
FEDERALISM & SEPARATION OF POWERS

DID CONGRESS REALLY GIVE THE SECRETARY OF HOMELAND SECURITY UNFETTERED DISCRETION BACK IN 1986 TO CONFER LEGAL IMMIGRANT STATUS ON WHOMEVER HE WISHES?

By John C. Eastman*

Note from the Editor:

This article is about the executive action on immigration announced by President Obama on November 20, 2014. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about immigration law, prosecutorial discretion, and the separation of powers. To this end, we offer links below to a variety of perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Ilya Somin, *Why Obama's Immigration Policy Is Constitutional*, REASON.COM, Dec. 16, 2014: <http://reason.com/archives/2014/12/16/why-obamas-immigration-policy-is-constit>
- Eric Posner, *Obama's Immigration Plan Is Perfectly Constitutional*, SLATE, Nov. 20, 2014: http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/obama_s_immigration_plan_the_constitution_allows_him_to_set_deportation.html
- Greg Sargent, *Getting Back to Basics in the Raging Debate over Deportations*, WASH. POST, Nov. 18, 2014: <http://www.washingtonpost.com/blogs/plum-line/wp/2014/11/18/getting-back-to-basics-in-the-raging-debate-over-deportations/>
- Erwin Chemerinsky & Sam Kleiner, *Obama Has the Law—and Reagan—on His Side on Immigration*, NEW REPUBLIC, Nov. 18, 2014: <http://www.newrepublic.com/article/120328/obama-immigration-executive-action-why-it-will-be-legal>
- Andrew C. McCarthy, *No, 'Prosecutorial Discretion' Does Not Justify Obama's Lawless Amnesty*, NAT'L REV., Nov. 20, 2014: <http://www.nationalreview.com/article/393094/no-prosecutorial-discretion-does-not-justify-obamas-lawless-amnesty-andrew-c-mccarthy>
- John O. McGinnis, *The President's Disregard for Constitutive Norms*, LIBRARY OF L. & LIBERTY, Nov. 25, 2014: <http://www.libertylawsite.org/2014/11/25/the-presidents-disregard-for-constitutive-norms/>
- Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE, Dec. 27, 2013: <http://fas.org/sgp/crs/misc/R42924.pdf>

There has been a lot of talk about prosecutorial discretion since November 20, 2014, when President Obama announced that he was unilaterally suspending deportation proceedings against millions of illegal immigrants. Despite the President's claim that his actions were simply "the kinds of actions taken by every single Republican president and every single Democratic President for the past half century," whether or not prosecutorial discretion can be stretched so far is actually an issue of first impression. But as serious as that issue is, it masks a much more fundamental constitutional question about executive power, for the President has not just declined to prosecute (or deport) those who have violated our nation's immigration laws. He has granted to millions of illegal immigrants a lawful status to remain in the United States as well, and with that the ability to obtain work authorization, driver's

licenses, and countless other benefits that are specifically barred to illegal immigrants by U.S. law. In other words, he has taken it upon himself to drastically re-write our immigration policy, the terms of which, by constitutional design, are expressly to be set by the Congress.

One thing should be clear, though. What the President announced on November 20, 2014 is simply a difference in degree, not a difference in kind, of the unconstitutional action his administration took back in 2012 when it announced, via a memo, the Deferred Action for Childhood Arrivals (DACA) program. The purpose of this paper is to highlight just what the DACA program (and its November 20 expansion) did, the statutory and constitutional authority the President has claimed for the actions, and the serious constitutional problems with those claims.

First, the DACA program. On June 15, 2012, in a memorandum from then-Secretary of Homeland Security Janet Napolitano to the heads of the three immigration agencies (David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP); Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services (USCIS); and John Morton, Director, U.S. Immigration and Customs Enforcement

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who are cooperating with law enforcement's investigation or prosecution of the trafficking crimes. Beyond these carefully delineated exceptions, there is no authority in this statute for the Attorney General, the Secretary of Homeland Security, the President, or any other executive official to grant authorization for legal status.

Section 1324a, which deals with employment of illegal immigrants, is the final authority cited in the regulation. Like Section 1101, it provides for certain authorizations by way of exemption from the general rule that employing an unauthorized alien is illegal. Section (a)(1) specifically makes it unlawful to hire "an unauthorized alien (as defined in subsection (h)(3) of this section)." Subsection (h)(3) in turn defines "unauthorized alien" as any alien who is not "lawfully admitted for permanent residence" (that would be all those carefully wrought exemptions in Section 1101(a)(15), such as the "T" visa) or an alien "authorized to be so employed by this chapter or by the Attorney General." (emphasis added). That last phrase, "or by the Attorney General" (and by extension the Secretary of Homeland Security, because of another statute transferring immigration duties from the Attorney General to the Secretary), is the only statutory hook anyone defending the President's actions in numerous debates I have had since the Napolitano memo was issued could point to. That is a pretty slim reed for all of the heavy lifting necessary to accept the President's assertion of complete discretion not only to decline to prosecute and/or deport illegal immigrants, but to grant them a lawful residence status and work authorization as well. Never mind that with such absolute discretion, none of the pages and pages of carefully circumscribed exemptions would be necessary. And never mind that the much more likely interpretation of that phrase is that it refers back to other specific exemptions in Section 1101 or Section 1324a that specify when the Attorney General might grant a visa for temporary lawful status, such as Section 1101(a)(15)(V), which allows the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a non-immigrant visa while an application for an immigrant visa is pending. Here, then, is some text in the statute that, taken out of context and ignoring the elaborate web of requirements for eligibility for lawful status that had been carefully constructed by Congress over decades, purports to give the President, through the Attorney General, absolute discretion to ignore the lion's share of the nation's immigration laws.

And yet it is that slim reed, and that slim reed alone, which has now been confirmed as the only asserted source of authority. The same day the President announced his expansion of the DACA program to cover millions of additional illegal immigrants (November 20, 2014), the current Secretary of Homeland Security issued a memo of his own, stating: "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, *pursuant to my authority to grant such authorization reflected in section 274A(b)(3) of the Immigration and Nationality Act.*" (emphasis added) (Attachment B). As the U.S. Customs and Immigration Service explains on its website, "An individual who has received deferred action is authorized by DHS to be present in the United States, and is

therefore considered by DHS to be lawfully present during the period of deferred action is in effect." That is why hundreds of thousands of DACA applicants were deemed to have "legal status," eligible to obtain work authorization and obtain driver's licenses (which were then used to open the door to a host of other benefits available only to citizens and those with lawful permanent residence). The new program will expand that number to millions, perhaps tens of millions. And it is a far cry from the exercise of prosecutorial discretion.

The section of the immigration law that includes the brief phrase on which this entire edifice has been erected was added in 1986 as part of the Immigration Reform and Control Act. The legislative record leading to the adoption of that monumental piece of legislation is extensive, but I have located no discussion whatsoever of the clause, much less anything supporting the claim that by including that clause Congress was conferring unfettered discretion on the Attorney General to issue lawful status and work authorization to anyone illegally present in the United States he chose, contrary to the finely wrought (and hotly contested) provisions providing for such lawful status only upon meeting very strict criteria.

Moreover, if the clause does provide the Attorney General (now Homeland Security Secretary) with such unfettered discretion, Congress has been wasting its time trying to put just such an authority into law. For more than a decade illegal immigration advocates have been pushing for Congress to enact the DREAM Act, the acronym for the Development, Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orrin Hatch as Senate Bill 1291 back in 2001. The bill would give lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived). The bill or some version of it has been reintroduced in each Congress since, but has usually kicked up such a firestorm of opposition by those who view its principal provisions as an "amnesty" for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted.

But no matter. The President (or more accurately in this case, his Secretary of Homeland Security) in 2012 unilaterally gave effect to the DREAM Act as if it were law, and now has extended that "lawful" authorization to millions more. If the President already had the unilateral power to impose the DREAM Act and beyond, why all the angst in Congress for over a decade of trying to get the bill passed? Why did the President himself claim in 2011 that he had no such authority, when just a year later he claimed to have it?

This is not how our system of government is designed. Article I, Section 1 of the Constitution makes patently clear that "All legislative powers" granted to the federal government "shall be vested in" Congress, not the executive branch. And Article I, Section 8, Clause 4 makes clear that plenary power over naturalization is vested in Congress, not the President.

The Court has allowed Congress to delegate extensive regulatory authority to executive agencies, but requires that Congress provide an intelligible principle pursuant to which

the regulatory authority must be exercised. Although this important non-delegation principal has been weakened to near death by the courts over the last three-quarters of a century, the absolute and unfettered discretion that results from the President's interpretation of Section 1324a(h)(3) runs afoul of the non-delegation doctrine even in its moribund state. That cannot be the right answer under a Constitution devoted to the Rule of Law and not the raw exercise of power by men. The President's constitutional duty is to "take care that the laws be faithfully executed," not to rewrite them as he wishes, enforce them only when he wants, and otherwise render superfluous the great legislative body of the Congress, the immediate representatives of the ultimate sovereign authority in this country, "We the People."

President Obama was right about one thing when, in his November 20, 2014 speech, he stated: "Only Congress can do that." Indeed, there are few areas of constitutional authority that are more clearly vested in the Congress than determinations of immigration and naturalization policy. The Supreme Court has routinely described Congress's power in this area as "plenary," that is, an unqualified and absolute power. But the President went forward; contradicting even his own express statements over the past four years that he did not have the constitutional authority to do this.

Congress is not without constitutional checks on a president who exceeds his constitutional authority. It has the power to impeach a lawless President, for example—an important political check to constrain what is otherwise an awesomely powerful office. It also has the power of the purse, and it can use that power to prohibit the expenditure of funds for carrying out a president's dictate to extend work authorization to those not lawfully authorized to work.

Finally, there might well be viable litigation strategies. For example, lawfully authorized workers displaced by those to whom Obama has unlawfully extended work authorization have the kind of particularized injury that would give them legal standing to challenge the new policy. Workers compensation insurance carriers, too, might be able to challenge the policy, which forces them to extend coverage to those not legally able to work.

Endnotes

1 The Court subsequently ruled, however, that the claims in the case were within the exclusive jurisdiction of the Merit Systems Protection Board. *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013), available at http://www.crs.gov/analysis/legalsidebar/Documents/Crane_DenialofMotionfor-Reconsideration.pdf.

