protest the . . . Court's decision to legalize same-sex marriage."[222]

Although such remedies are infrequently granted, they provide evidence of the power of courts to address executive actions that are in contravention of legal standards or undertaken without the authority to act. Federal officials, including presidents, have grudgingly acknowledged that the contempt power of courts does serve to compel compliance with court orders. "As President George W. Bush put it when the Supreme

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219. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power,* 131 HARV. L. REV. 685, 697 (2018).
220. *See* Yasmin Abusaif & Douglas Keith, *What Courts Can Do If the Trump Administration Defies Court Orders*, BRENNAN CTR. FOR JUST. (Feb. 14, 2025), https://www.brennancenter.org/our-work/research-reports/what-courts-can-do-if-trump-administration-defies-court-orders (discussing various Trump administration federal court cases where a stay or other injunctive measures are pending or resolved).
221. *See generally* Ex Parte Robinson, 86 U.S. 505, 511–12 (1873) (explaining that the power of the judiciary to compel implementation of a court order lies with the authority to hold parties in contempt.) Notably, "The seventeenth section of the Judiciary Act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion." *Id.* at 512.
222. Abusaif & Keith, *supra* note 220.

Court held that detainees in Guantanamo Bay could challenge their confinement, '[w]e'll abide by the Court's decision. That doesn't mean I have to agree with it.'"[223]

IX. LAWYERS (AND THE REGULATORY STATE) TO THE RESCUE

It is comforting to think that where there is a right, our legal system provides a mechanism–a remedy–for protection of that right or correction of wrongs. The maxim, *Ubi Jus, Ibi Remedium,*[224] is predicated on the hope that in our system of law, including our statutes, substantive regulations, and cases, unlawful behavior stands no chance against the power and majesty of the law. At the moment, that seems optimistic—but it is more probable than one might think and will require more courage and work than one might want to contribute.

It has taken decades to get to where we are. The Supreme Court's departure from precedent in 2024[225] and the jarring political transition starting immediately after President Trump's inauguration in January

223. *Id.*
224. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636–37 (2004) (discussing the Latin maxim and its meaning–where there is a wrong, there is a remedy).
225. *E.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024) (rewriting the standards for judicial review by overruling Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)); SEC v. Jarkesy, 603 U.S. 109, 140–41 (2024) (holding that certain agency enforcement actions should take place in a federal district court instead of in an agency hearing based on the premise that such civil enforcement cases are within the purview of the Seventh Amendment right to a jury trial).

2025[226] are part of a much longer set of variables that produced widespread discontent[227] with government and the legal system.[228]

It is hard to know when this started, but consider the following. On the morning of September 11, as the horrifying events were unfolding, there was almost an immediate outpouring of patriotic acts and bipartisan support for those who could help in any way.[229] It was a time of abject terror followed by hope and public support of the government. It also came on the heels of a fragmented political universe borne, *inter alia*, of hard feelings over the contested 2000 election.[230] The newly elected president had no "honeymoon" and was declining in the polls.[231] Yet, on that day of unthinkable disaster, the spark of our democracy reignited and burned bright for several years. The economy was booming but turned out to be fragile, and the Great Recession of 2008, a national gut punch, doused the flame kindled on September 11.[232] The period of discontent and animosity

226. *E.g.*, *2025 Donald J. Trump Executive Orders*, FEDERAL REGISTER: PRESIDENTIAL DOCUMENTS, https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025 (last visited Feb. 3, 2026 EST 4:00 PM) (compiling President Trump's 225 executive orders form 2025).

227. It's always questionable to cite oneself, but for my take on the genesis of current discontent, *see generally* Andrew F. Popper, *Discontent and Discord: The Effect of Anti-Government Animus on Compliance with the Norms of Governance*, 101 DEN. L. REV. F. 1 (2023).

228. In a previous article, I laid out how, with 40 years and several billion dollars of advertisements blaring that the United States legal system was broken, people had good reason to believe it was. *See generally* Andrew F. Popper, *Backlash: After 40 Years of Tort Reform Noise, Let's Change the Tone, Undo the Harm, and Correct the Big Lie*, 49 NOTRE DAME J. OF LEG. 52 (2022). I'm sure tort reformers did not mean to crush the national spirit, but they overshot their target; advertising campaigns that argue about all the flaws in the legal system over the last half century took their toll.

229. *See* Oral History, *Whereas: Stories from the People's House Taking the Steps: Unity and Recovery After 9/11*, U.S. H. OF REPS.: OFF. HISTORIAN & OFF. ART & ARCHIVES (Sept. 9, 2016), https://history.house.gov/Blog/2016/September/9-8-September-11-Recovery/.

230. *See generally Bush v. Gore*, 531 U.S. 98, 108–11 (2000) (denying Vice President Al Gore a manual voter recount in the wake of the razor thin margins of the 2000 presidential election in Florida)..

231 Frank Newport, *Bush Approval Drops to 53%*, GALLUP (Mar. 31, 2001), https://news.gallup.com/poll/1849/bush-approval-drops-53.aspx.

232 John Weinberg, *The Great Recession and Its Aftermath*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath.

toward government then returned with a vengeance, as witnessed in the presidential campaign of 2016.[233]

The events of the last year seem to capitalize on that discontent and lingering doubt, a troubling uncertainty about the strength and resilience of our economy and our democracy. Into that void, in the last year, the political voice rang clear: The President can fix it, or, to borrow his campaign slogan, he can Make America Great Again.[234] As to democracy, the separation of powers, equity and fairness, and goodwill, these are virtues that appear to be on hold and in danger of fading further into the background.

If the above left you feeling hopeless, sorry about that. There is light at the end of this long and tortured tunnel, and it boils down to this: The legal system is resilient and powerful. The commitment to legality, decency, and democracy is right here. It has always been. "We the People"[235] will get through the complex problem of illegality raised throughout this essay.

As the preceding section suggests, there are remedies in the courts and in Congress and in oft-maligned but essential federal agencies. The regulatory state will still have fair hearings conducted by federal agencies

233. Kenneth T. Walsh, *2016 Takes the Cake for Negative Campaigns*, U.S. NEWS (Apr. 8, 2016), https://www.usnews.com/news/the-report/articles/2016-04-08/vicious-presidential-campaigns-are-an-american-tradition.

234. Josh Boak & The Associated Press, *'We fixed inflation, and we fixed almost everything': Trump travels to Pennsylvania to talk affordability while denying it's a problem*, FORTUNE (Dec. 4, 2025 4:09 PM ET), https://fortune.com/2025/12/04/trump-affordability-pennsylvania-visit-inflation-hoax-democrats-pricing/.

235. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence. . . .")

with the power and responsibility to apply legal standards and precedent based on their best understanding of a statute and the facts presented. Although every regulatory agency decision has at least the possibility of being set aside by the Supreme Court, that takes time—and over time, opinions can and do change.

If agencies "go by the book" in the way they issue rules and guidances, conduct adjudication, and otherwise enforce legal standards, things can change. The value of this approach is that agencies—unlike the courts, Congress, or the White House—present opportunities for large numbers of people to participate, write comments, and get involved. Moreover, unlike any other branch of government, agencies provide everyone with access to participate in proceedings and even to petition agencies to issue rules and do their jobs.[236] On receipt of that petition, every agency has the obligation to provide a reasoned response.[237]

Agencies were not established to provide a platform for the recovery of confidence in government or to ferret out illegal acts slithering through our courts and Congress, but they can play a part and be a model for the return to rationality and the rule of law. Who knows? Perhaps the three main branches of government will take notice and join in the recovery of the most cherished aspects of our democracy.

236. *See* Administrative Procedure Act, 5 U.S.C. § 553(e).
237. *See id.* § 555(e).

This country, this nation of immigrants,[238] may be down, but it is not defeated.[239] As stated at the outset, we, the legal community broadly defined, cannot let that happen. Perhaps the ethical impulses of those in our three branches of government have been calcified, vilified, relegated to the status of inconsequence, but our code of professional responsibility, the oath we take, the reason so many of us went into the field of law, remain strong. We can and must use all that we know to ensure just results and fairness in every corner of the legal system. We must be the agents of change and by all that we do, set an example for all to see the strength and grandeur of this democracy as it celebrates its 250th anniversary.

238. JOHN F. KENNEDY, A NATION OF IMMIGRANTS (Harper Perennial, 1958).
239. *See* Andrew F. Popper, *Democracy on the Brink, Down But Not Defeated*, 10 U. PENN. J. OF L. & PUB. AFFS. 1 (2024).