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## Executive Action in the Face of Congressional Inaction: Education Waivers Circumventing the Legislative Process

Courtney K. Morgan

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## EXECUTIVE ACTION IN THE FACE OF CONGRESSIONAL INACTION: EDUCATION WAIVERS CIRCUMVENTING THE LEGISLATIVE PROCESS

### I. INTRODUCTION

On January 27, 2010, President Barak Obama addressed members of Congress and the nation in his State of the Union speech regarding education reform.

[W]e need to invest in the skills and education of our people. Now, this year, we've broken through the stalemate between left and right by launching a national competition to improve our schools. And the idea here is simple: Instead of rewarding failure, we only reward success. Instead of funding the status quo, we only invest in reform—reform that raises student achievement; inspires students to excel in math and science; and turns around failing schools that steal the future of too many young Americans . . . And in this country, the success of our children cannot depend more on where they live than on their potential. When we renew the Elementary and Secondary Education Act, we will work with Congress to expand these reforms to all 50 states.<sup>1</sup>

Despite his optimistic intentions at the start of his presidency, President Obama has, so far, failed to fulfill his pledge to reform the No Child Left Behind Act, a bill passed under the Bush administration that was heavily criticized from both the political left and right. Although the Act was up for reauthorization in 2007, Congress has yet to pass any federal legislation under President Obama's leadership, as partisan lines and lack of compromise have left Congress at a standstill.<sup>2</sup> In response, the Obama administration's Secretary

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<sup>1</sup> President Barack Obama, State of the Union Address, 111th Cong., 2d Sess. (Jan. 27, 2010), *available at* <http://www.whitehouse.gov/photos-and-video/video/2010-state-union-address#transcript>.

<sup>2</sup> See No Child Left Behind Act of 2001, 20 U.S.C. § 6302 (2006); *see also* Cynthia G. Brown & Jeremy Ayers, *Education Waivers 101: Eight Questions You Should Ask About Education Waivers*, CTR. FOR AM. PROGRESS (Sept. 23, 2011), <http://www.americanprogress.org/issues/education/news/2011/09/23/10295-/education-waivers-101/> (stating that NCLB has been operating on "auto-pilot" since 2007).

of Education, Arne Duncan, has issued conditional waivers to school districts, exempting them from NCLB requirements only if a school district agrees to implement the Obama administration's educational policy.<sup>3</sup> Instead of a comprehensive law that respects the legislative process and our constitutional foundation, the overreach of the executive branch is shaping our education reform.

Part II of this paper will critique the divided political climate and education policy stalemate in Congress that currently exists, preventing the passage of federal education policy legislation. Part III will discuss the constitutional framework and statutory provisions that govern executive action in education. Part IV will evaluate President Obama's current actions in issuing waivers to various school districts, circumventing the legislative process, and Congress' subsequent reaction to such executive action. Part V will then balance constitutional concerns with practical interests.

## II. EDUCATION POLICY STALEMATE IN CONGRESS

The No Child Left Behind Act of 2001 ("NCLB"), a reauthorization of the Elementary and Secondary Education Act, was enacted by the 107th Congress and signed into law by President George W. Bush on January 8, 2002, in an effort "to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."<sup>4</sup> As a priority on President Bush's legislative agenda, NCLB was intended to increase student achievement and hold states more accountable for student progress, focusing primarily on minority students.<sup>5</sup> Specifically, NCLB required states to administer annual tests for grades three through eight in reading and mathematics in which students were to score

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<sup>3</sup> Memorandum from Emily Barbour et al., Cong. Research Serv., to House Committee on Education and the Workforce, Sec'y of Educ.'s Waiver Auth. with Respect to Title I-A Provisions Included in the Elementary and Secondary Educ. Act 4 (2011).

<sup>4</sup> 107 P.L. 110; 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 6301-7941 (2006)) (reiterating that the purpose of the Act is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.").

<sup>5</sup> *No Child Left Behind*, EDUC. WEEK, <http://www.edweek.org/ew/issues/no-child-left-behind/> (last updated Sept. 19, 2011).

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“proficient” by the 2013–2014 school year.<sup>6</sup> States were also required to track the progress of the student population as a whole, in addition to the progress of individual demographic groups, ensuring “adequate yearly progress.”<sup>7</sup> NCLB received substantial bipartisan support in Congress, with both Democrats and Republicans advocating for increased school district accountability for the education of America’s poor and minority children.<sup>8</sup>

Although NCLB received widespread support initially, it became the subject of harsh criticism from both the political left and right once it was implemented.<sup>9</sup> Once championed as legislation that would provide opportunity and advance the education of poor and minority students, NCLB was now being criticized for its “obsessive focus on test results.”<sup>10</sup> Diane Ravitch, Research Professor of Education at New York

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<sup>6</sup> 20 U.S.C. §§ 6301–7941; *see also* *No Child Left Behind*, *supra* note 5 (“If a school receiving federal Title I funding failed to meet the target two years in a row, it would be provided technical assistance and its students would be offered a choice of other public schools to attend. Students in schools that failed to make adequate progress three years in a row also were offered supplemental educational services, including private tutoring. For continued failures, a school would be subject to outside corrective measures, including possible governance changes.”); *No Child Left Behind Act*, N.Y. TIMES (last updated July 6, 2012), <http://archive.is/uQsV#> (“Schools that fail to make the required annual progress, whether overall or for subgroups, face a mounting scale of sanctions, from being required to provide tutoring to students in poor-performing schools to the threat of state takeovers or the shutting down of individual schools.”).

<sup>7</sup> *No Child Left Behind*, *supra* note 5; *see also* *No Child Left Behind Act*, *supra* note 6.

<sup>8</sup> *See* Jack Kenny, *Education Waivers Highlight Obama’s Executive Agenda*, NEW AM. (July 7, 2012, 4:30 PM), <http://www.thenewamerican.com/culture/education/item/11991-education-waivers-highlight-obamas-executive-agenda> (stating that “[t]he goal of holding schools and school districts responsible for the education of poor and minority students generated widespread, bipartisan support for the No Child Left Behind Act. . .”); *see also* Ben Feller & Kimberly Hefling, *Official: 10 States Given Waiver on No Child Left Behind Learning Laws*, NBCNEWS.COM (Feb. 9, 2012, 7:02 AM), <http://www.nbcnews.com/id/46323704/ns/politics/t/official-states-given-waiver-no-child-left-behind-learning-laws/#.URCsZ1qLwVk> (reiterating that “No Child Left Behind was primarily designed to help the nation’s poor and minority children and was passed a decade ago with widespread bipartisan support.”).

<sup>9</sup> Kenny, *supra* note 8 (also citing that conservatives opposed the program “as an unconstitutional imposition of federal authority over local and state education policies, while liberals have complained of underfunding.”).

<sup>10</sup> *No Child Left Behind Act*, *supra* note 6; *see also* CTR. ON EDUC. POLICY, STATE HIGH SCHOOL EXIT EXAMS: TRENDS IN TEST PROGRAMS, ALTERNATE PATHWAYS, AND PASS RATES 1 (2009), *available at* <http://www.cepd.org/displayDocument.cfm?DocumentID=326> (“Changes in exit exam policies over the past eight years reflect states’ struggles to develop standards and testing systems that are sufficiently demanding but also achievable and fair.”).

University, explained that “[t]he problem with using tests to make important decisions about people’s lives is that standardized tests are not precise instruments.”<sup>11</sup> Testing experts contend that test scores should be one part of a broader assessment of student achievement, including final grades, class participation, homework scores, and teacher assessments; yet NCLB does not allow this comprehensive evaluation.<sup>12</sup> Critics argue that because standardized testing and adequate yearly progress are required for a school district to avoid sanctions, the law’s rating system does not set practical goals for schools to meet.<sup>13</sup> During the 2010–2011 school year, almost half of all public schools in the country failed to meet the educational goals based on the NCLB rating system.<sup>14</sup> Further, opponents contend that NCLB has not improved the education of students. The National Assessment of Educational Progress math test results for 2009 show faster growth in student achievement in the years before NCLB when states were in full control of their education systems.<sup>15</sup>

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<sup>11</sup> DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 152 (2010); *see also* Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 *YALE L. J.* 1454, 1480 (2011).

<sup>12</sup> RAVITCH, *supra* note 11; *see also* Meteor Blades, *Jim Cummins Demolishes NCLB’s Ideology and Practice*, *DAILY KOS* (July 26, 2007, 11:49 AM), <http://www.dailykos.com/story/2007/7/26/131722/394> (quoting Jim Cummins in a speech before the California Teachers of English to Speakers of Other Languages Association on July 25, 2007, stating that NCLB “standardized tests dominate curriculum and instruction; first language literacy is discouraged and undervalued.”).

<sup>13</sup> *No Child Left Behind Act*, *supra* note 6; *see also* Kenny, *supra* note 8; Sam Dillon, *Obama To Seek Sweeping Change in “No Child” Law*, *N.Y. TIMES*, Feb. 1, 2010, at A1 (“The education law has been praised for focusing attention on achievement gaps, but it has also generated tremendous opposition, especially from educators, who contend that it sets impossible goals for students and schools and humiliates students and educators when they fall short.”), *available at* <http://www.nytimes.com/2010/02/01/education/01child.html?pagewanted=all>; *but see* WORKING GRP. ON ELL POLICY, *IMPROVING EDUCATIONAL OUTCOMES FOR ENGLISH LANGUAGE LEARNERS: RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6–7* (Mar. 26, 2010), *available at* <http://www.cal.org/topics/ell/ELL-Working-Group-ESEA.pdf> (“NCLB has fostered greater inclusion of ELLs [English Language Learners] in standards-based instruction, assessment, and accountability than did prior authorizations of ESEA. By holding schools and districts accountable for the performance of ELLs in acquiring proficiency in English and in meeting grade-level performance standards for content area achievement, the law has brought attention to both the language and academic content needs of ELLs. With this attention have come positive actions and improved outcomes for this traditionally underserved group.”).

<sup>14</sup> Kenny, *supra* note 8 (noting that in Virginia, 61% of schools were failing to meet their educational goals, and a startling 80 percent were failing in Massachusetts).

<sup>15</sup> Sam Dillon, *Sluggish Results Seen in Math Scores*, *N.Y. TIMES*, Oct. 15, 2009,

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Yet even more troubling than schools failing to meet educational goals are the numerous cheating scandals that have been exposed since the passage of NCLB.<sup>16</sup> In 2011, USA Today identified 1,610 examples of “anomalies in which public school classes—a school’s entire fifth grade, for example—boasted what analysts regard as statistically rare, perhaps suspect, gains on state tests.”<sup>17</sup> The most infamous of these cheating scandals occurred in the Atlanta public school district. On March 29, 2013, the Fulton County Grand Jury issued indictments of Atlanta Public School Superintendent Beverly Hall and 34 other educational professionals for conspiring to “either cheat, conceal cheating or retaliate against whistleblowers’ in order to boost the school district’s scores on Georgia’s Criterion-Referenced Competency Tests (CRCT).”<sup>18</sup> Opponents of NCLB, including Verdaillia Turner, president of the Georgia Federation of Teachers, blame the law for these cheating scandals, claiming that when there is “high-stakes testing, which are one-shot deals” as with NCLB, it is “unfair to children, [and] unfair to educators.”<sup>19</sup> With similar cheating schemes identified in Texas<sup>20</sup> and California,<sup>21</sup> critics of NCLB

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at A18 (“Scores increased only marginally for eighth graders and not at all for fourth graders, continuing a sluggish six-year trend of slowing achievement growth since passage of the law.”) *available at* <http://www.nytimes.com/2009/10/15/education/15math.html>; *see also* JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 10–11 (2010) (noting that by allowing states to decide the difficulty of their tests, NCLB creates a perverse incentive for states to “dumb down” their academic and proficiency standards, converting a “race to the top” to a “race to the bottom.”).

<sup>16</sup> Motoko Rich, *No Child’ Law Whittled Down by White House*, N.Y. TIMES, July 6, 2012, at A1, *available at* <http://www.nytimes.com/2012/07/06/education/no-child-left-behind-whittled-down-under-obama.html> (faulting NCLB’s focus on test results as leading to “some notorious cheating scandals.”).

<sup>17</sup> Greg Toppo, et al., *When Test Scores Seem Too Good to Believe*, USA TODAY, [http://usatoday30.usatoday.com/news/education/2011-03-06-school-testing\\_N.htm](http://usatoday30.usatoday.com/news/education/2011-03-06-school-testing_N.htm) (last updated Mar. 17, 2011, 12:44 PM) (The USA Today investigation included three to seven years of test scores from Arizona, California, Colorado, Florida, Michigan, Ohio, and Washington, D.C.).

<sup>18</sup> Ned Resnikoff, *Atlanta Cheating Scandal Puts National Education Policy on Trial*, NBCNEWS.COM (Apr. 1, 2013, 1:09 PM), <http://tv.msnbc.com/2013/04/01/atlanta-cheating-scandal-puts-national-education-policy-on-trial> (NCLB critics “argue that the Atlanta cheating scandal is not an isolated incident of criminal activity.”).

<sup>19</sup> *Id.* (quoting Interview by MSNBC with Verdaillia Turner, President, Georgia Federation of Teachers, (Apr. 1, 2013)) (noting that there was increased pressure in Georgia to obtain NCLB federal funds since the state cut education spending per student by 14.8% since 2008).

<sup>20</sup> Claudio Sanchez, *El Paso Schools Cheating Scandal: Who’s Accountable?*, NPR (Apr. 10, 2013, 5:30 PM), <http://www.npr.org/2013/04/10/176784631/el-paso-schools-cheating-scandal-probes-officials-accountability> (noting that Lorenzo Garcia

have increasing evidence that the law fails to serve its purpose of improving the education of poor and minority students.

Despite the overwhelming criticism of NCLB, little action has been taken by Congress to rectify its weaknesses. In 2007, the act was up for reauthorization, with President Bush supporting the continuation of the law, stating that one of his “top priorities . . . will be the reauthorization and the strengthening of the No Child Left Behind Act.”<sup>22</sup> The Bush administration intended to improve the law by proposing funding for a new program to bring math and science professionals into the classroom, providing parents of children in struggling schools with information of transfer options, and setting higher standards of high school achievement. Further, a \$1.5 billion initiative to fund more testing and a program to train over 70,000 new teachers in Advance Placement courses was established.<sup>23</sup> However, President Bush was unable to persuade Congress to undertake the reauthorization of NCLB during the last year of his presidency, as disagreements over the role of the federal government in education and harsh criticisms of the Act resulted in a partisan standstill.<sup>24</sup>

In March 2010, President Obama released his proposal to reauthorize the Elementary and Secondary Education Act entitled “A Blueprint for Reform.”<sup>25</sup> His blueprint was “not only

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was the first superintendent convicted of “fraud and reporting bogus test scores for financial gain” after changing test scores and forcing academically struggling students to drop out of Bowie High School while collecting more than \$56,000 in bonuses).

<sup>21</sup> Howard Blume, *State Strips 23 Schools of API Rankings for Cheating*, L.A. TIMES (Oct. 28, 2012), <http://articles.latimes.com/2012/oct/28/local/la-me-tests-cheating-20121029> (citing 23 schools that were stripped of a key state ranking by state officials for “cheating, other misconduct or mistakes in administering the standardized tests given last spring.”).

<sup>22</sup> See Press Release, Office of the White House Press Sec’y, President Bush Discusses No Child Left Behind (Oct. 5, 2006) *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061005-6.html> (President Bush addressing Woodridge Elementary and Middle Campus in Washington, D.C.).

<sup>23</sup> See Press Release, Office of the White House Press Sec’y, Fact Sheet: The No Child Left Behind Act: Challenging Students Through High Expectations (Oct. 5, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061005-2.html> (specifying other Bush proposals to improve NCLB, including a scholarship program to allow 28,000 low income children to transfer to a private or religious school of their choice).

<sup>24</sup> See Associated Press, *Education Department Allows States to Get Waivers on No Child Tests*, FOX NEWS (Aug. 9, 2011), <http://www.foxnews.com/politics/2011/08/09/education-department-allows-states-to-get-waivers-on-no-child-tests/?test=latestnews>; see also Feller & Hefling, *supra* note 8.

<sup>25</sup> U.S. DEPT OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), *available at*

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a plan to renovate a flawed law, but also an outline for a re-envisioned federal role in education,”<sup>26</sup> focusing on

(1) Improving teacher quality and principal effectiveness to ensure that every classroom has a great teacher and every school has a great leader; (2) Providing information to families to help them evaluate and improve their children’s schools, and to educators to help them improve their students’ learning; (3) Implementing college- and career-ready standards and developing improved assessments aligned with those standards; and (4) Improving student learning and achievement in America’s lowest-performing schools by providing intensive support and effective interventions.<sup>27</sup>

President Obama’s Blueprint for Reform attempted to correct NCLB’s overemphasis on testing by eliminating the school rating system based on students’ test scores and “annual yearly progress,” and extending the 2014 proficiency deadline to 2020.<sup>28</sup> While the Blueprint restates a commitment to meet the needs of poor and minority students, including English language learners and students with disabilities, it proposes no details or strategies for school districts to implement.<sup>29</sup>

President Obama’s Blueprint for Reform changed some evident weaknesses in President Bush’s No Child Left Behind Act; however, the proposed blueprint still faced opposition in Congress and has yet to become law.<sup>30</sup> Some education scholars

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<http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>; see also *Education Department Allows States to Get Waivers on No Child Tests*, *supra* note 24 (emphasizing that President Obama waited a year into his presidency before proposing his changes to the education policy).

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*; see also *No Child Left Behind Act*, *supra* note 6 (identifying A Blueprint for Reform as “a sweeping overhaul of the law in March 2010 that would encourage states to raise academic standards, end the identification of tens of thousands of reasonably managed schools as failing and refocus energies on turning around the few thousand schools that are in the worst shape.”).

<sup>28</sup> A BLUEPRINT FOR REFORM, *supra* note 25, at 9–10; see also Salomone, *supra* note 11, at 1479.

<sup>29</sup> Salomone, *supra* note 11, at 1479 (noting that the Blueprint reiterates the Obama administration’s 2009 “Race to the Top” initiative which “placed states in competition . . . for \$4.35 billion in education stimulus funds allocated for fiscal year 2010” by inducing school districts “to create data-driven systems for training and evaluating teachers and principals, encourage the establishment of high-quality charter schools, develop plans for turning around failing schools, demonstrate statewide political consensus for proposed reforms, and adopt the national education standards” in order to qualify).

<sup>30</sup> *No Child Left Behind Act*, *supra* note 6 (noting that “teachers’ unions and some Republican lawmakers immediately signaled their dislike for pieces of the plan, complicating the administration’s job as Congress takes up the task of reworking the

argued that the Blueprint failed to provide any specifics on how to implement the changes, stating “[i]t might be easy to overstate the significance of the Blueprint; it is an extremely vague forty-one page document that neither resembles a statute nor resolves many of the particularities that an eventual statute in this realm will.”<sup>31</sup> Without specific instructions on how to implement the changes to the law, or detailed changes to NCLB in general, the Blueprint has proven to be nothing more than a theoretical idea, with no chance of actual execution.

Moreover, partisanship in Congress has prevented the passage of a sweeping federal policy in education reform. Those on the left attribute the lack of education policy legislation to the “highly partisan bills” proposed by Republicans “that would scale back federal accountability for low-performing schools and students, and even limit accountability for how states and districts use taxpayer funds.”<sup>32</sup> The Republican-majority House Committee on Education and the Workforce, led by Representative John Kline (R) from Minnesota, has proposed three bills focusing on more specific areas of education;<sup>33</sup> yet these bills have never made it to the House floor for debate or vote.<sup>34</sup> Another bill, proposed by Senator Tom Harkin (D) of Iowa, Chairman of the Senate Health, Education, Labor, and Pensions Committee, supported “state-designed accountability systems” and “flexibility for innovation on the local level,” restoring power to the states to set “college and career ready academic standards.”<sup>35</sup> Yet Secretary of Education Arne

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No Child law” and that “even if lawmakers were to adopt the plan in its broad outlines, experts said, years of work would be required to roll out the new federal policies to states and in the nation’s 15,000 school districts.”).

<sup>31</sup> Sandy Kress, Stephanie Zechmann, & J. Matthew Schmitten, Symposium, *Education Reform: When Performance Matters: The Past, Present, and Future of Consequential Accountability in Public Education*, 48 HARV. J. ON LEGIS. 185, 228 (2011).

<sup>32</sup> Brown & Ayers, *supra* note 2 (defending President Obama’s issuance of waivers to school districts, stating “[w]ith little prospect for bipartisan cooperation in sight, the Obama administration is wise to take action to ensure states, districts, and schools move forward in education reform.”).

<sup>33</sup> Sally Holland, *White House Announces Waivers for No Child Left Behind Law*, CNN.COM, Aug. 9, 2011, <http://www.cnn.com/2011/POLITICS/08/08/no.child.waivers/index.html> (specifying that these bills were “intended to streamline education programs, address charter school issues and give states and localities more flexibility in spending their federal dollars” and that only the charter school bill had bipartisan support).

<sup>34</sup> *Id.*

<sup>35</sup> U.S. Senate Committee on Health, Education, Labor, & Pensions, HELP

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Duncan argued that the Harkin-Enzi bill “compromises too much, particularly on teacher evaluations and student-achievement goals.”<sup>36</sup> Further, minority student advocates criticize the bill’s elimination of central, federal accountability, claiming that the bill “would represent ‘a significant step backward,’ returning the nation to the years before [NCLB’s] passage, when many states did a slipshod job of promoting student achievement.”<sup>37</sup>

More recently, on June 6, 2013, Representative John Kline (R) introduced another reauthorization of ESEA to the House floor, H.R. 5: Student Success Act.<sup>38</sup> On July 19, 2013, the House of Representatives voted to pass the Student Success Act with a vote of 221–207.<sup>39</sup> According to Rep. Kline, the Student Success Act “eliminates the one-size-fits-all Adequately Yearly Progress (AYP) metric and returns authority for measuring student achievement to states and school districts” while encouraging states and districts “to develop teacher evaluations systems that better gauge an educator’s influence on student learning.”<sup>40</sup> Further, the Student Success Act grants “maximum flexibility to develop effective school improvement strategies for underperforming schools.”<sup>41</sup> While the passage of this bill in the House suggests advancement towards a comprehensive federal education policy, it is highly unlikely that the Student Success Act will pass in the Senate. For one, the bill is co-sponsored by twelve

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Committee Approves Bipartisan Bill to Fix No Child Left Behind (Oct. 20, 2011), *available at* <http://www.help.senate.gov/newsroom/press-/release/?id=9b968366-140f-4b60-a568-2f6efa48877c&groups=Chair> (noting that the “bipartisan Elementary and Secondary Education Reauthorization Act passed out of committee by a bipartisan vote of 15 to 7”); *see also* Dillon, *supra* note 13.

<sup>36</sup> Sam Dillon, *Senate Panel Approves Bill That Rewrites Education Law*, N.Y. TIMES, Oct. 21, 2011, at A9; *see also* Holland, *supra* note 33 (quoting Secretary Duncan: “The law—No Child Left Behind—as it currently stands is four years overdue for being rewritten. It is far too punitive, it is far too prescriptive, lead to a dummied down of standards, lead to a narrowing of the curriculum . . . We can’t afford to have the law of the land be one that has so many perverse incentives or disincentives to the kind of progress that we want to see.”).

<sup>37</sup> Sam Dillon, *Bill Would Overhaul No Child Left Behind*, N.Y. TIMES, Oct. 11, 2011, at A9.

<sup>38</sup> H.R. 5: *Student Success Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr5> (last updated July 24, 2013).

<sup>39</sup> *Final Vote Results for Roll Call 374*, HOUSE.GOV, <http://clerk.house.gov/evs/2013/roll374.xml> (last visited March 13, 2014).

<sup>40</sup> *Education*, U.S. CONGRESSMAN JOHN KLINE, <http://kline.house.gov/issues/issue/?IssueID=109065> (last visited March 13, 2014).

<sup>41</sup> *Id.*

Republicans and passed in the House by a narrow margin without a single Democratic vote.<sup>42</sup> To pass in the Democrat-controlled Senate, the bill would need to have bipartisan support; however, that this would occur is doubtful. Critics from the political left claim the bill “does nothing to ensure that state standards are rigorous enough to make sure students graduate from school college and career ready”<sup>43</sup> and “neglects to close a well-known federal loophole that allows districts to allocate fewer dollars to high-poverty schools compared to more affluent schools.”<sup>44</sup> The National Education Association claims the Student Success Act “erodes the historical federal role in public education: targeting resources to marginalized student populations as a means of helping to ensure equity of opportunity for all students.”<sup>45</sup> While one can hope that bipartisan compromise could save this bill in the Senate, failed legislative attempts in the past of reauthorizing the ESEA suggest that the Student Success Act will not become federal law, leaving NCLB to continue to run on “auto-pilot” as it has been since 2007.<sup>46</sup>

This political climate, and the stalemate in Congress, has brought about President Obama’s practice of issuing conditional waivers of NCLB provisions to school districts. As Secretary Duncan said when he released waivers to districts in Washington and Wisconsin, “A strong, bipartisan reauthorization of the ESEA remains the best path forward in education reform, but as 26 states have now demonstrated, our

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<sup>42</sup> *Final Vote Results for Roll Call 374*, HOUSE.GOV, <http://clerk.house.gov/evs/2013/roll374.xml> (last visited March 13, 2014); *see also* <https://www.govtrack.us/congress/votes/113-2013/h374>.

<sup>43</sup> Melissa Lazarín, *The Student Success Act Is the Wrong Way Forward*, CENTER FOR AMERICAN PROGRESS (July 18, 2013), <http://www.americanprogress.org/issues/education/news/2013/07/18/70033/the-student-success-act-is-the-wrong-way-forward/> (arguing that “in pursuit of flexibility and increased local control, the House Republican bill limits federal oversight in ways that can actually undermine educational opportunities for students.”).

<sup>44</sup> *Id.* (“Federal Title I dollars are intended to narrow the funding gap between high- and low-poverty schools . . . but the ability of federal Title I dollars to equalize school funding is undermined by a common practice that allows districts to use average teacher-salary figures and teacher-student ratios in their school budget allocations, masking inequities.”).

<sup>45</sup> *No Child Left Behind Act (NCLB)-ESEA*, NATIONAL EDUCATION ASSOCIATION, <http://www.nea.org/home/-NoChildLeftBehindAct.html> (last visited March 14, 2014).

<sup>46</sup> Brown & Ayers, *supra* note 2; *see also* *Education Department Allows States to Get Waivers on No Child Tests*, *supra* note 24 (noting that “Duncan has warned that 82 percent of U.S. schools could be labeled failures next year if the law is not changed.”).

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kids can't wait any longer for Congress to act.”<sup>47</sup> With a lack of cohesion and partisan lines preventing a comprehensive federal education policy from being passed in Congress, one could argue that waivers are the only option available to the Obama administration to implement change. However, where conditional waivers bypass the legislative process fundamental to our Constitution, one must also be cautious of the legal basis for such executive action.

### III. CONSTITUTIONAL FRAMEWORK AND STATUTORY PROVISIONS

When discussing the constitutionality of President Obama's actions with regard to unilaterally issuing waivers to school districts, it is critical to examine the executive and congressional functions outlined in the Constitution. The Supreme Court has ruled that, “the President's power, if any, to issue an [executive] order must stem either from an act of Congress or from the Constitution itself.”<sup>48</sup> Article II, Section I of the Constitution states, “[t]he executive Power shall be vested in a President of the United States of America.”<sup>49</sup> Article II, Section III further establishes that the President shall “take Care that the Laws be faithfully executed.”<sup>50</sup> These provisions are the primary justifications for unilateral action by the executive. Conversely, Article I, Section I provides that, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>51</sup> Article I, Section 8 further empowers Congress “to make all laws which shall be necessary and proper.”<sup>52</sup> These constitutional underpinnings are at the heart of the current debate over education policy, as Congress argues that President Obama's actions of issuing waivers to school districts infringes on its Article I power to legislate. As Republican Senator Lindsey Graham iterates, the President is “using executive orders as a political tool—I can't work with

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<sup>47</sup> Kenny, *supra* note 8; *see also* Holland, *supra* note 33 (quoting Secretary Duncan: “We hope that this is simply a transition or bridge to fixing the law.”).

<sup>48</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>49</sup> U.S. CONST. art. II, § I.

<sup>50</sup> U.S. CONST. art. II, § III.

<sup>51</sup> U.S. CONST. art. I, § I.

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 18.

Congress so I'm going to do it myself."<sup>53</sup> Such action violates the separation of powers doctrine.

Provisions under the Elementary and Secondary Education Act (ESEA), as reauthorized by the No Child Left Behind Act of 2001, provide a statutory framework to examine executive authority to issue waivers relieving school districts of NCLB requirements. In the ESEA, Congress delegated certain powers to the Secretary of Education, one of the fifteen heads of executive departments through which the President has the ability to act.<sup>54</sup> Section 9401 of the ESEA establishes that "the Secretary [of Education] may waive any statutory or regulatory requirement of this Act . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that (1) receives funds under a program authorized by this Act . . . and (2) requests a waiver under subsection (b)."<sup>55</sup> It is worthy to note that the text of the statute, both plain and unambiguous, grants the Secretary broad, discretionary power to waive *any* requirement of NCLB.<sup>56</sup> Section 9401(c) of the ESEA does provide for restrictions on the Secretary's waiver authority; these restrictions, however, do not relate to testing requirements, which are the most commonly requested waivers by school districts.<sup>57</sup>

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<sup>53</sup> Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J., (Mar. 20, 2012, 12:31 AM), <http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html> (noting that Senator Graham "generally supports Mr. Obama's executive actions in national security but not on domestic affairs.").

<sup>54</sup> See U.S. CONST. art. II, § 2, cl. 2 (providing that the President appoints his cabinet with the advice and consent of the Senate).

<sup>55</sup> 20 U.S.C. § 7861(a) (2011); see also BARBOUR ET AL., *supra* note 3, at 1–2.

<sup>56</sup> See BARBOUR ET AL., *supra* note 3, at 1–2, 4 (noting that the Secretary's discretionary authority was affirmed when a federal court rejected a state's challenge to a denial of its waiver request in *State of Connecticut v. Spellings*); see also *State of Connecticut v. Spellings*, 453 F. Supp. 2d 459, 495 (D. Conn. 2006) (stating that "the language of the provision governing waivers grants the Secretary broad discretion to deny states' waiver requests"), *aff'd* on other grounds, *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010), cert. denied 131 S. Ct. 1471 (2011); see, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>57</sup> 20 U.S.C. § 7861(c) (2011). "The Secretary shall not waive under this section any statutory or regulatory requirements relating to (1) the allocation or distribution of funds to States, local educational agencies, or other recipients of funds under this Act [20 U.S.C. §§ 6301 et seq.]; (2) maintenance of effort; (3) comparability of services; (4) use of Federal funds to supplement, not supplant, non-Federal funds; (5) equitable participation of private school students and teachers; (6) parental participation and involvement; (7) applicable civil rights requirements; (8) the requirement for a charter school under subpart 1 of part B of title V [20 USCS §§ 7221 et seq.]; (9) the prohibi-

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ESEA section 9401(b) establishes the specific process by which a state educational agency, local educational agency, or Indian tribe can request waivers. The waiver request submitted to the Secretary of Education must meet, at a minimum, the following requirements: the waiver must (1) identify the Federal programs that will be affected by the waiver, (2) include a description of how the Federal statutory or regulatory requirements are to be waived and how waiving the requirements will improve the quality of instruction and academic achievement of students, (3) describe measurable educational goals for each school year and methods to measure annual progress, (4) explain how the waiver will help achieve these annual goals, and (5) make clear how the schools will continue to assist the same population of students served by the Federal programs for which waivers have been requested.<sup>58</sup> Waivers granted by the Secretary under Section 9401 may not be extended for longer than four years; the Secretary, however, “may extend the period . . . if the Secretary determines that (A) the waiver has been effective in enabling the State or affected recipient to carry out the activities for which the waiver was requested and the waiver has contributed to improved student achievement; and (B) the extension is in the public interest.”<sup>59</sup> Conversely, if “the Secretary determines, after notice and an opportunity for a hearing, that the performance of the State or other recipient affected by the waiver has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purposes,” the Secretary shall terminate the waiver.<sup>60</sup>

Lastly, Section 9401(g) of the ESEA requires the Secretary to publish “notice of the Secretary’s decision to grant each waiver” in the Federal Register and to “provide for the

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tions regarding (A) State aid in section 9522 [20 U.S.C. § 7902]; (B) use of funds for religious worship or instruction in section 9505 [20 U.S.C. § 7885]; and (C) activities in section 9526 [20 U.S.C. § 7906]; or (10) the selection of a school attendance area or school under subsections (a) and (b) of section 1113 [20 U.S.C. § 6313], except that the Secretary may grant a waiver to allow a school attendance area or school to participate in activities under part A of title I if the percentage of children from low-income families in the school attendance area or who attend the school is not more than 10 percentage points below the lowest percentage of those children for any school attendance area or school of the local educational agency that meets the requirements of subsections (a) and (b) of section 1113 [20 U.S.C. § 6313].”

<sup>58</sup> 20 U.S.C. § 7861(b)(1) (2011).

<sup>59</sup> 20 U.S.C. § 7861(d) (2011).

<sup>60</sup> 20 U.S.C. § 7861(f) (2011).

dissemination of the notice to State educational agencies, interested parties, including educators, parents, students, advocacy and civil rights organizations, and the public.”<sup>61</sup> Further, the Secretary of Education must submit annual reports to Congress detailing the effectiveness of granted waivers.<sup>62</sup>

The Secretary does not have the explicit authority, under Section 9401, to impose new conditions on school districts; yet, the Secretary may be able to enact new education policies by implicitly or explicitly conditioning the waiver’s approval on the school district acquiescing to new conditions.<sup>63</sup> While technically these conditions would not be required, as the school district’s compliance would be voluntary and a separate waiver request for an unconditional waiver could be submitted,<sup>64</sup> the Secretary would nonetheless be able to impose the executive branch’s education policy without the involvement or consent of Congress.<sup>65</sup> Those opposed to waivers, including Republicans in Congress and conservative think tanks, argue that the Secretary’s act of placing conditions on waivers is beyond the constitutional power of the executive.<sup>66</sup> As Senator Marco Rubio (R) from Florida expressed in a letter to Secretary Duncan regarding the President’s authority to issue waivers to school districts, “[o]ur principal concern is that the Executive branch does not possess the authority to force states into compliance with administration-backed reforms instituted through the issuance of waivers. . . .

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<sup>61</sup> 20 U.S.C. § 7861(g) (2011).

<sup>62</sup> See, e.g., U.S. DEPARTMENT OF EDUCATION, THE U.S. DEPARTMENT OF EDUCATION’S REPORT TO CONGRESS ON WAIVERS GRANTED UNDER SECTION 9401 OF THE ELEMENTARY AND SECONDARY EDUCATION ACT DURING CALENDAR YEAR 2009 (Dec. 2010), available at <http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters/2010waiverreport.pdf>; see also BARBOUR ET AL., *supra* note 3, at 6–7.

<sup>63</sup> BARBOUR ET AL., *supra* note 3, at 6–7.

<sup>64</sup> *Id.* (arguing that “a reviewing court could deem the conditional waiver to be arbitrary and capricious or in excess of the agency’s statutory authority.”).

<sup>65</sup> Kenny, *supra* note 8 (highlighting that the “profusion of waivers has raised the question of whether the Obama administration is using the procedure to bypass Congress in the legislative promise . . .”).

<sup>66</sup> Meckler, *supra* note 53 (quoting Senator Graham, saying that the President is “using executive orders as a political tool—I can’t work with Congress so I’m going to do it myself”); see also Lindsey M. Burke, *Issue Brief: No Child Left Behind Waivers: Bogus Relief, Genuine Overreach*, THE HERITAGE FOUND. (Sept. 5, 2012), [http://thf\\_media.s3.amazonaws.com/2012/pdf/ib3718.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/ib3718.pdf) (“[T]he waivers are part of a long line of executive overreach that is not limited to education, compounding a pattern of disregard for the normal legislative process.”).

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This initiative is an overstep of authority that undermines existing law, and violates the constitutional separation of powers.”<sup>67</sup> Those in favor of the Secretary granting waivers, including Democrats in Congress and liberal political organizations, counter by arguing that Section 9401 does not expressly forbid voluntary conditions on waivers and that this has been common practice.<sup>68</sup> Despite these concerns, a legal challenge to the Secretary’s broad and extensive waiver authority in federal court has yet to surface.<sup>69</sup>

### IV. PRESIDENT OBAMA’S CURRENT ACTIONS AND CONGRESS’ REACTION

With an education legislation standstill in Congress, the Obama administration’s Secretary of Education Arne Duncan has issued conditional waivers to school districts, releasing them of certain NCLB requirements. With these waivers, the Obama administration executed its own education policy agenda, conditioning waiver approval on the school district agreeing to certain provisions, thereby circumventing Congress’ involvement in policy making.<sup>70</sup> As required by Section 9401 of the ESEA, the Department of Education publishes an annual count on all waivers granted.<sup>71</sup> During the 2009 calendar year,

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<sup>67</sup> Letter from Sen. Marco Rubio to the Honorable Arne Duncan, Secretary of Education (Sept. 12, 2011), *available at* [http://www.rubio.senate.gov/public/index.cfm/files/serve?File\\_id=7c1cf499-4bfc-4db0-8a5b-5e3cc5291560](http://www.rubio.senate.gov/public/index.cfm/files/serve?File_id=7c1cf499-4bfc-4db0-8a5b-5e3cc5291560).

<sup>68</sup> Brown & Ayers, *supra* note 2; *see also* U.S. Senate Committee on Health, Education, Labor, & Pensions, Harkin Statement on President’s Announcement of NCLB Waivers (Feb. 9, 2012), *available at* <http://www.help.senate.gov/newsroom/press/release/?id=d55d4e9b-f6ab-4db3-89ab-f09fe948d483> (quoting Senator Harkin: “House Republicans seem committed to pushing forward partisan legislation that will move our schools backwards . . . . In the face of the House Republicans’ refusal to work across the aisle, President Obama has shown great leadership in taking this step to relieve some states from some of the most burdensome requirements of NCLB while ensuring that those states commit to a modernized accountability system that maintains a focus on student success.”).

<sup>69</sup> BARBOUR ET AL., *supra* note 3 (stating that “[T]here are no federal court cases that provide guidance regarding the scope of the Secretary’s waiver authority.”).

<sup>70</sup> *See No Child Left Behind Act*, *supra* note 6 (“In exchange for the education waivers, schools and districts must promise to set new targets aimed at preparing students for colleges and careers. They must also tether evaluations of teachers and schools in part to student achievement on standardized tests. The use of tests to judge teacher effectiveness is a departure from No Child Left Behind, which used test scores to rate schools and districts.”); *see also* BARBOUR ET AL., *supra* note 3.

<sup>71</sup> 20 U.S.C. § 7861(g) (2011).

Secretary Duncan issued 351 waivers.<sup>72</sup> While few waivers allowed state educational agencies to approve new schools or provide supplemental educational services,<sup>73</sup> the majority of the waivers granted to school districts directly pertained to the ESEA growth models or differentiated accountability measures.<sup>74</sup> During the 2010 calendar year, a total of 238 waivers were granted by the Department of Education under its waiver authority granted by the ESEA, with many allowing the state educational agency to redefine the “regulatory definition of ‘persistently lowest-achieving schools.’”<sup>75</sup>

While recent statistics on the issuance of waivers have yet to be reported in the Federal Register for the 2011, 2012 and 2013 calendar years, it is likely that the Obama administration plans to continue on its path of unilateral executive action in education. In September of 2011, President Obama clearly expressed his intent to relieve failing school districts of strict NCLB standards and put Congress on notice, stating “Congress hasn’t been able to do it, so I will . . . Starting today, we’ll be giving states more flexibility to meet high standards.”<sup>76</sup> At the

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<sup>72</sup> U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended,” 75 Federal Register 56834-01 (Sept. 16, 2010), available at <http://www2.ed.gov/legislation/FedRegister/other/2010-3/091610c.html>; but see U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended,” 74 Federal Register 22909-01 (May 15, 2009), available at <http://www2.ed.gov/legislation/FedRegister/other/2010-3/091610c.html> (reporting that during the 2008 calendar year the Department of Education granted a total of 51 waivers under Section 9401, signifying nearly a 600% increase in waivers issued in 2009); BARBOUR ET AL., *supra* note 3, at 3–4 (“[O]ver half of the waivers granted (196 waivers) were provided to LEAs and schools with respect to the treatment of their Title I-A funds granted under the American Recovery and Reinvestment Act (ARRA; P.L. 111-5) when calculating the amount of Title I-A funds that were required to be used to provide public school choice and supplemental educational services (SES) and when calculating their per-pupil amount for SES, as well as to waive a carryover limitation for Title I-A funds more than once every three years.”).

<sup>73</sup> BARBOUR ET AL., *supra* note 3, at 3–4.

<sup>74</sup> *Id.* at 3–4; see also 34 CFR 200.20 (detailing specific requirements regarding growth models).

<sup>75</sup> U.S. Department of Education, “Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act of 1965, as Amended; Notice,” 78 Federal Register 71410 (November 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-27/html/2013-28504.htm>.

<sup>76</sup> President Barack Obama, Office of the White House Press Secretary, Remarks by the President on No Child Left Behind Flexibility (Sept. 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/23/remarks-president-no-child-left-behind-flexibility> (“[T]hese problems have been obvious to parents and educators all over the country for years now. Despite the good intentions of some . . . Congress has

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start of the 2011–2012 school year, Secretary Arne Duncan announced that he would “unilaterally’ grant waivers from the 100% proficiency requirement for states that have adopted acceptable accountability programs and are ‘making other strides toward’ school improvement” because Congress has “failed thus far to act on reauthorization.”<sup>77</sup>

The Obama administration stayed true to its position on waivers during the 2012 year. On February 9, 2012, the administration issued waivers to ten states, relieving them of the student proficiency requirement in reading and math by 2014 “in exchange for embracing the administration’s educational agenda and its focus on accountability and teacher effectiveness.”<sup>78</sup> On May 29, 2012, eight more states were granted waivers regarding the proficiency requirement,<sup>79</sup> with five more states joining the ranks on June 29, 2012, by agreeing “to enact new standards and evaluate schools and teachers based on students’ academic progress.”<sup>80</sup> The

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not been able to fix these flaws so far. I’ve urged Congress for a while now, let’s get a bipartisan effort, let’s fix this. Congress hasn’t been able to do it. So I will. Our kids only get one shot at a decent education. They cannot afford to wait any longer . . . So starting today, we’ll be giving states more flexibility to meet high standards. Keep in mind, the change we’re making is not lowering standards; we’re saying we’re going to give you more flexibility to meet high standards.”)

<sup>77</sup> Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 71–72 (2012); see also Letter from Arne Duncan, U.S. Sec’y of Educ., to Hon. John Kline, Chairman, Comm. on Educ. & the Workforce, U.S. House of Representatives (July 6, 2011) (stating to Representative Kline that the Secretary would “waive most statutory and regulatory requirements if needed”); see also Sam Dillon, *Obama to Waive Parts of No Child Left Behind*, N.Y. TIMES (Sept. 22, 2011), [http://www.nytimes.com/2011/09/23/education-23educ.html?\\_r=0](http://www.nytimes.com/2011/09/23/education-23educ.html?_r=0) (“[U]nder the plan outlined by the White House, Secretary of Education Duncan would allow states that agree to overhaul low-performing schools and adopt more rigorous teacher evaluation systems to apply for relief from the Bush-era law’s 2014 deadline and other unpopular provisions. States that qualify for the waivers would be allowed to design their own school accountability systems.”).

<sup>78</sup> Winnie Hu, *10 States Are Given Waivers From Education Law*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/10/education/10-states-given-waivers-from-no-child-left-behind-law.html?ref=nochildleftbehindact> (detailing that Secretary Duncan said the states, including New Jersey, Massachusetts, Tennessee, Georgia, Florida, Kentucky, Indiana, Colorado, Minnesota, and Oklahoma, “had agreed to adopt standards for college and career readiness; implement new accountability systems with more flexibility in assessing student achievement; and develop evaluation and support systems based on measures to improve teacher effectiveness.”).

<sup>79</sup> Richard Perez-Pena, *Waivers for 8 More States From “No Child Left Behind,”* N.Y. TIMES (May 29, 2012), [http://www.nytimes.com/2012/05/30/education/eight-more-states-get-waiver-from-no-child-law.html?ref=nochildleftbehindact&\\_r=0](http://www.nytimes.com/2012/05/30/education/eight-more-states-get-waiver-from-no-child-law.html?ref=nochildleftbehindact&_r=0) (specifying the states included: Connecticut, Delaware, Louisiana, Maryland, New York, North Carolina, Ohio, and Rhode Island).

<sup>80</sup> Motoko Rich, *5 More States Get Waivers From Education Law Rules*, N.Y.

administration has issued waivers to “more than half the nation’s states freeing them from central provisions of the law, raising the question of whether the decade-old federal program has been essentially nullified.”<sup>81</sup> By September of 2013, 41 states, the District of Columbia, and 8 districts in California had been granted NCLB “flexibility waivers” by the U.S. Department of Education.<sup>82</sup>

## V. CONSTITUTIONALITY VERSUS PRACTICALITY

Under Section 9401 of the ESEA, “the Secretary [of Education] may waive any statutory or regulatory requirement of this chapter for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that (1) receives funds under a program authorized by this chapter; and (2) requests a waiver under subsection (b) of this section.”<sup>83</sup> While it is evident that broad, discretionary power is given to the Secretary of Education to issue waivers to *any* requirement,<sup>84</sup> the Secretary does not have the authority under Section 9401 to impose new conditions on school districts. Many argue that Section 9401 does not expressly forbid voluntary conditions on waivers and that accepting such conditional waivers has been common practice.<sup>85</sup> Yet when

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TIMES (June 29, 2012), <http://www.nytimes.com/2012/06/30/education/5-more-states-get-waivers-from-education-law-rules.html?ref=nochildleftbehindaet> (noting that “Friday’s action by the administration brings to a total of 24 the number of states that have received waivers, and applications from an additional 13 states are under review.”).

<sup>81</sup> *No Child Left Behind Act*, *supra* note 6.

<sup>82</sup> Michele McNeil, *NCLB Waiver-Renewal Process Turns Up Heat on States*, EDUC. WEEK (Sep. 10, 2013), [http://www.edweek.org/ew/articles/2013/09/11/03waiver\\_ep.h33.html?qs=nclb+waivers+issued+in+2013](http://www.edweek.org/ew/articles/2013/09/11/03waiver_ep.h33.html?qs=nclb+waivers+issued+in+2013) (“Thirty-five of those waivers were approved in the first two rounds, which means their flexibility expires at the end of the 2013–14 school year. Those 35 will be the first to go through the renewal process.”).

<sup>83</sup> 20 U.S.C. § 7861(a) (2011); *see also* BARBOUR ET AL., *supra* note 3, at 1–2.

<sup>84</sup> *See* BARBOUR ET AL., *supra* note 3, at 12 (noting that the Secretary’s discretionary authority was affirmed when a federal court rejected a state’s challenge to a denial of its waiver request in *State of Connecticut v. Spellings*); *see also* *State of Connecticut v. Spellings*, 453 F. Supp. 2d 459, 495 (D. Conn. 2006), *aff’d as modified sub nom. Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010), cert. denied 131 S. Ct. 1471 (2011) (stating that “[T]he language of the provision governing waivers grants the Secretary broad discretion to deny states’ waiver requests.”); *see, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>85</sup> *Brown & Ayers*, *supra* note 2; *see* BARBOUR ET AL., *supra* note 3, at 4 (there has not been a legal challenge to the Secretary’s broad and extensive waiver authority in federal court).

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waivers are dependent on states accepting the Obama administration's education policies,<sup>86</sup> the Secretary is imposing the federal education policy agenda on states, which is not permitted under Section 9401 of the ESEA.<sup>87</sup>

Conditional waivers raise serious questions of constitutionality as well. Article I, Section 8 of the Constitution empowers Congress "to make all laws which shall be necessary and proper."<sup>88</sup> When states and school districts are required to implement the Obama administration's education policies to receive waiver approval, Article I is violated. President Obama effectively enacts federal education policy through conditional waivers without the input of, or legislation passed by, both Houses of Congress the Constitution requires.<sup>89</sup> However, when there is no prospect of legislation passing Congress in a divided political climate, what option does the President have but to act to create some makeshift federal education policy? The NCLB Act was up for reauthorization in 2007, yet no cohesive legislation has been passed to correct its weaknesses and states repeatedly fail to make adequate yearly progress as required to avoid sanctions.<sup>90</sup>

Despite real-world practicality concerns over the continuation of the NCLB provisions, the unconstitutionality of implementing education policy through conditional waivers remains paramount. Although President Obama faces a politically divided Congress with little desire to compromise, the ability to pass legislation is Congress' authority alone

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<sup>86</sup> Hu, *supra* note 78; *see also* Perez-Pena, *supra* note 79 (specifying that the waivers were granted "in exchange for an agreement by states to meet new standards, in a longer time frame, that Arne Duncan, the education secretary, says are tougher"); Rich, *supra* note 80 (reporting these states agreed "to enact new standards and evaluate schools and teachers based on students' academic progress" in accordance with President Obama's education policy agenda).

<sup>87</sup> *See* BARBOUR ET AL., *supra* note 3, at 6 (while the Secretary is not explicitly requiring the conditions, the reality is that a waiver's approval is dependent on the state acquiescing to new conditions).

<sup>88</sup> U.S. CONST. art. I, § 8.

<sup>89</sup> *See* U.S. CONST. art. II, § 1, 3 (These provisions are the primary justifications for unilateral action by the executive); *see also* INS v. Chadha, 462 U.S. 919 (1983) (ruling that where the House takes actions that have the purpose and effect of altering legal rights, duties, or relations of persons outside of the legislative branch, bicameralism and presentment are required).

<sup>90</sup> *See* Brown & Ayers, *supra* note 2 (stating that NCLB has been operating on "auto-pilot" since 2007); *see also* Kenny, *supra* note 8 (noting that during the 2010–2011 school year, almost half of all public schools in the country failed to meet the educational goals based on the NCLB ratings system goals).

under Article I of the Constitution.<sup>91</sup> While a comprehensive policy to improve our public schools is long overdue, conditional waivers that circumvent the legislative process and put a band-aid on a continuously bleeding system are not the answer. Conditional waivers lack comprehensive education policy provisions, set a dangerous precedent for future legislation, and undermine the legislative process central to our democracy.<sup>92</sup>

## VI. CONCLUSION

It is evident that America's education system needs saving. A comprehensive education bill that respects the legislative process and our constitutional foundation is the solution. This idea may seem optimistic, unrealistic, or even delusional, as partisan politics are so strongly embedded in Congress that compromise seems a mere fantasy of another era. So, we allow President Obama to evade the political divide in Congress through executive action, as he tells us, "[w]e can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."<sup>93</sup> Yet, unilateral executive action that undermines the Constitution must be analyzed under a rigorous standard, for more is at stake than merely the issues being addressed. The issuance of conditional waivers challenges the legitimacy of government decision-making and adherence to our constitutional order.

*Courtney K. Morgan\**

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<sup>91</sup> *Id.* (arguing that "[t]o refuse to pass any piece of legislation is as much a function of legislative power as to pass it.").

<sup>92</sup> *Id.* (noting President Obama's actions in bypassing the legislative process and using executive action to "prevent drug shortages, raise fuel-efficiency standards, and cut refinancing fees for federally insured mortgages"); see also Marc Tucker, *The Feds' Education Power Grab*, L.A. TIMES (Jan. 24, 2013), <http://articles.latimes.com/2013-jan/24/opinion/la-oe-tucker-nationalization-of-education-20130124> ("The denial is disturbing for what it reveals: namely, that the American education system is being reshaped in a truly fundamental way, and with little debate.").

<sup>93</sup> President Barack Obama, Office of the White House Press Secretary, American Jobs Act (Oct. 24, 2011), <http://www.whitehouse.gov/economy/jobsact>; but see Kenney, *supra* note 8 (arguing that "the refusal of either house to pass the president's agenda hardly makes the Congress 'dysfunctional.'").

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