

# An Administrative Path to Student Debt Cancellation

REPORT BY **LUKE HERRINE**

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## ABOUT THE AUTHOR

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# Executive Summary

The \$1.6 trillion student debt crisis has led to recent legislative proposals to cancel student debt. This report considers the possibility of implementing a student debt jubilee without further legislation. In particular, it argues that the Department of Education (ED) could run a debt cancellation program without further instruction from Congress, at least for the public student loans over which ED has control (Direct Loans) or could obtain control through existing legal mechanisms (FFEL and Perkins Loans).

Congress has already given ED the discretion to “compromise, waive, or release” its claims over student debtors. Further, current law prohibits courts from reviewing administrative agencies’ discretionary determinations not to enforce laws within their bailiwick unless Congress provides explicit guidance for how to do so. This report reviews the likely legal hoops that ED and other instrumentalities in the executive branch would have to jump through in order to implement a student debt jubilee without further congressional action and the potential legal and political challenges that they would face in doing so.

# Introduction

“Cancel student debt” has moved from radical slogan to serious policy proposal in the past five years; it may move from proposal to reality within the next five. An increasing number of candidates in the race for the Democratic presidential nomination have proposed canceling at least some student debt as part of their plans for reforming higher education.<sup>i</sup> Two of these proposals have taken concrete form as competing bills with sponsors in both chambers of Congress.<sup>ii</sup> Meanwhile, this past year has already seen a study on the likely macroeconomic and distributional impacts of full student debt cancellation, and two white papers from progressive think tanks analyzing various alternative approaches to cancellation.<sup>iii</sup>

Proposals to cancel large proportions of student debt poll well, and as they begin to become more accepted within the domain of legitimate debate, more politicians are likely to see benefit in supporting them.<sup>iv</sup> The most straightforward way to implement any of these varieties of student debt cancellation would be through legislation. Congress has plenary power to cancel obligations to the federal government, to authorize spending, and to determine the taxability of canceled debt. Any of the proposals currently on the table could become reality through statute without serious legal challenge. However, even as a growing number of politicians have begun to support student debt cancellation, majorities in Congress might not appear overnight. This report explores one way a President could make a student debt jubilee a reality without waiting for Congress.<sup>1</sup>

All debt cancellation proposals that have been memorialized into draft bills would run the cancellation through the Department of Education (ED). This report argues that ED could run a debt cancellation program without further instruction from Congress, at least for the public student loans over which ED has control or could obtain control through existing legal mechanisms.<sup>2</sup> Congress has already given ED the discretion to “compromise, waive, or release” its claims over student debtors. Further, current law prohibits courts from reviewing administrative agencies’ discretionary determinations not to enforce laws within their bailiwick (i.e., their “enforcement discretion” or

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<sup>1</sup> Generally, debt cancellation proposals have been paired with proposals for reducing future student debt loads by making higher education more affordable and for reducing the burden of those debt loans by reforming rules pertaining to repayment, collections, and bankruptcy. These proposals are important, but beyond the scope of this report.

<sup>2</sup> ED only has authority over public student loans, so this report only pertains to the ability to cancel public student loan debt. Whenever “student debt” is referred to below, it is shorthand for “public student loan debt.” Approximately 95 percent of student loan debt is public, and that share grows every year. As will become clear, the control that ED has over public student loans varies with the type of loan (Direct Loans are easy, FFELP and Perkins not so much), but ED has no control and—as far as the author of this report can tell—no lawful means to obtain control over private student debt.

“prosecutorial discretion,” used interchangeably in this report) unless Congress provides explicit guidance for how to do so. Congress has provided no such guidance with respect to ED’s enforcement discretion; thus, unless a federal court creates a limit not currently in the law, ED would be able to exercise its discretion without court review.

The mechanisms of administrative debt cancellation are relatively simple. To implement debt cancellation, ED would issue an order waiving/releasing the obligations to repay borrowers’ loans, or whatever portion of their loans the President has decided to cancel. It would then send notifications to the borrowers that some or all of their debts had been canceled. For the approximately 20 percent of public loans held by non-governmental parties (those issued under the now-defunct Federal Family Education Loan and Perkins Loan Program), ED would have to take additional steps to induce the holders of those loans to transfer them to ED before ED could cancel them.

Although ED has most of the responsibility for administrative loan cancellation, it would have to coordinate with other federal agencies. Because of limitations ED imposed on itself via regulation, ED would do best to issue this order jointly with the Department of Justice (ED could also repeal these regulations if necessary). Because cancellation of indebtedness sometimes counts as taxable income under current law, ED would do best to issue this order only after obtaining confirmation from the Internal Revenue Service that any such cancellation would *not* be counted as part of gross income. Because current executive branch policy—under so-called “Administrative PAYGO”—might arguably require ED to “offset” the foregone revenue from debt cancellation by cutting other expenditures, ED would do best to issue this order only after the Office of Management and Budget either eliminates Administrative PAYGO (as it ought to) or clarifies that the policy would not apply to student debt cancellation. Because all of these instrumentalities of the executive branch would ideally sign off on any large-scale debt cancellation plan executed through ED’s prosecutorial discretion, the White House would do best to centrally coordinate the policy.

## **ED can cancel student debts owed to it on a class-wide basis without court review.**

The remainder of this report lays out the basic argument that ED can cancel student debts owed to it on a class-wide basis without court review and reviews the legal hoops that ED and other instrumentalities in the executive branch would have to jump through in order to implement a student debt jubilee without further congressional action.

# The Department of Education's Discretion to Cancel Debt

## What the Higher Education Act Says

The Higher Education Act (HEA) grants ED the authority to “compromise, waive, or release” any claims it has against student debtors. This settlement authority<sup>3</sup> has existed since Congress first created student loans. The first student loans were created with the National Defense Education Act of 1958. The NDEA gave the Commissioner of Education (then the head of a division of the Department of Health, Education, and Welfare)<sup>4</sup> the “power to agree to modification of agreements or loans made under this title and to compromise, waive, or release any right, title, claim or demand, however arising or acquired under” the National Defense Education Loan (NDEL) program.<sup>v</sup>

On their own terms, the powers articulated in the NDEA are about as broad as can be. “Compromise,” “waive,” and “release” all refer to a legal person’s discretion to decide not to pursue the full extent of her legal rights (or potential legal rights) against another party. Whereas “compromise” indicates situations in which a (potential) litigant settles a potential legal claim subject to an agreement with the person(s) against whom she has a claim, “waive” and “release” both indicate a unilateral decision to give up a (potential) legal claim, regardless of the reason why.<sup>vi</sup> Thus, the Secretary of Education—or her delegate—has the ability to cancel or write down claims against student debtors either unilaterally or in exchange for something else, apparently for any reason or for no reason.

Over time, the NDEL program became part of—and was then replaced by—the Perkins Loan program. Although no new Perkins Loans have been issued since 2015, the Secretary of Education still has the authority to “enforce, pay, compromise, waive, or release any right, title, claim or demand, however arising” with respect to Perkins Loans still outstanding.<sup>vii</sup> These loans currently make up only half a percent of outstanding federal student loan debt.

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<sup>3</sup> This report refers to statutory grants of the power to compromise, waive, negotiate, or otherwise settle a claim as “settlement authority” to differentiate them from “prosecutorial discretion” (or “enforcement discretion”) more broadly, though grants of settlement authority are in fact grants of the ability to exercise prosecutorial discretion.

<sup>4</sup> The Secretary of Education inherited all the powers of the Commissioner of Education when the Department of Health, Education, and Welfare split into the Department of Education and the Department of Health and Human Services in 1979. See Pub. L. No. 96-88, § 301(a), 93 Stat. 668, 677 (Oct. 18, 1979).

The Higher Education Act of 1965 created the first permanent student loans (NDEL was conceived as a temporary program as a rapid response to the launch of Sputnik) under the Federal Family Education Law Program (FFELP). FFELP was a program that guaranteed loans issued by private financial institutions so long as they complied with government regulations. In creating this program, the HEA gave ED the authority to “compromise, waive, or release any right, title, claim, lien, or demand, however acquired” under FFELP.<sup>viii</sup> No new FFELP loans have been issued since 2010, but they still account for around 16 percent of outstanding public student loan debt (measured in dollars).<sup>5</sup>

The remaining 83.5 percent of federal student loans were issued under the Direct Loan Program, initially created as a pilot in 1992. The HEA amendments that created them do not explicitly mention anything about the Secretary’s powers to compromise, waive, or release its claims to them, and subsequent amendments have not clarified the matter.<sup>ix</sup> However, those amendments do make Direct Loans subject to “the same terms, conditions, and benefits as [FFELP Loans].”<sup>x</sup> ED has previously asserted, without challenge, that this clause includes its authority to compromise, waive, or release claims.<sup>xi</sup>

These grants of settlement authority contain no guidance for how the authority can or cannot be used. The only explicit limits that Congress has placed on ED’s discretion are nominal. Section 433(a) of the Higher Education Opportunity Act of 2008 reads as follows: “The Secretary may not enter into any settlement of any claim [under FFEL or Perkins, or by implication, Direct Loans] that exceeds \$1,000,000 unless (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General; and (2) the Attorney General responds to such request.”<sup>xii</sup> The most natural reading of this section<sup>6</sup> is as a limit on ED’s ability to exercise discretion with respect to any individual debt over \$1 million. It seems that there are at least some debtors who owe that much money, but it is not clear how many. Even for their debts, however, this section only sets a limit on the amount of discretion that ED can exercise by itself.<sup>xiii</sup> So long as ED consults with the relevant officials in the Department of Justice, this section sets no limits on the amount of discretion that can be exercised without consulting Congress.

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<sup>5</sup> This number includes all outstanding FFELP loans. Of these, 57 percent are held by private lenders, 11 percent by guaranty agencies, and 32 percent by ED itself.

<sup>6</sup> This is argued at greater length in the law review article that this report draws upon. The basic argument is that the repetition of “any” (“any settlement of any claim”) seems to separate out the individuation of the decision to settle debts from the individuation of the claims/debts being settled.

## The Higher Education Act in the Context of the Law of Prosecutorial Discretion

The grants of settlement authority in the HEA were enacted during an era in which administrative agencies' authority to exercise discretion to settle federal claims without explicit grants of statutory authority was not clearly established. Because the Attorney General's authority to settle both criminal and civil claims—her “prosecutorial discretion”—was understood to be inherent or else implicit in the Judiciary Act of 1789,<sup>xiv</sup> during this era it was standard practice for agencies without explicit grants of settlement authority to refer all potential compromises and settlements to the Department of Justice (DOJ). Apparently agencies *with* explicit grants, such as those in the HEA, did not have to take this step. Eventually, the DOJ became weary of having to approve every niggling settlement and pressed for the passage of the Federal Claims Collection Act of 1966 (FCCA). As discussed below, the FCCA (later amended as the Debt Collection Improvement Act) created a blanket grant of authority to settle claims under a certain amount subject to regulations developed jointly by the Department of Treasury (“Treasury”) and DOJ.<sup>xv</sup> The FCCA was designed to act as a backstop; agencies, like ED, with separate grants of settlement authority may simply rely on those. They neither gain nor lose power under the FCCA.<sup>xvi</sup>

However, in a 1985 case called *Heckler v. Chaney*, the Supreme Court made clear that there is nothing special about the Attorney General with respect to the discretion to decline to enforce claims of the federal government and that explicit grants of such discretion are not actually required.<sup>xvii</sup> All federal officials charged with enforcing legal obligations have discretion to decline to enforce those obligations, in whole or in part, for any reason, unless that discretion is circumscribed by statute.<sup>7</sup> The power to decline to enforce—sometimes referred to as “prosecutorial discretion” and sometimes “enforcement discretion”—need not be explicitly granted: It is implicit in the grant of the power to enforce. Of course, where there is an explicit grant of settlement authority, the language of that grant binds the agency and guides courts in reviewing (or declining to review) the actions of that agency.

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<sup>7</sup> This includes “[p]ower to release or otherwise dispose of the rights and property of the United States,” even though that power is “lodged in the Congress by [Article IV of] the Constitution.” *Royal Indemnity Co. v. U.S.*, 313 U.S. 289, 294 (1941) (citing U.S. Const. Art. IV, § 3, Cl. 2). That is because Congress can confer that power to an official in the executive branch (and confer the power to delegate it), including by giving an official the power to dispose of federal property, to enter into contracts, to settle claims, and the like. See *id.*; *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 791-92 (9th Cir. 2012).



As a general matter, prosecutorial discretion is *absolute*, meaning it can be exercised for any constitutional reason without any form of court review.<sup>8</sup> The term “prosecutorial discretion” may seem to imply a form of discretion that pertains only to the determination as to whether and how to *prosecute* a case, in the sense of bringing and managing a lawsuit. But the language should not mislead. Unless otherwise specified, prosecutorial discretion is the ability to make any decision about whether and how to pursue a legal claim (or potential legal right), including whether and when to waive that claim. Waiver of a claim can occur before it arises.<sup>9</sup> In the leading case of *Heckler v. Chaney*, the Supreme Court did not even require the federal agency in question—the Food and Drug Administration (FDA)—to *investigate* a *potential* violation of the law it was charged with enforcing.

Further, it is well established that enforcement discretion can be used to implement systematic policies that legislatures have not explicitly approved of and that even undermine explicit legislative intent. For instance, federal and state prosecutors have used their discretion to create pretrial diversion programs in which an alleged lawbreaker is given a probationary period that, if completed without violating the prosecutor’s terms, prevents the lawbreaker from being charged.<sup>xviii</sup> A growing number of prosecutors have also begun to effectively decriminalize certain actions that legislatures have criminalized, such as marijuana possession. Similarly, systematic discretion has been exercised in the civil context under the rubric of “deferred action” to indefinitely delay deportation for certain classes of immigrants, making them eligible for certain benefits (though, as discussed below, the legitimacy of deferred action is currently in limbo). In all of these circumstances, enforcement discretion is used in a quasi-legislative manner to enact prosecutors’ priorities, even if those policies are in tension with that of the law they are charged with enforcing.

It is always Congress that grants the authority to decline to enforce, even if implicitly, by granting the authority to enforce. As such, Congress can always take away or

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<sup>8</sup> This is true for all forms of prosecutorial discretion as a matter of common law read in the shadow of the Constitutional separation of powers. As it pertains to administrative agencies, 701(a)(2) of the Administrative Procedure Act (APA) enacts into statutory law the common law principle that “administrative actions committed to agency discretion by law” are unreviewable by courts. See *Heckler*, 470 U.S. at 836; *Webster*, 486 U.S. at 607-10 (Scalia, J., dissenting). For other applications of Section 701(a)(2), see, e.g., *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992); *Webster*, 486 U.S. at 599-600; *ICC v. Locomotive Engineers*, 482 U.S. 270, 282, (1987).

<sup>9</sup> In fact, this is the form in which “a waiver” is most familiar to non-lawyers. If you sign a document stating that you understand the risks of, say, a dangerous theme park ride, you are promising not to sue if you are harmed in a way that could give rise to a legal claim.

circumscribe an agency’s discretion in how an enforcement power is used. Because common law, constitutional law, and good sense all provide reason for a court to avoid policing executive branch officials’ discretion subject to its own standards, Congress must be *explicit* about whatever limits it sets. In the jargon of this area of doctrine, it must create “law to apply” in reviewing an official action, and not leave it to judges to come up with principles for how discretion ought to be exercised.<sup>xix</sup>

The HEA grants ED the authority to enforce claims against debtors, at least once ED comes into possession of their loans.<sup>10xx</sup> As discussed in the preceding section, the HEA also grants ED the power to “compromise, waive, or release” and only explicitly limits this authority by compelling ED to consult with the Attorney General in writing down individual debts of more than \$1 million, which is of no practical importance in a world where nobody has that much student debt. At least as an initial matter, then, it would seem that the HEA gives ED absolute and unreviewable discretion to cancel or write down its claims against student debtors.

## **The HEA gives ED absolute and unreviewable discretion to cancel or write down its claims against student debtors.**

### **ED’s Regulations Limiting Its Settlement Authority and How to Avoid Those Limits**

Although the HEA creates no explicit limits, ED has limited its own discretion via regulations passed in 2016. In relevant part, those regulations only allow ED to “compromise ... suspend, or terminate collection of a [FFELP, Direct, or Perkins Loan] debt in any amount” so long as it does so “under the provisions of 31 CFR part 902 or 903.”<sup>xxi</sup> The “provisions of 31 CFR part 902 or 903” are parts of the Federal Claims Collections Standards (FCCS). The FCCS were developed jointly by DOJ and Treasury to guide agencies that get their settlement authority from the FCCA. As mentioned above, because ED gets its settlement power from a statute other than the FCCA, it is under no obligation to follow the FCCS. Thus, imposing the FCCS on itself creates constraints that the HEA does not.

We need not review the details of those constraints here. That is because they do not limit ED so long as it consults with the Attorney General (or his delegate in DOJ), and

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<sup>10</sup> It does so in the same provisions that it grants the authority to “compromise, waive, or release” such claims.

presumably having a President that makes student debt cancellation a priority would ensure that that consultation would go smoothly.<sup>11</sup>

Alternatively, ED could always repeal its current regulations and replace them with regulations that simply enact the full breadth of prosecutorial discretion provided by the HEA. Doing so would require going through a time-consuming rulemaking proceeding (that would likely take over a year),<sup>12</sup> but it is perfectly permissible. Indeed, doing so would merely be to revert the regulations back to the form they took before 2016.<sup>xxii</sup>

## Wrinkles Pertaining to FFELP and Perkins Loans

The nature of ED's authority to enforce the obligation to pay student debts (and therefore to waive this obligation) depends on the type of student loan at issue. Three types of public student loans are relevant for present purposes: Direct Loans, FFELP (Federal Family Education Loan Program) Loans, and Perkins Loans. Direct Loans are owed directly to ED, but FFELP and Perkins are not. ED would have to act creatively to obtain the authority to enforce, and therefore to decline to enforce, FFELP and Perkins Loans.

ED issues Direct Loans directly, and the debtor's obligation to repay those loans runs directly to ED. Like any other agency with the power to enforce debts to the federal government, ED must "try to collect" these loans.<sup>13xxiii</sup> So ED has the power to enforce them.<sup>14</sup>

Both FFELP and Perkins Loans are at least initially directly owed to entities other than ED. FFELP Loans are issued by and initially owed to financial institutions on terms that Congress (via legislation) and ED (via regulation) dictate. ED licenses guaranty agencies to guarantee all FFELP Loans. It insures these guarantees subject to contracts with the guaranty agencies that are standardized by a combination of legislation and regulation. To minimize the amount of insurance it needs to pay out, ED is charged with ensuring that guaranty agencies ensure that loans are collected on as much as possible without violating borrowers' rights. ED can take possession of a FFELP Loan once the guaranty

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<sup>11</sup> This argument is made in more detail in an accompanying law review article. See Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. (forthcoming 2020). The basic idea is this: Both text and history pellucidly speak to the fact the FCCA was enacted and the FCCS were drafted to enable agencies to enter into relatively small settlements without having to consult DOJ, and not to constrain the DOJ's discretion if and when consulted. Thus, if ED were to consult with DOJ (assuming DOJ were on board with ED's plan), the specifics of the FCCS would continue to be irrelevant.

<sup>12</sup> It is possible ED could establish "good cause" to avoid going through a new rulemaking. See 5 U.S.C. § 553(b)(B).

<sup>13</sup> Unlike the HEA, this provision of the Debt Collection Improvement Act (DCIA) seems to *require* ED to try to collect debts owed to it. The difference is discussed further below.

<sup>14</sup> One exception is defaulted loans that have been transferred to the Treasury for tax or benefit offsets. The details of how to cancel those loans, which are covered by the DCIA, go beyond the scope of this report.

agency has paid out the guarantee to the holder (usually the lender) and ED has paid out the insurance to the guaranty agency. Usually the former assignment (when a loan is sold from one creditor to another, it is “assigned”) takes place when a debtor has been in default for many months despite the repeated efforts of the holder to extract payment, and the latter takes place when the guaranty agency cannot extract payment either. However, ED also takes possession through such double assignment when a debtor is eligible for a statutory discharge—for instance, if a debtor has died or become totally and permanently disabled. In either case, once ED takes possession, a debtor’s obligation to repay a FFELP Loan runs directly to ED.

Because FFELP Loans not in ED’s possession (approximately 68 percent of them) are not owed directly to ED, ED does not have the power to enforce the obligation to repay them.<sup>15</sup> Presumably, ED would have to take possession of FFELP Loans before it could exercise the discretion not to enforce the obligation to repay them. Doing so would not be entirely straightforward. As discussed, ED is explicitly authorized to do so when debts are in default and the guaranty agency is ready to give up on collecting them as well as when a debtor is eligible for one of a few statutory discharges. This authority relates to a small percentage of loans. (But nota bene: If many debtors began to refuse to pay in anticipation of cancellation, it would relate to a growing number.) ED also has the ability to “compromise[] any claim on, or arising because of” its insurance on the guaranty on FFELP loans.<sup>xxiv</sup> Using this authority, it might announce its plan to exercise its discretion to cancel or write down some or all FFELP loans that ultimately come within its possession and then negotiate with guaranty agencies to pay out a lump sum in exchange for assignment of the relevant debts. Debtors would have a lessened incentive to pay these debts, giving holders/lenders an incentive to sell.<sup>16</sup>

Perkins loans are issued by and initially owed to the college that the student debtor uses the loan to pay. ED provided funds to colleges participating in the Perkins Loan program and, subject to the rules created by statute, set the regulations relevant to its management. Unlike with FFELP Loans, ED does not guarantee or insure Perkins

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<sup>15</sup> Approximately \$40.1 million of FFELP Loans are in ED’s possession already (mostly because of chronic default), leaving approximately \$237 million in the hands of financial institutions or guaranty agencies.

<sup>16</sup> ED has previously gone beyond explicit grants of statutory power to incentivize a guaranty agency to assign a loan to it for cancellation. As far back as 1973, ED informed guaranty agencies that it would not pay out insurance on loans taken out to attend for-profit colleges where there was (more likely than not) consumer fraud. In such situations, the Department can determine in advance that no holder of the loan should continue to enforce it because it is not legally owed and then accept transfers from a guaranty agency. See Comment of Margaret Reiter on Notice of Proposed Rulemaking Docket ID ED-2015-OPE-0103, 7-10 (Aug. 1, 2016) (reviewing history of non-payment on non-enforceable notes, going back at least to 1973).

Loans. However, ED can take possession of Perkins Loans where such loans have “been in default despite due diligence on the part of the institution in attempting collection thereon” or where “an institution of higher education determines not to service and collect” its Perkins Loans.<sup>xxv</sup> Once ED takes possession of a Perkins Loan via assignment from a college, it must “attempt to collect” on it “until all appropriate collection efforts, as determined by the Secretary, have been expended.”<sup>xxvi</sup>

As with FFELP, it would seem that ED would have to take possession of Perkins Loans before being able to enforce them, or, as relevant here, to exercise discretion not to. The best way to do so seems to be for ED to encourage colleges to “determine[] not to service or collect” Perkins Loans anymore, which would then require them to assign the loans to ED.<sup>17xxvii</sup> Loans assigned in this way do not require ED to make any payments to colleges.<sup>18</sup> Some colleges might be willing to assign loans in this way out of the goodness of their collective heart—knowing that these loans would be canceled—or out of a desire to be rid of the responsibility of collecting on them. Collecting on Perkins Loans is hardly a major revenue generator for most colleges, so it would not be much of a sacrifice. ED could also offer some sort of incentive (regulatory relief of some sort, for example) as part of a compromise with colleges.

Alternatively, for colleges that would be inclined to write down at least some of a debt, ED might exercise its authority to “consent to modification” of the terms of a Perkins Loan and/or to “waive any ... claim” to enable colleges to do so without penalty.<sup>xxviii</sup> Doing so would not require ED to take possession of the debt or to exercise its authority to compromise, waive, or release a claim against student debtors. It would only require cooperation with colleges who were on board with debt cancellation.

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<sup>17</sup> The HEA also enables ED to authorize colleges to directly compromise with student debtors, but only if the compromise results in the debtor paying a lump sum amounting to at least 90 percent of the principal and all of the interest and fees.

<sup>18</sup> Indeed, any amount ED collects on such a loan assigned in this way must be distributed to colleges other than the assignor.

# Coordinating Within the Executive Branch

Carrying out a jubilee through ED would be difficult to do without coordination across the executive branch. In addition to the fact (discussed above) that DOJ would have to be consulted in order to comply with ED's current regulations, the Office of Management and Budget (OMB) would ideally approve of the revenue loss, and Treasury would ideally confirm that the debt canceled would not count as taxable income. Unlike DOJ approval, neither OMB nor Treasury approval seems strictly required, but failure of coordination would at the least result in a messy intra-branch fight that would slow down or nullify efforts at cancellation. Likely the White House would have to take charge, convening the relevant officials from each agency to develop a plan, then either writing out a formal executive order to carry it out or informally instructing each agency to do so. The White House could then ensure that communication lines are open as the plan is carried out.

## Budgetary Impact and Approval from the OMB

The OMB would have to be consulted because canceling student debt has an impact on the budget. Since the George W. Bush Administration, the OMB has imposed budgetary restrictions on administrative agencies under what has become known as "Administrative PAYGO."<sup>xxix</sup> The details of these restrictions are not fully public, but it is known that, at least as of the Obama Administration, they apply to any "discretionary administrative action" by an agency official—apparently including everything from new regulations to increased staffing—that "increase[s] mandatory spending" (i.e., pre-authorized congressional spending) "relative to the projection in the most recent [President's annual budget request] or Mid-Session Review of what is required, under current law, to fund the mandatory-spending program."<sup>xxx</sup> Any such increase must be presented to the OMB for approval alongside cost estimates and "one or more proposals for other administrative actions ... that would comparably reduce mandatory spending," which is to say, an "offset."<sup>xxxi</sup>

One might quibble as to whether refraining from collecting debt counts as increasing *spending*, since the two are not the same for all purposes (if they were, Congress's spending and taxing powers would be redundant). It is not clear exactly how "spending" is used in this context; the details of the rules are not public. Ultimately the OMB's interpretation would win the day, and it seems likely that an OMB skeptical of the budgetary impact of student debt cancellation would apply Administrative PAYGO to any

exercise of the settlement authority that substantially reduced ED's revenues, especially if that lack of revenue would require ED to borrow from the Treasury to maintain other parts of its budget. On the other hand, since Administrative PAYGO only applies if the OMB says it does, it could be repealed entirely (as it should be) or waived for any particular case of "spending" increases. So, unless the OMB were otherwise inclined to remove administrative PAYGO (which, again, it should be), it would have to approve of the debt cancellation plan.<sup>19</sup>

It may be worth noting that this seems to be the only budgetary restriction on debt cancellation. As the Republican Chairs of the House and Senate Budget Committees complained in a 2016 letter to the Secretary of Education, "[t]here are at present no [congressional] budget control mechanisms to limit the cost of administrative changes to student loan programs made pursuant to current law, however great the cost or departure from long-standing policy."<sup>xxxii</sup> For instance, canceling loans already held by ED would require no money to be paid out of the Treasury and, even if paying out FFELP would, Congress has already granted blanket authority for the Department to cover those costs.<sup>xxxiii</sup> The Balanced Budget and Emergency Deficit Control Act ("BBEDCA") and the Statutory Pay You Go Act ("Statutory PAYGO") would also have nothing to say about debt cancellation, since both of them only apply to congressional approval of new expenditures, and no congressional approval would be at issue. Similarly, the Appropriations Clause of the Constitution would have no bite since that clause only means "that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" and the Antideficiency Act would not be implicated because (in relevant part) it only prevents Executive Branch officials from paying out money that has not been appropriated.<sup>xxxiv</sup>

## Tax Implications and Approval from the Treasury

Treasury (whether via the Office of Tax Policy, the IRS, or both) would have to be consulted because, at least as a general rule, "cancellation of indebtedness" is treated as part of gross income for tax purposes.<sup>xxxv</sup> There are multiple overlapping and not-entirely-consistent exceptions to this general principle, several of which apply to the government's cancellation of various swaths of student debts. The most directly

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<sup>19</sup> If the OMB and/or the President insisted on a strict application of Administrative PAYGO for some reason, there would ways to design student debt cancellation or to make arguments about adjusting expected revenue (given rising default rates, for instance) that would reduce the accounting value of the budgetary impact. The potential details of those possibilities are set aside for the purposes of this report.

applicable exemption is the “general welfare exception,” which exempts any form of income from taxation if it is a government benefit “for the promotion of general welfare (that is, based on need)” and not “compensation for services.”<sup>xxxvi</sup> This exception has previously been applied to government benefits for education (especially for vocational training), although, confoundingly, the IRS treats Pell Grants as subject to the “scholarship exception” rather than the “general welfare” exception, which makes them excludable from gross income only to the extent that they cover “educational services” and *not* to the extent that they cover living expenses.<sup>xxxvii</sup>

Other exceptions—the scholarship exception itself, the disputed debt and purchase price adjustment exceptions, the avoidance of loss exception—also have some potential for application.<sup>xxxviii</sup> And there is also a broader argument, offered by Professor Richard CE Beck, that cancellation of indebtedness should only be taxed as income if it results in a “realization of gain” (i.e., an increase in liquidity with which a tax obligation could actually be paid), and if the gain would itself be taxable income.<sup>xxxix</sup> But setting aside the legal details, the most important point is that Treasury has leeway in determining whether to tax any given instance of canceled debt. Neither the Internal Revenue Code nor any tax regulations specify which types of canceled debts count as income. Courts have made some rulings about canceled debts that *can* and *cannot* be counted as income, but no court ruling or regulation creates categories of debt cancellation that *must* be counted as income. (Plus, who would challenge a Treasury ruling that resulted in less taxation?) The IRS has also issued guidance documents, but these are not binding precedent.

As such, Treasury (via the IRS) need only issue a Revenue Procedure stating that it will not treat the cancellation of student debt as income and will not require student debtors to fill out 1099s. It can do so with detailed legal reasoning making clear the exact legal justification, or it can simply summarize the relevant authorities and state its conclusion in summary fashion. In its Revenue Procedure declaring that defense to repayment discharges would not be counted as income, the IRS did the latter. It listed a number of potentially applicable reasons that at least some ex-debtors might be able to appeal to and declared that it would exclude the cancellation from income as a blanket policy to avoid getting into a “fact-intensive analysis.”<sup>xl</sup> There is no reason it could not do the same thing again.



## What a Court Challenge Might Look Like

Suppose the Executive Branch were to carry out debt cancellation using the mechanism described so far. Would a court strike it down?<sup>20</sup> It's possible, especially with a federal bench increasingly comfortable with overturning settled law granting deference to the administrative state and especially if debt cancellation were broad. But that outcome is far from assured. There's a real question as to whether anybody would have standing to bring a case, and, as already indicated, current precedent provides strong reasons to deny judicial review of administrative agencies' decisions not to enforce claims over which they have authority. Even if a court were to find cancellation reviewable, it would review the action under the arbitrary and capricious standard, which would not seem to foreclose all possible forms of debt cancellation.

A court cannot merely opine on the lawfulness of an administrative jubilee; somebody would have to sue. Under federal law, not just anybody can sue—only plaintiffs with “standing.” To have standing, a potential plaintiff has to be able to allege that they were injured by the ED's debt cancellation program and injured in a way that a court could remedy.<sup>xii</sup> A plaintiff's injury would have to be something more than not liking the program. One cannot sue merely as a “taxpayer” or as a legislator concerned about a separation of powers issue.<sup>xiii</sup> That sort of generalized injury must be remedied through the “political” branches (i.e., by voting and putting pressure on elected and appointed officials), not the judiciary.

Who else would have a reason to sue? Perhaps a student debtor who did not qualify for the cancellation program, whether because she paid her debt already or because she did not qualify for whatever conditions ED used. But her “injury” would be having to pay a debt that the law requires her to pay—and it is not clear that that counts as an injury at all, let alone one that a court could remedy. Her interest in other debtors' cancellations is the same as anybody else's: They got a benefit that she did not. A more likely plaintiff would be a servicer or guaranty agency suffering from lost profits or even bankruptcy. But guaranty agencies would be paid according to the HEA under the above plan, so it is hard to see how they could claim injury. And it is not clear that servicers have any right to collect debts that ED determines should not be collected. A state government or

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<sup>20</sup> To keep things simple, preemptive and ex post review are treated as equivalent, though of course there would be a separate legal question as to whether preemptive review would be possible and the practical difference between preventing and reversing debt cancellation would be significant.

instrumentality of a state government might also sue if they could show that a student debt jubilee would have an impact on their budgets—whether via increased burden on their student grant/loan systems or otherwise.

More details of a scenario would have to be adduced to go more deeply into the analysis. For now, the point is only that standing should not simply be assumed.

But suppose a proper plaintiff could be found. The court would have to determine whether the HEA's text and structure creates "law to apply" of sufficient specificity that it rebuts the presumption that a court should defer to an exercise of discretion. When does a statute create "law to apply"? There is no established standard. The case law does provide some hints, though. The basic principle might be summarized as follows: The more an exercise of discretion is in tension with the statutory text or scheme an official is charged with administering, the more likely a court is to intervene. Judging whether this tension has reached a breaking point is not an exact science and is likely to be colored by a judge's views on the separation of powers, on statutory interpretation, and on substantive matters that the official is empowered to administer. The more specific a statute is about how enforcement should work, the more likely there is to be a tension. The broader the impact of an exercise of discretion, the more likely a court is to scrutinize it, on the principle that Congress should be presumed not to "hide elephants in mouseholes" (that is, when Congress wants to give an agency the power to make big changes in society, it should do so clearly rather than backhandedly).<sup>xliii</sup>

In the case of the HEA, the basic tension is that ED seems to have unlimited authority to write down student debts while also having a responsibility to collect as many debts as possible. The statute explicitly grants ED the authority to "compromise, waive, or release" any of its claims relating to student debt, without conditioning that authority on anything or creating any guidelines or processes for the exercise of enforcement discretion. At the same time, administrative agencies that manage claims of the government have the duty to "try to collect" on them, and the HEA both explicitly and implicitly requires ED to manage the student loan portfolio in a manner that maximizes collection without violating debtors' rights.<sup>xliiv</sup> One might also point out that the production and reproduction of a student *loan* program rather than (or, actually, in addition to) a student *grant* program implicitly requires the agency administering that program to take the legal actions necessary to ensure students repay.

Viewed from one angle, any discretionary form of debt cancellation undermines the (mostly implicit) responsibility to enforce debtors' legal obligations and maximize collections. The potential exception is any time the debts canceled are those that would have cost more than the revenue they generated.

In fact, this seems to be as far as ED has gone in exercising its own discretion. As far as can be discerned from the thin public record, ED only exercises its prosecutorial discretion with respect to what might be called "hopeless" debts: those that have been in chronic default despite repeated attempts to collect and for which future attempts would seem to be futile.<sup>xiv</sup> At least part of its reasoning is that only hopeless debts came into its possession under FFELP (or Perkins, but let us set those aside for simplicity), and, because Congress did not create a separate grant of the power to compromise, waive, or release claims for Direct Loans, it only has as much authority to exercise enforcement discretion with respect to Direct Loans as it has with respect to FFELP.<sup>xvi</sup> This reasoning is seriously flawed. As we have already discussed, ED can come into possession of non-hopeless FFELP Loans, both when it is exercising a mandatory statutory discharge authority and when it compromises a claim with a guaranty agency. Moreover, even if ED only could take possession of hopeless FFELP Loans, ED always already has possession of Direct Loans, whether they are hopeless or in good standing or anything in between. That Direct Loans are subject to the "same terms, conditions, and benefits" as FFELP does not mean that Direct Loans are identical to FFELP—or else why would they have been created in the first place? Rather, Direct Loans are subject to the same terms, conditions, and benefits except insofar as the statute differentiates them. And if there is any difference between FFELP and Direct Loans it is the fact that a debtor's obligation to pay Direct Loans run directly to ED, unlike with FFELP Loans.

As for the broader principle that ED's discretion can *only* be exercised to minimize administrative costs, or perhaps in cases where the legality of the claim would be dubious (and thus where collection might generate costly litigation or even be ruled unlawful), is in tension with the very idea of prosecutorial discretion. That is because exercising prosecutorial discretion not to enforce a law or to enforce a law to less than its full extent is nearly *always* in tension with the duty to enforce that law. A decision not to prosecute can be based on a judgment about the probability of winning the case given a defendant's potential defenses or the adequacy of the evidence, but it can also be based on a judgment about the wisdom of prosecuting given the likely cost of doing so, the likely public backlash, or even a determination of the morality of enforcing the law in the

case at hand. The point is that it is the Executive and not the Judiciary that is charged with exercising this judgment unless Congress explicitly takes it away. Congress's creation of ways to get out of an obligation is not an explicit denial of prosecutorial discretion to let somebody out of an obligation for other reasons.

The Supreme Court was quite explicit about all of this in *Heckler v. Chaney*. It pointed out that enforcement decisions involve "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise."<sup>xlvii</sup> It determined that, even though the Food Drug and Cosmetics Act (FDCA) stated that violators "shall be imprisoned ... or fined," this language did not by itself require the FDA even to begin investigations to determine whether to imprison or fine drugmakers who were in flagrant violation of the FDCA.<sup>xlviii</sup> As mentioned above, the Court concluded as much even though the statute enabled discretionary non-enforcement only in the case of "minor violations."<sup>xlix</sup> In coming to these conclusions, it recognized that an agency could take into account any number of factors, whether envisioned by the statute or otherwise. It also observed that when non-enforcement is at issue, the court is not called on to intervene to protect an agency from broadening its powers at the expense of individual rights (even though requiring the agency to intervene in this case would have immediately delayed the execution of hundreds of people!).

All of which militates against reviewability except in cases presenting constitutional difficulties. Any "law to apply" in devising a standard of review would have to be created by a court, balancing the tension between the general duty to enforce debts and the discretion not to enforce them a court would be willing to tolerate. Nevertheless, judges can be creative, and there may be portions of law arguably on point that this report fails to account for. A skeptical court, in other words, might find a way to strike down at least some debt cancellation.

One possibility worth noting briefly is that a court could find that an expansive debt collection program is not *really* an exercise of prosecutorial discretion and thus is not "committed to agency discretion by law," which would make it a run-of-the-mill agency action subject to judicial review under the Administrative Procedure Act (APA).<sup>l</sup> A divided Fifth Circuit reasoned along similar lines in striking down the Obama Administration's Deferred Action for Parents of Americans ("DAPA") program.<sup>li</sup> A tie vote at the (short-staffed) Supreme Court resulted in an affirmance-by-default.<sup>lii</sup> The specific reasoning in the Fifth Circuit's majority decision is likely not directly applicable (and it has serious flaws), but the decision points to the possibility of a skeptical or ideologically motivated

court finding a way to get past the deference that current law seems to require. Supposing a court were to do so, it would then be required to “hold unlawful and set aside agency action” if it is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction.”<sup>21</sup> A full analysis of how the APA might apply to different forms of student debt cancellation undertaken under ED’s settlement authority cannot be undertaken in this report.<sup>21</sup> For presents purposes, it suffices to say that ED would have the easiest time justifying a form of settlement that could be portrayed as an extension of its other cancellation authorities (e.g. by cancelling the debts of all for-profit college students from a given set of years in which there is reason to believe that fraud was widespread in the industry, as an anticipation of potential future “defenses to repayment” by such students) or of its obligation to collect (e.g. by adjusting its cost-benefit analysis of continuing to collect on debts for which long-term default is likely to increase the estimated cost of collecting and/or reduce the estimated revenue earned).

**Current law is substantially on the side of deference to ED, and there is ample room for discretionary cancellation even without such deference.**

In any case, the lack of a determinate answer in existing law should be seen as an opportunity, not an obstacle. Current law is substantially on the side of deference to ED, and there is ample room for discretionary cancellation even without such deference. A contrary court ruling would possibly result in damages and would surely result in some debtors having debts reinstated (or having cancellation enjoined ex ante), but the depth of hostility is impossible to know until the battlefield is tested.

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<sup>21</sup> Again, a forthcoming law review article will provide more detail.

## What if Congress Were Hostile?

One of the major reasons that courts defer to exercises of agency discretion is that, so long as no individual rights or clear statutory commands are violated, it is up to the “political process” to police the discretion of executive branch officials. One way this policing could happen is through congressional scrutiny. Congress may have granted ED broad prosecutorial discretion, but it could always take it away. However, doing so would not be easy. It would require new legislation. And new legislation would require majorities of both chambers of Congress. If a President were committed to vetoing such legislation—as a President committed to debt cancellation through use of ED’s discretion would surely be—it would require supermajorities in both chambers. In other words, it would require a long drawn-out fight and disciplined vote-whipping. It would be a massive expenditure of political capital on an issue that is likely to be unpopular, given the large and growing popularity of student debt cancellation. Especially given the difficulty of commanding a supermajority of the Senate on any issue of major political importance in recent years, it thus seems unlikely that even a relatively hostile Congress would step in to prevent ED from using its discretion to cancel student debt.

That is not to say that members of Congress could not make life difficult for ED or the President, by holding hearings and writing letters and the like. Doing so would raise the cost of carrying out the debt cancellation and might weaken support within the Executive Branch. And an especially hostile—but not super-majoritarian—Congress might be able to “retaliate” against the Executive (but really against students) by raising interest rates on student loans or cutting funding for some aspect of higher education in a budget bill. These types of actions seem likely to be unpopular with most voters, but it is not impossible that they would shift the political dynamics in a way that would make it harder for some officials to support a creative use of Executive power.

# Conclusion

This report has explored the possibility of carrying out a student debt cancellation program through the Department of Education without further action from Congress. It has concluded that such a program could be carried out (at least with respect to *public* student loans) through an exercise of ED's prosecutorial discretion, though the ambiguity of governing law makes it possible that a court would narrow or nullify it. Administrative student debt cancellation of any ambition would be most efficiently accomplished with a President fully committed to the project because it would require coordination across the Executive Branch as well as withstanding a court challenge and, potentially, efforts from members of Congress to undermine the plan. Accordingly, this report analyzes the coordination that would be required, as well as the potential shape of a court challenge and the sorts of efforts hostile members of Congress might undertake. It also examines the steps ED would have to take to exercise its prosecutorial discretion with respect to FFELP and Perkins Loans, which are structured such that ED does not have a direct claim against students that it could decline to enforce.

**Administrative student debt cancellation of any ambition would be most efficiently accomplished with a President fully committed to the project.**

Administrative student debt cancellation could take a number of forms, some of which would require more bureaucratic creativity and political capital than others. A President committed to relieving the burdens of student debt would be well-advised to consider converting the Department of Education's power of enforcement into the power of jubilee.

# Endnotes

- i Team Warren, "I'm Calling for Something Truly Transformational: Universal Free Public College and Cancellation of Student Loan Debt," Medium (Apr. 22, 2019), <https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f>; Bernie Sanders, "This is How We Will Cancel All Student Debt," Medium (June 24, 2019), <https://medium.com/@SenSanders/this-is-why-we-should-cancel-all-student-debt-6ea987d02ce2>; "People First Education," juliancastro.com, <https://issues.juliancastro.com/people-first-education/>; "Reducing the Opportunity Gap: Investing in HBCUs and Black Entrepreneurship," kamalaharris.org, <https://kamalaharris.org/opportunity-gap/>.
- ii Student Debt Cancellation Act of 2019, H.R. 3448, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr3448/BILLS-116hr3448ih.pdf>; Student Loan Debt Relief Act of 2019, H.R. \_\_\_\_, 116th Cong. (2019), [https://www.warren.senate.gov/imo/media/doc/Student%20Loan%20Debt%20Relief%20Act%20\(Legislative%20Text\).pdf](https://www.warren.senate.gov/imo/media/doc/Student%20Loan%20Debt%20Relief%20Act%20(Legislative%20Text).pdf).
- iii Scott Fullwiler et al., "The Macroeconomic Effects of Student Debt Cancellation" (Levy Economics Institute of Bard College, Feb. 2018), [http://www.levyinstitute.org/pubs/rpr\\_2\\_6.pdf](http://www.levyinstitute.org/pubs/rpr_2_6.pdf); Ben Miller et al., "Addressing the \$1.5 Trillion in Federal Student Loan Debt" (Center for American Progress, June 2019), <https://cdn.americanprogress.org/content/uploads/2019/06/11062131/Evaluating-Options-REPORT.pdf>; Mark Huelsman, Debt to Society: The Case for Bold, Equitable Student Loan Cancellation and Reform (Demos, June 2019), <https://www.demos.org/sites/default/files/2019-06/Debt%20to%20Society.pdf>.
- iv Annie Nova, "Elizabeth Warren's Plan to Cancel Student Debt is Popular with Voters, Survey Finds," CNBC (May 9, 2019), <https://www.cnbc.com/2019/05/09/elizabeth-warrens-plan-to-cancel-student-debt-popular-with-voters.html>.
- v National Defense Education Act, Pub. L. No. 85-864 § 209(a). ED continues to have the power to "agree to modification" of loans, see 20 U.S.C. § 1082(a)(4), and this authority might provide an alternative ground for writing down debts, even to \$0.
- vi COMPROMISE, Black's Law Dictionary (11th ed. 2019) (Westlaw); RELEASE, Black's Law Dictionary (11th ed. 2019) (Westlaw); WAIVE, Black's Law Dictionary (11th ed. 2019) (Westlaw).
- vii 20 U.S.C. § 1087hh(2).
- viii The Higher Education Act of 1965, Pub. L. No. 89-329, § 432(a)(5), (6), 79 Stat. 1219, 1246 (1965), codified at 20 U.S.C. § 1082(a)(5), (6).
- ix See Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 572 (Jul. 23, 1992); 20 U.S.C. § 1087a et. seq.
- x 20 U.S.C. § 1087a(b)(2).
- xi See 81 Fed. Reg. 39330, 39368 (June 16, 2016) (discussing authority to issue regulations regarding compromise authority over Direct Loans by invoking "Section 451(b)," i.e. 20 U.S.C. § 1087a(b)). Even if ED were wrong about this, the ability to settle for less than the full amount could be taken to be implied in the ability to enforce the full amount, since prosecutorial discretion is inherent in the exercise of an enforcement power unless explicitly limited. If not that, ED's settlement power could be traced to the Federal Claims Collection Act (FCCA), which creates a default statutory baseline of settlement authority for all executive agencies that do not have separate grants of such discretion. See 31 U.S.C. §§ 3711; Federal Claims Collection Act, P.L. 89-508 (1966); H.R. REP. NO. 89-533 at 3 (1966); Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1223-24 (1967).
- xii Pub. L. No. 110-315 § 433(a), 122 Stat. 3078 (2008), codified at 20 U.S.C. § 1082(b).
- xiii Annie Nova, "'The Fabric of America is Being Destroyed.' Why This Ex-Trump Official Says Student Debt Needs to Be Cancelled," CNBC (November 9, 2019), <https://www.cnbc.com/2019/11/03/why-this-ex-trump-official-says-student-debt-needs-to-be-cancelled.html>.
- xiv See *The Confiscation Cases*, 74 U.S. 454, 457-59 (1868); *Swift & Co. v. U.S.*, 276 U.S. 311, 331-32 (1928).
- xv On the legislative history of the FCCA, See Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1223-24 (1967); *Improvement of Procedures in Claims Settlement and Government Litigation*, 89th Cong. 23 (1966); H.R. REP. NO. 89-533 (1966).
- xvi See Federal Claims Collections Act of 1966, Pub. L. No. 89-508 § 4, 80 Stat. 308 (1966) ("Nothing in [the FCCA] shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims."); 31 C.F.R. § 900.4 ("Nothing in [the Federal Claims Collection Standards] precludes agency disposition of any claim under statutes and implementing regulations other than [the Federal Claims Collection Act]...In such cases, the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over [the FCCS]."). See also *The Government's Duty and Authority to Collect Debts Owed to It*, 2008 WL 6969346, at \*2 (providing examples of agencies that have such separate authority).
- xvii 470 U.S. 821 (1985).
- xviii Pretrial Diversion Program, The United States Department of Justice (updated April 2011), <https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program>.
- xix Heckler, 470 U.S. at 836. The importance of there being "law to apply" derived from the Court's previous decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, which found the phrase "no law to apply" in reference to grants of discretion in the legislative history of the APA. 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).
- xx 20 U.S.C. §§ 1082(a)(6) (FFELP), 1087hh(2) (Perkins), 1087a(b)(2) (Direct, by implication).
- xxi 34 C.F.R. § 30.70(e)(1).



- xxii 53 Fed. Reg. 33,424 (Aug. 30, 1988).
- xxiii 31 U.S.C. § 3711(a)(1). See also *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016); *Commonwealth v. U.S. Dept. of Ed.*, 340 F. Supp 3d 7, 16 (2018).
- xxiv 20 U.S.C. § 1082(a)(5).
- xxv 20 U.S.C. § 1087cc(a)(4), (c)(5).
- xxvi 20 U.S.C. § 1087gg(b). It is not clear if this is any different than the obligation to “try to collect” any debts owed to the federal government at 31 U.S.C. § 3711(a)(1).
- xxvii 20 U.S.C. § 1087dd(f).
- xxviii 20 U.S.C. §§ 1087hh(1), (2).
- xxix See Clinton T. Brass & Jim Monke, OMB Controls on Agency Mandatory Spending Programs: “Administrative PAYGO” and Related Issues for Congress (Congressional Research Service, 7-5700, Aug. 19 2010), <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R41375.pdf>.
- xxx Id. at 1, 3 (quoting Memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, “Budget Discipline for Agency Administrative Actions,” M-05-13, May 23, 2005, at [http://www.whitehouse.gov/omb/memoranda\\_2005/](http://www.whitehouse.gov/omb/memoranda_2005/)).
- xxxi Id. at 4 (quoting Memorandum from Joshua B. Bolten, at ¶ 1).
- xxxii Letter from Tom Price, Chairman of the House Budget Committee, and Mike Enzi, Chairman of the Senate Budget Committee, to John B. King, Secretary of Education (Jul. 14, 2016), <https://www.budget.senate.gov/imo/media/doc/EnziPriceLetter.pdf>.
- xxxiii See 20 U.S.C. § 1081 (creating an ongoing “insurance fund” to cover any costs of insuring FFELP loans and authorizing the Secretary to borrow from the Treasury as appropriate to cover costs); 2 U.S.C. § 661c(c)(1) (explicitly using “the guaranteed student loan program” as an example of the types of entitlement programs that are exempt from the usual appropriations process).
- xxxiv *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)); 31 U.S.C. § 1341(a)(1)(A).
- xxxv 26 U.S.C. § 61(a)(12).
- xxxvi Rev. Proc. 2014-35. See also *Bailey v. Commissioner*, 88 T.C. 1293, 1300 (1987).
- xxxvii See Tax Benefits for Education (IRS Publication 270, Jan. 17, 2019).
- xxxviii These possibilities are discussed in the aforementioned law review article. *Supra*.
- xxxix Richard C.E. Beck, *The Tax Treatment of Cancelled Interest and Penalties on Consumer Debt*, 53 N.Y.L. Sch. L. Rev. 1025 (2009).
- xl Rev. Proc. 2015-57, 4 (2015).
- xli See generally *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).
- xlii See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992); *Raines v. Byrd*, 521 U.S. 811 (1997).
- xliii *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001); see also *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1071 (2018); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016); *EME Homer City*, 572 U.S. at 528; *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 132 (2000).
- xliv 31 U.S.C. § 3711(a)(1). See *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) (stating in dictum that Section 3711(a)(1) gives ED “the non-discretionary mandate to collect on federal student loans.”); *Commonwealth v. U.S. Dept. of Ed.*, 340 F. Supp 3d 7, 16 (2018) (stating in dictum that “the law embodying Congressional intent appears to *require* the Department to continue collecting” student debt even when it thinks a borrower may assert a defense to repayment, citing Section 3711).
- xlv The evidence for this comes from guidance documents for guaranty and collections agencies as well as ED’s response to questions from the National Consumer Law Center in 2015. See Standardized Compromise and Write-off Procedures (Nov. 11, 1993), on file with author; U.S. Department of Education, PCA Procedures Manual: 2009 ED Collections Contract 71-73 (Sep. 2009), on file with author; Letter from Department of Education to National Consumer Law Center, on file with author.
- xlvi This reasoning has not been publicly articulated, but rather expressed to the author of this report over email by David Bergeron, former Undersecretary for Higher Education.
- xlvii Id. at 831-32. See also *Webster*, 486 U.S. at 607-10 (Scalia, J., dissenting).
- xlviii *Heckler*, 470 U.S. at 835 (emphasis added).
- xlix Id. at 837.
- I 5 U.S.C. § 704.
- li *State v. United States*, 809 F.3d 134, 177-82 (5th Cir. 2015).
- lii *U.S. v. Texas*, 136 S. Ct. 2271 (2016). This vote was taken in between Justice Scalia’s death and Justice Gorsuch’s appointment.
- liii 5 U.S.C. § 706(2)(A), (C).

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