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Table of Contents

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CONTENTS

CONGRESSIONAL DYSFUNCTION AND EXECUTIVE LAWMAKING DURING THE OBAMA ADMINISTRATION

SYMPOSIUM EDITOR
RAQUEL ALDANA

CONGRESSIONAL DYSFUNCTION AND
EXECUTIVE LAWMAKING DURING
THE OBAMA ADMINISTRATION *Raquel Aldana* 3

TRUST IN IMMIGRATION ENFORCEMENT:
STATE NONCOOPERATION AND SANCTUARY
CITIES AFTER SECURE COMMUNITIES *Ming H. Chen* 13

The conventional wisdom, backed by legitimacy research, is that majority of people obey most of the laws, most of the time. This turns out to not be the case in a study of state and local participation in immigration law enforcement. In the five years following initiation of the Secure Communities program, through which the federal government requests that local law enforcement agencies hold immigrants beyond their scheduled release upon suspicion that they are removable, a significant and growing number of states and localities have declined to cooperate with federal immigration detainer requests—ultimately leading to the demise of the Secure Communities program and revitalizing a debate about Sanctuary Cities and the terms of federal-state partnerships in immigration enforcement. This article finds that state and local non-cooperation is influenced by attitudes toward the legitimacy of executive action, distinct from attitudes toward the law's legality, morality, or politics.

THE EXECUTIVE POWER OF PROCESS
IN IMMIGRATION LAW *Jill E. Family* 59

This article, part of an AALS symposium on executive power during the Obama administration, focuses on the role of procedure in the president's implementation of immigration law. The president undeniably has power over immigration law, but the exact contours of that power are not clear. At times, the president acts via delegation from Congress. The president also may have inherent power over immigration law that is not dependent on a delegation. Such inherent power would be subject to the president's discretion. Even when acting pursuant to delegated immigration power, the president operates within a wide ring of discretion granted by the delegation. While we debate the exact boundaries of executive power over immigration law and the extent of the president's discretion, we must not forget that executive implementation of immigration law in-

cludes procedural power and that procedural mechanisms affect fairness: Does the executive implementation of immigration law function with just procedural mechanisms?

This article explores the nature and variety of executive procedural power over immigration law by looking at examples from executive agencies that contribute to executive action in immigration law. This article identifies themes across the procedures that these agencies use to carry out immigration decision-making. These themes are: (1) the structure of executive branch implementation of immigration law is complex; (2) the use of agency guidance documents is a popular procedural choice; and (3) minimal process is a prominent feature. This article explores the implications of these themes and raises some questions for future inquiry.

The procedural mechanisms that accompany the implementation of immigration law deserve sustained attention. Executive branch procedures are an essential element of the president's power over immigration law.

OBAMA'S NATIONAL SECURITY EXCEPTIONALISM

Sudha Setty 91

The label of national security exceptionalism fits the Obama administration in two ways: first, although the administration has actively sought to address and improve the protection of human rights and civil rights of racial minorities suffering disparate negative treatment in a variety of contexts, those moves toward rights protection generally do not extend to the realm of counterterrorism abuses, although almost all of those who have suffered from violations of human and civil rights in the post-9/11 counterterrorism context are racial and/or religious minorities. One of the justifications for this exceptionalism is based on the widespread view that national security is an area in which ordinary legal and constitutional constraints do not apply because of the strong deference that ought to be afforded to the president in foreign policy matters. Alongside this type of exceptionalism is the outsized perception of the threat of terrorism by politicians and the public, which makes it difficult for the government to shift away from its exceptionalist footing. The second type of exceptionalism is predicated on the view that the United States plays an exceptional role on the world stage in terms of its responsibility to police global actions by exercising its hard and soft power.

This article addresses several areas of the Obama administration's national security exceptionalism: non-prosecution of those who endorsed torture of detainees, use of drones for targeted killings of citizens and non-citizens, invocations of the state secrets privilege, and use of immigration authorities to detain and sometimes remove those accused of having a connection with terrorist activity. With regard to each of these policies, the administration's exceptionalism has been accompanied by a lack of judicial engagement and review of these programs, political enabling by Congress that has allowed the commission of violations of fundamental rights, a lack of public pressure for reforms with regard to most of these policies, and, ultimately, a distorting effect on the rule of law.

REVIVING THE ENVIRONMENTAL JUSTICE AGENDA

Rachael E. Salcido 115

During his 2008 campaign, President Obama pledged that his administration would put an emphasis on environmental justice, outlining a strategy to address the unequal burden of pollution in low-income, minority and indigenous communities. Though many criticize some of the shortcomings, such as inadequate pursuit of civil rights remedies, the administration has followed through to supply some of the most critical components of solutions to the environmental justice challenge: leadership, capacity, collaboration-in-fact, and funding. This article will examine the reinvigorated Inter-Agency Working Group on Environmental Justice, the roadmaps prepared to address EJ, and significant rules and guidance enacted by the EPA furthering the EJ mission. The paradoxical relationship between overburdened communities and the industries that both nourish and poison them demands more vigilant attention to local conditions atypically addressed at the federal level. The administration's actions illustrate the importance of the federal role in alleviating unequal environmental burdens.

THE GRASS IS NOT ALWAYS GREENER:
CONGRESSIONAL DYSFUNCTION, EXECUTIVE
ACTION, AND CLIMATE CHANGE IN
COMPARATIVE PERSPECTIVE

Hari M. Osofsky 139
& *Jacqueline Peel*

Partisan climate change politics, paired with a legislative branch that is often deeply divided between two parties, has led to congressional gridlock in the United States. Numerous efforts at passing comprehensive climate change legislation have failed, and little prospect exists for such legislation in the foreseeable future. As a result, executive action under existing federal environmental statutes—often in interaction with litigation—has become the primary mechanism for national-level regulation of greenhouse gas emissions from motor vehicles and power plants.

Although many observers critique this state of affairs and wish for a legislature more able to act, this essay argues that more unified government paired with partisanship is also problematic. Using the Australian experience of climate change regulation as an example of an alternative pathway, it demonstrates the ways in which a deeply divided country with a parliamentary system of government can have unstable policy that changes more significantly with each administration. It considers the benefits and limitations of each approach, and explores possibilities for a better way forward.

FEMINIST-IN-CHIEF? EXAMINING PRESIDENT
OBAMA'S EXECUTIVE ORDERS ON
WOMEN'S RIGHTS ISSUES

Mary Pat Treuthart 171

This article focuses on President Obama's use of executive orders in various areas of women's rights issues including the empowerment of women, gender-based violence, reproductive rights, and employment. As scholars of the American presidency have noted, executive orders can be used either as strategic tools to short-circuit legislative gridlock or to underscore and complement presidential policy measures pending in Congress. Executive orders can also serve to promote projects of special interest groups. Finally, knowing that their directives can be powerfully symbolic, presidents can be particularly effective in the use of executive action to underscore the gulf between the Democratic Party and the GOP on women's issues. Examining the content and context of President Obama's executive orders on women's rights can help us to ascertain whether he has been the Feminist-in-Chief during his time in office.

PRESIDENTIAL LEGITIMACY THROUGH
THE ANTI-DISCRIMINATION LENS

Catherine Y. Kim 207

The Obama administration's deferred action programs granting temporary relief from deportation to undocumented immigrants have focused attention to questions regarding the legitimacy of presidential lawmaking. Immigration, though, is not the only context in which the president has exercised policymaking authority. This essay examines parallel instances of executive lawmaking in the anti-discrimination area. Presidential policies relating to workplace discrimination, environmental justice, and affirmative action share some of the key features troubling critics of deferred action yet have been spared from serious constitutional challenge. These examples underscore the unique challenges to assessing the validity of actions targeting traditionally disenfranchised groups—be they noncitizens, racial or ethnic minorities, or members of the lesbian, gay, bisexual, and transgender (LGBT) communities, for example. Just as prior generations grappled with the unique legitimacy concerns raised by judicial interventions to protect these interests, the current era of presidential lawmaking suggests the need for a distinct theory of legitimacy when the president acts to protect vulnerable populations.

STUDENT NOTES

SECOND CHANCES FOR THE SECOND CITY'S VACANT PROPERTIES: AN ANALYSIS OF CHICAGO'S POLICY APPROACHES TO VACANCY, ABANDONMENT, & BLIGHT

Elizabeth Butler 233

Addressing the externalities of vacancy and blight is a major challenge for the Chicago metropolitan area. While neighborhoods on the South and West sides of Chicago struggle with blight, neglect, and abandonment, downtown Chicago and the northern neighborhoods and suburbs experience stronger market conditions. This crisis has amplified entrenched socioeconomic divisions and ultimately burdens the entire region by perpetuating a cycle of poverty, violence, and physical and social disorder that tarnish Chicago's image.

This Note outlines Chicago's vacant property challenge by discussing the history of urban decline in Chicago. It examines factors that led to a high level of vacant and abandoned properties, namely long-term trends of declining population, suburbanization, and deindustrialization, in addition to the foreclosure crisis of recent years. The Note assesses the impacts of concentrated vacancy and blight, and then analyzes the legal and policy approaches the Chicago-area local governments have taken to addressing those impacts. Generally, the existing legal regime has been insufficient. Finally, this Note proposes enhancements to existing programs in order to drive revitalization efforts. Part IV proceeds with recommendations for legislation that will allow Chicago to more aggressively manage and reutilize the region's vacant land and abandoned building stock. Vacancy and abandonment have wrought devastation on Chicago's neighborhoods on a scale much greater than did the Great Chicago Fire. However, just as the city did after that disaster, with creative and aggressive policies the region will again reemerge and rebuild.

THE TECHNICAL BARRIERS TO TRADE AGREEMENT: A RECONCILIATION OF DIVERGENT VALUES IN THE GLOBAL TRADING SYSTEM

Samantha Gaul 267

In the context of multilateral trading, there is a historical tension between economically oriented, laissez-faire, pro-trade concerns as they are juxtaposed with social, environmental, and health concerns. These conflicting values are inextricable from one another in a world that encourages, and quite frankly mandates, a high level of economic interdependency. But what if institutional actors could reconcile these conflicting values—at least toward the more efficient and practical goals of alleviating (rather than eliminating) the underlying tension? This Note argues that Article 2.2 of the World Trade Organization's Technical Barriers to Trade Agreement operates to reconcile these fundamental tensions to some degree. The outcomes of three recent Article 2.2 cases suggest that the appropriate analysis is one of deference to regulating states' social values, and simultaneously illustrates that such deference does not displace economic concerns. Furthermore, this Note argues that these concepts will likely shape the outcome of the currently pending dispute arising from Australia's Tobacco Plain Packaging Act.

DUTY OF CANDOR IN THE DIGITAL AGE: THE NEED FOR HEIGHTENED JUDICIAL SUPERVISION OF STINGRAY SEARCHES

Andrew Hemmer 295

This Note explores the constitutional implications of the use of a device known as the "Stingray" in criminal investigations. This device masquerades as a cell phone tower and forces all cell phones within a considerable range to connect to it, transmitting data and allowing law enforcement to ascertain the location of each cell phone. The use of Stingrays raises important Fourth Amendment con-

cerns that have been brought to light most significantly by the 2008 federal prosecution of Daniel Rigmaiden. This Note argues that Stingray use constitutes a Fourth Amendment search and that a new standard of warrant requirements is needed to effectively allow the judiciary to supervise the government's use of the device.

FROM *GARNER* TO *GRAHAM* AND BEYOND:
POLICE LIABILITY FOR USE OF DEADLY
FORCE – FERGUSON CASE STUDY

Kyle J. Jacob 325

On August 9, 2014, an unarmed black teenager was shot to death by a white police officer in the St. Louis suburb of Ferguson, Missouri. Just over a year later, the dust has yet to settle. Since that fateful afternoon, tensions between law enforcement and segments of American society seem to have reached a critical mass. Far, far too many tragedies have ensued. The wildfire that is social media has led to a polarization and politicization of what unfortunately seem to have become competing movements. “Black Lives Matter” and “Police Lives Matter” have somehow become competing socio-political battle cries. While most rational observers would posit that these movements may, indeed should, exist in harmony, the fact that battle lines have formed, figuratively and literally in places like Ferguson and Baltimore illuminates the premise this Note seeks to explore: a perception of injustice is as emboldening as a substantive injustice. This Note takes up a source of that “perception of injustice” by looking to the law governing police use of deadly force generally, and civil liability for excessive force under 42 U.S.C. § 1983 specifically. The so called “objective reasonableness” standard for evaluating police use of force, which grew out of the foundational cases *Tennessee v. Garner* and *Graham v. Connor*, is explored. This analysis takes up the deficiencies of a standard that affords great deference to police judgment in deadly force cases and explicitly rejects that an officer’s subjective motivations are relevant to an examination of whether a particular use of deadly force is “objectively reasonable.” Finally, the Note explores an alternative substantive due process standard, initially posited by Judge Henry Friendly, for reviewing police use of deadly force. Judge Friendly’s model considers several factors explicitly excluded under the objective reasonableness standard and seeks to balance law enforcement’s fundamental interest in effective crime control and officer safety with the individual’s fundamental interest in his or her own life. By changing the lens with which deadly force cases are reviewed and giving more weight to the sanctity of human life, this Note advocates for a standard of review of police use of deadly force that places the value of all human life at the forefront.

LIMITING DOWNSTREAM EFFECTS OF
PATENT LICENSING ACTIVITY IN
SOFTWARE AND ELECTRONICS:
AN ARGUMENT FOR ALIENABILITY OF
PATENT LICENSES TO LICENSEES’
BUSINESS SUCCESSORS

Anna A. Onley 361

Frustrating the ability to transfer ownership is costly, and non-creative entities (NCEs) may contribute to rising costs of innovation by contractually requiring their licensees to seek NCE consent to subsequent license transfers. One possible way of gradually limiting the reach of NCEs in this area is to expand the doctrine of patent misuse—which supports the unenforceability defense to patent infringement—to construe restraints on alienation of patent licenses as patent misuse. This narrowly tailored approach, discussed in this Note, minimizes the risk of negative impact on the patent system because it avoids the question of patent invalidity and does not seek to alter the ability of NCEs to procure patents.

FIGHTING FOR MARKET SHARE:
HOW A TRADE-AT RULE CAN
IMPROVE MARKET EFFICIENCY

Maria Zyskind 411

The last several decades have seen the stock market transform from an exchange-dominated marketplace to a fragmented arena where trading is dispersed among various locales. Gone are the days where exchanges served as the primary marketplaces for order execution. Today, many orders execute at off-exchange venues. Namely, investors can choose from thirteen exchanges, several electronic communication networks, and more than forty dark pools. This Note analyzes the impact of off-exchange trading and the implementation of a trade-at rule as a remedy for the consequences associated with off-exchange trading.

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