WRITTEN STATEMENT

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"THE UNCONSTITUTIONALITY OF PRESIDENT OBAMA'S EXECUTIVE ACTIONS ON IMMIGRATION"

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, thank you for the opportunity to discuss the constitutionality of President Obama's executive actions on immigration.

I strongly support congressional deliberation of immigration reform proposals, and believe that reform is both desirable and inevitable on this subject. The objections I will voice to you regarding the President's immigration orders are based on legal *process*, not any particular political or policy *results*. What shape or form immigration reform ultimately takes is not my concern as a constitutional scholar, nor should it be to any federal judge. My concern is solely with preserving the Constitution and its architecture of separation of powers.

To be constitutional, immigration reform must come about through the normal legislative process. It cannot be accomplished by executive fiat. Specifically, I believe that both the Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) programs violate Article I, section one's declaration that "All legislative Powers . . . shall be vested in a Congress of the United States," as well as Article II, section three's concomitant duty that the President "shall take Care that the Laws be faithfully executed."

Without the separation of powers, the United States is no better than a banana republic. When a President takes upon himself the power to change existing law or do an "end run" around Congress when it will not bow down to his will, we have no democracy anymore.

Unilateral immigration reform by the President thus sets a dangerous precedent. If allowed to stand, President Obama's immigration orders will empower future Presidents to flagrantly disrespect Congress's will, bypass the process of congressional debate and compromise, and allow one person, the President, to undermine our democracy itself.

I believe President Obama's immigration orders are unconstitutional for three distinct reasons, any one of which would be a sufficient basis for a court to enjoin them as violative of separation of powers. To summarize briefly, the three unconstitutional dimensions of these executive orders are:

(1) status alteration;

(2) remedy alteration; and

(3) conferral of benefits.

When executive action combines all three of these unconstitutional aspects—as President Obama's immigration actions do—it creates a Bermuda Triangle of unconstitutionality, with a uniquely powerful gravitational force capable of destroying laws. The combination of all three unconstitutional aspects is uniquely dangerous to our republic, and must be fought with every tool available to Congress.

I will discuss each of these three unconstitutional actions separately and then proceed, in section four, to explain why President Obama's immigration orders are not properly characterized as an exercise of "prosecutorial discretion." Section V will explain how the President's executive actions on immigration also violate the Constitution's vertical separation of powers, or federalism.

I. STATUS: PRESIDENT OBAMA'S IMMIGRATION ORDERS ALTER THE LEGAL STATUS OF LARGE CATEGORIES OF ILLEGAL IMMIGRANTS

Current law declares that any alien who is "present in the United States in violation of this chapter or any other law of the United States . . . is deportable."[1] Those who enter the U.S. without proper documentation commit a crime called "improper entry by alien," which is a misdemeanor upon first offense and a felony upon a subsequent offense.[2] Because illegal entrants are "present in the United States in violation of this chapter or any other law of the United States," they are "deportable."[3]

[1] 8 U.S.C. § 1227(a)(1)(B).

[2] *Id*. at § 1325(a).

[3] *Id*. at § 1227(a)(1)(B).

Similarly, current law also states that anyone who enters this country and is "inadmissible by the law existing at such time is deportable."[4] The Immigration and Nationality Act (INA) contains a comprehensive definition of "inadmissibility," which excludes from admission to the U.S. numerous categories of individuals, including those with certain physical, mental or substance abuse ailments, criminals, suspected substance abuse traffickers or terrorists, previously removed aliens, practicing polygamists, and members of communist or other totalitarian parties.[5] In addition, one of the most common bases for "inadmissibility" under the INA is what is known as the "intending immigrant" situation, whereby an alien seeks to enter the U.S. and immigrate (remain permanently), but lacks documentation demonstrating that she has authorization to do so.[6] Because these individuals who enter the U.S. with the intent to remain are "inadmissible" aliens under the INA, they are "deportable" under the law.

Under DACA, approximately 1.1 million individuals whom Congress has deemed "deportable" under the INA are no longer deportable.[7] Specifically, DACA—which was recently expanded by the Administration—grants individuals a "deferred action" status, meaning they no longer deportable during a three-year period (the original DACA was only two years), renewable indefinitely, if they:

(1) entered the U.S. before age 16;

(2) have lived in the U.S. continuously since January 1, 2010 (the original DACA date was June 15, 2007);

(3) are of any age (removing the original DACA requirement that eligible individuals must have been born since June 15, 1981); and

(4) meet all of the other DACA paperwork and processing guidelines.[8]

Under DAPA, an additional 4 million illegal immigrants whom Congress has declared "deportable" under the INA are no longer deportable.[9] Specifically, under DAPA, individuals are granted "deferred action" status and consequently no longer deportable for a three-year period, renewable indefinitely, if they:

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[4] *Id*. at § 1227(a)(1)(A).

[5] *Id*. at § 1182.

[6] *Id*. at § 1182(a)(7)(A)(i)(I).

[7] Jens Manuel Krogstad and Ana Gonzalez-Barrera, *If Original DACA Program is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, FacTank, Pew Research Center, Dec. 5, 2014 (also revealing that of the 1.1 million estimated DACA-eligible individuals, over 700,000 have thus far applied for non-deportable status) [hereinafter Krogstad and Gonzalez-Barrera].

[8] USCIS, Dep't of Homeland Security, *Executive Actions on Immigration*, *available at* http://www.uscis.gov/immigrationaction.

[9] Krogstad and Gonzales-Barrera, *supra* note 7.

(1) are the parent of a U.S. citizen or lawful permanent resident as of November 20, 2014;

(2) have lived in the U.S. continuously since January 1, 2010;

(3) are not an enforcement priority for removal, as defined by a separate DHS memo issued November 20, 2104.[10]

In addition to DACA and DAPA, the Office of Legal Counsel (OLC) memo of November 19, 2014, reveals that the Administration has also implemented a third, broader "prioritization" policy, whereby illegal immigrants deemed "deportable" by Congress are no longer deportable unless they:

(1) pose a threat to national security, public safety or border security;

(2) have been convicted of multiple or significant misdemeanor offenses, or are apprehended and cannot establish continuous U.S. presence since January 1, 2014, or those who have significantly abused the visa or visa waiver programs; and

(3) have been issued a final order of removal on or after January 1, 2014.[11]

The first three categories of illegal immigrants—those who pose a threat to national security, public safety or border security—are identified as "highest priority" categories for removal.[12] The second and third categories are, respectively, designated "second and third priority" categories.[13] According to the OLC memo, illegal immigrants who fall outside these three priority categories are not to be deported at all.[14] Specifically, those outside these three priority categories may be deported only if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest."[15]

President Obama's executive actions have thus altered the legal status for many more illegal immigrants beyond just the DACA and DAPA populations, allowing deportation outside these three priority categories only if an ICE Field Director specifically finds that their removal would

[10] USCIS, Dep't of Homeland Security, *Executive Actions on Immigration*, *available at* http://www.uscis.gov/immigrationaction.

[11] The Dep't of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 38 Op. Off. Legal Counsel ____(Nov. 19, 2014), at 1 [hereinafter OLC Memo].

[12] *Id*. at 8.

[13] *Id*. at 8-9.

[14] Indeed, OLC makes it clear that even within these three priority categories, the executive branch plans to retain "discretion" to refuse to deport if, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similar discretionary provisions would apply to aliens in the second and third priority categories." *Id.*

[15] *Id*. at 9.

serve "important federal interests"—whatever that may mean. The fact that Congress, through the INA, has classified these illegal immigrants as "deportable" is apparently not, in the view of the OLC or Obama Administration, enough to classify their removal as an "important federal interest." Indeed, it is fair to say that, pursuant to DACA, DAPA and the global "prioritization" policy, the vast bulk of individuals deemed "deportable" by the plain language of the INA are no longer deportable at all, but categorically exempted from deportation.

President Obama's various executive actions on immigration have thus had the magical effect of transforming millions of "deportable" individuals into "not deportable" individuals, for a minimum period of three years, subject to indefinite renewal at the option of the executive branch.[16] So long as these deportable individuals satisfy the criteria unilaterally created by the executive, they simply are no longer "deportable."

As President Obama stated in televised speech to the nation announcing DAPA on November 20, 2014, he was going to offer a "deal" to the individuals he decided where entitled to an exemption from the operation of existing immigration law: "You'll be able to stay in this country temporarily, without fear of deportation. You can come out of the shadows and get right with the law." These individuals can thus "get right with the law," pursuant to President Obama's executive actions, even though the actual law—the Immigration and Naturalization Act—says otherwise. How can an individual "get right with the law" when the law itself declares them to be violating the law? Is President Obama claiming the power to make law, in contradiction to Article I, section one of the Constitution?[17]

The President made these individuals' new legal status abundantly clear, telling them, "All we're saying is we are not going to deport you." These individuals are no longer deportable, although Congress has unambiguously declared them so. The President's policies thus transform a large category of aliens deemed deportable—those who've entered illegally—into two different categories, whereby some are deportable and some are not. This is a shift in kind, not merely degree.

These policies thus attempt to effectuate a change in legal status at variance with congressional will as expressed in the INA. As the Supreme Court recently reaffirmed in *Utility Air Regulatory Group v. EPA*, "Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always " 'give effect to the unambiguously expressed intent of Congress."[18] Moreover, "An agency confronting resource constraints may change its own conduct, but it cannot change the law."[19] Because the EPA had adopted a regulation contrary to the plain language of the Clean Air Act, the *UARG* Court concluded that it had violated separation of powers, declaring, "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise

[16] OLC Memo at 2.

[17] U.S. CONST. art. I, § 1 ("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.").

[18] 134 S. Ct. 2427, 2445 (U.S. 2014).

[19] *Id*. at 2446.

during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."[20] In short, the executive branch does not possess the constitutional power to act in ways that contradict congressional will; doing so is an unfaithful execution of the law that violates separation of powers.

The specious argument that this legal status alternation is somehow justified as an exercise of "prosecutorial discretion" will be addressed extensively in section IV.

II. REMEDY: PRESIDENT OBAMA'S IMMIGRATION ORDERS PROVIDE LARGE CATEGORIES OF ILLEGAL IMMIGRANTS A REMEDY—DEFERRED ACTION—THAT HAS NOT BEEN AUTHORIZED BY CONGRESS

President Obama's immigration policies provide a form of relief—a remedy—for a category Congress has not allowed. Specifically, the President's policies confer the remedy of "deferred action" upon populations identified solely by the executive branch, not Congress. Deferred action is not defined in the U.S. Code, but the OLC has defined it as "an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States."[21]

The OLC memo blithely lumps deferred deportation together with various other kinds of deportation relief—such as parole, temporary protected status, voluntary departure and deferred enforced departure—labeling them all permissible "forms of discretionary relief" available to immigration officials.[22] But each of these other types of relief have been specifically authorized by Congress, or—in the case of deferred enforced departure—is supported by the President's independent foreign affairs power. Indeed, the OLC memo makes this abundantly clear in footnote 5, wherein OLC catalogues the specific statutory provisions that support the use of parole, temporary protected status, and voluntary departure.[23] OLC then notes that only one of these forms of relief—deferred enforced departure—lacks a statutory basis, but then goes on to explain that this is nonetheless permissible because it "is an exercise of the President's constitutional power to conduct foreign relations."[24] Deferred enforced departure, in other words, is grounded in the President's independent Article II authority to conduct foreign relations,[25] and thus does not require any authorization from Congress.

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[20] *Id.*

[21] OLC Memo at 12 (*citing* Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 484 (1999), which in turn cites an immigration law treatise by Charles Gordon et al.). *Cf.* Deferred Action for Childhood Arrivals, USCIS, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (defining deferred action as "a use of prosecutorial discretion to defer removal action against an individual for a certain period of time.").

[22] OLC Memo at 12.

[23] *Id.* at 12 n.5.

[24] *Id.*

[25] *See* U.S. CONST. art. II, § 2-3 (specifying the power to make treaties and receive foreign diplomats).

While Congress has authorized deferred action for specific categories, it has not authorized it for those to whom President Obama wishes to extend it—namely, the DACA and DAPA beneficiaries. OLC claims this is not important because, although the President lacks statutory authorization to grant deferred action to these individuals, deferred action "has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court."[26] In support, it cites the Supreme Court decision, *Reno v. American-Arab Anti-Discrimination Committee* (1999). But the *AAADC* decision did not, in any way, endorse the power of the executive to grant deferred action.

Specifically, in *AAADC*, members of the Palestinian Liberation Front asserted that the INS's *refusal to defer* their deportation constituted discrimination—that they had been "target[ed] for deportation based on their affiliation with an unpopular group."[27] The Court disagreed, ruling that a statute Congress had recently enacted was "clearly designed to give some measure of protection to 'no deferred action' decisions" and deny adjudication of such discrimination claims.[28] Thus, *AAADC* merely acknowledged that Congress did not want federal courts getting tied up in adjudicating "discrimination" lawsuits every time immigration officials refused to grant deferred action. *AAADC* simply did not consider or endorse the legality of deferred action, and accordingly does not aid OLC's attempt to justify the legality of its DACA and DACA programs.

Deferred action is legal only when: (1) it has been explicitly authorized by Congress via statute; or alternatively, (2) it has been authorized by the executive branch in a situation consonant with congressional intent. Deferred action is not legal, however, when it is granted to a population in a situation that is contrary to congressional intent. OLC's memo on DAPA acknowledges this, concluding "any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute."[29] OLC even went further, warning that deferred action programs require "careful examination" to ensure that they do not "cross the line between executing the law and rewriting it."[30] It then concluded that "in the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the possible uses of deferred action."[31]

Given that OLC seems to agree with the notion that congressional will is controlling as to the legality of any grant of deferred action, I will now proceed to explore the prior instances in which deferred action has been either statutorily or administratively granted, and examine whether those prior instances were, in fact, consonant with congressional intent.

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[26] OLC Memo at 13.

[27] *Reno v. Arab-Am. Anti-Discrim. Comm.*, 525 U.S. 471, 472 (1999).

[28] *Id*. at 485.

[29] OLC Memo at 24.

[30] *Id*.

[31] *Id*.

A. Statutory Grants of Deferred Action

The OLC tries to justify the Administration's grant of deferred action in DACA and DAPA based upon an outlandish claim that Congress has "acquiesced" to deferred deportation, because "it has never acted to disapprove or limit the practice."[32] In support of this extraordinary claim—that a failure by Congress to enact a statute banning deferred action constitutes "acquiescence" to the executive's ability to grant it *sua sponte* whenever it wants—OLC ironically cites "several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens."[33]

OLC then proceeds to discuss three instances of explicit statutory authorization and two instances in which OLC believes Congress was "aware" of the executive branch's decision to permit deferred action. I will address the two instances of congressional "awareness" of administratively granted deferred action in the following subsection. For present purposes, I will survey the instances in which Congress has statutorily specified the availability of deferred action as a remedy.

Congress has explicitly authorized deferred action only for certain children,[34] and for certain immediate family members of either LPRs killed in the 9/11 attacks[35] or U.S. citizens killed in combat.[36] It would be absurd to assert that explicit congressional authorization for deferred action in these instances somehow implies implicit congressional authorization for deferred action in other instances. Indeed, the maxim of statutory construction, *expression unius est exclusion alterius*—the expression of one thing is the exclusion of the other—rather strongly suggests that, since Congress has expressly provided for deferred action in specific instances, courts should be loathe to imply the availability of deferred action in other instances.[37] Thus, if

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[32] *Id.* at 18.

[33] *Id.*

[34] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV).

[35] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (2001).

[36] National Defense Authorization Act of 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694 (2004). Congress has also explicitly acknowledged that some of the individuals who have lawfully been granted deferred action status may, in some states, be issued driver's licenses or other identification cards that are acceptable for federal purposes. *See* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 301, *codified at* 49 U.S.C. § 30301 note). Specifically, the REAL ID Act merely stated that, evidence of "lawful status" for issuance of ID cards could include, among other things "approved deferred action status." REAL ID Act, § 202(c)(2)(B)(viii), *available at* https://www.dhs.gov/xlibrary/assets/real-id-act-text.pdf. The fact that Congress specifically mentioned "approved deferred action status" for purposes of the REAL ID Act does not in any way suggest that Congress believes the executive branch possesses a generic power to grant deferred action status to whomever it wishes. It is far more logical to assume that this language evinces congressional recognition that deferred action is sometimes lawfully available—e.g., in the statutes where it has authorized it explicitly—and that, in such circumstances, deferred action status is indeed "lawful status" for purposes of issuing an ID card in some states.

[37] *See* Leatherman v. Tarrant Co., 508 U.S. 223 (1993) (unanimously holding that Federal Rule of Civil Procedure's heightened pleading requirement for fraud and mistake allegations should be interpreted to exclude the application of a heightened pleading standard in any other instances).

anything, the existence of statutes explicitly authorizing deferred action suggest that any administrative grant of deferred action should be presumptively unavailable, and judicially tolerated only in those instances where an administrative grant of deferred action is clearly consonant with congressional intent.

B. Administrative Grants of Deferred Action

There have been a handful of instances in which deferred action has been granted by the executive branch *sua sponte*. OLC tries to justify the legality of President Obama's deferred action grants by citing four such instances—all of which occurred since 1997—in which immigration officials have administratively granted deferred action prior to DACA in 2012:

(1) 1997 Deferred Action for Abused Spouses of U.S. citizens or LPRs (VAWA):

In 1997, Congress enacted the Violence Against Women Act of 1994 (VAWA). As part of that statute, individuals who have been abused by an LPR or US-citizen spouse are authorized to self-petition to adjust their legal status to remain in the U.S., as well as receive work authorization, even after termination of their marriage.[38] Based upon this statutory enactment, the Immigration and Naturalization Service (INS) determined that a grant of deferred action would be consistent with congressional intent.[39] Deferred action in the VAWA situation was thus an administrative "bridge" that allowed VAWA-eligible individuals to remain in the country lawfully until their status could be formally adjusted.

(2) 2001 Deferred Action for T and U Visa Applicants (VTVPA):

Beginning in 2001, the INS began granting deferred action, parole and other mechanism to prevent the removal of individuals whom Congress had decided to grant two new types of visas under the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). Specifically, pursuant to the VTVPA, "T visas" were made available to victims of human trafficking and certain family members, and "U visas" were made available to victims and certain family members of crimes specified in the statute.[40] Because these individuals had been deemed eligible for lawful status by the VTVPA, the INS granted them deferred action as a "bridge" until such time as their visas could be processed.[41] The INS and DHS subsequently promulgated regulations embodying the deferred action policy for T and U visa-eligibles.[42]

(3) 2005 Deferred Action for Foreign Students Affected by Hurricane Katrina:

[38] *See* 8 U.S.C. § 1154.

[39] *See* OLC Memo at 15 ("INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994.").

[40] *See* 8 U.S.C. § §1101(a)(15)(T), 1101(a)(15)(U).

[41] *See* OLC Memo at 15-16.

[42] *Id*. at 16 (citing 8 C.F.R. §§ 214.11(k)(1), -(k)(4), and -(m)(2)).

After Hurricane Katrina devastated large portions of the Gulf coast in 2005, several thousand foreign students, who possessed F-1 student visas, became temporarily unable to complete the "full course of study" requirement of those visas, when the schools they were attending were forced to close for extended periods of time. Consequently, DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina."[43]

Once again, the executive branch's decision to defer action against the students affected by Hurricane Katrina was a temporary "bridge," allowing them to remain lawfully in the U.S. until their schools could reopen. These students' presence in the U.S. was initially lawful, and their legal entitlement to an F-1 student visa undoubtedly evinced a congressional desire that they be permitted to remain in the U.S. until they could resume their course of study. The intervention of an unforeseeable Act of God made it impossible to continue, and the grant of deferred action for these individuals in no way undermined congressional intent.

(4) 2009 Deferred Action for Widows/Widowers of U.S. Citizens:

In 2009, DHS officials granted deferred action to a group of individuals in a much more aggressive manner than the three prior instances elaborated above. Specifically, they announced the availability of deferred action for certain widows and widowers of U.S. citizens whose citizen-spouse had died prior to the expiration of two years of marriage.[44] Under the then-existing provision of the INA, individuals were not permitted to adjust to legal status based upon a marriage that had not lasted at least two years.[45]

I say this 2009 use of deferred action is "much more aggressive" than prior instances because unlike those prior instances, in which deferred action served as a temporary "bridge" to effectuate congressional intent, the executive branch's decision to grant deferred action for these widows/widowers was *inconsistent with the existing law*, which required a minimum two-year marriage before status could be adjusted.

Despite the shady legal underpinnings of the 2009 widow/widower executive action, its legality was never tested. And it never will be tested, because several months after DHS announced it, Congress altered the statutory two-year waiting period for adjustment of status,[46] thus mooting any possible legal challenge. Congress, in other words, shortly thereafter blessed the adjustment of lawful status for individuals whose marriage had not lasted two years. DHS then determined

[43] *Id*. at 16.

[44] *Id*. at 17.

[45] *See* Widow(er): Green Card of a Widow(er) of a U.S. Citizen, USCIS, *available at* http://www.uscis.gov/green-card/green-card-through-family/green-card-through-special-categories-family/widower ("Until October 28, 2009, you had to have been married to the deceased citizen for at least two years at the time of the deceased citizen's death, in order to immigrate as the widow(er) of a citizen. Congress removed this requirement, effective October 28, 2009.").

[46] Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009).

that the new law rendered its policy "obsolete" and withdrew it, opting to treat all pending deferred action applications as applications for visas under the new statute.[47]

As the foregoing discussion shows, these four prior precedents cited by OLC to support the legality of the DACA and DAPA deferred actions do not, in fact, support their legality at all. The first three involve temporary "bridges" to allow individuals who were *otherwise statutorily entitled to visas* to remain until such time as their visas could be obtained, or their purposes fulfilled (in the case of the Hurricane Katrina situation). Unlike the DACA and DAPA situations, none of the individuals in these first three situations had entered the country illegally, nor were they rewarded with a remedy inconsistent with congressional directive.

Indeed, except the situation where Congress may expressly ban the availability of using deferred action as such a temporary "bridge," an administrative grant of deferred action creating such a bridge is inherently an administrative action designed to *effectuate congressional intent* that a given population be allowed to remain in the country. In these first three situations discussed above—VAWA, VTVPA and Hurricane Katrina—the executive branch's administrative issuance of deferred action provided such a bridge, facilitating the achievement of congressional desires for these populations. These three instances were, in other words, a classic instance in which the executive branch exercised its administrative discretion in a lawful manner, to administratively assist in a manner consonant with congressional will and thus faithfully execute the statutes Congress had passed.

The 2009 widow/widower policy proposed by the Obama Administration, by contrast, was directly contradictory of the then-existing statutory requirements for adjustment of status based on marriage to a U.S. citizen. As such, it cannot be classified as a legitimate exercise of agency discretion. Agencies may do many things in the exercise of their administrative discretion, but they surely cannot act in a manner that contradicts or undermines congressional intent. Because Congress amended the applicable statute only months after the 2009 widow/widower administrative policy was issued, however, any judicial scrutiny of its legality was mooted, and its utility as a precedent to support the legality of deferred action under DACA or DAPA is zero.

C. What about the 1990 Bush Family Fairness Policy?

As a last-ditch effort to save the legality of DACA/DAPA, the OLC memo resorts to an argument that essentially asserts, "Bush did it, too!" Specifically, when addressing the argument about the sheer size and scope of DACA/DAPA programs makes them qualitatively different—suggesting an inherent contradiction of congressional intent—OLC concedes that "In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion."[48] OLC then quickly concludes, however, that "although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens---approximately four in ten—

[47] OLC Memo at 17 n.7.

[48] *Id*. at 30.

potentially eligible for discretionary extended voluntary departure relief."[49] And the existence of the 1990 Family Fairness Policy (FFP) leads OLC to conclude that "DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context."[50]

OLC's understanding and analysis of the FFP is pitiful and sloppy. The FFP is not legally analogous, in any good faith way, to DACA/DAPA. Unlike the DACA/DAPA orders, the FFP did not grant the remedy of deferred action. Instead, the FFP granted the remedy of "voluntary departure" for a maximum one-year period to the immediate family members of individuals granted amnesty by the Immigration Reform and Control Act of 1986 (IRCA).[51] Voluntary departure is a remedy that allows deportable individuals a period of time in which to self-deport, at their own expense, in lieu of forced deportation by the government. [52]

The FFP was *consistent with then-existing law*. Specifically, the voluntary departure statute existing at the time stated, "The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation . . . ."[53]

By the plain language of this statute, Congress granted unfettered discretion to the Attorney General to grant voluntary departure in lieu of deportation. It imposed no time limits whatsoever. The one-year period provided by the FFP was well within the boundaries of the expressed will of Congress. As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress amended the voluntary departure to tighten its availability in significant ways, including limiting the award of voluntary departure to a maximum of 120 days.[54] But the statute under which the Bush Administration operated in 1990 authorized discretionary allowance of voluntary departure for *any* period of time. By granting voluntary departure for a one-year period to immediate family members of those granted asylum by the 1986 immigration reform law, the 1990 FFP grant of voluntary departure was a remedy that comfortably fell within existing statutory authority.

Equally important, the FFP—unlike DACA and DAPA—did not alter the legal status of the FFP's beneficiaries. Beneficiaries of the FFP were still "deportable," but merely allowed to self-deport. Nothing in the FFP purported to alter their deportability. Moreover, FFP beneficiaries—

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[49] *Id*. at 31.

[50] *Id.*

[51] Memorandum, Gene McNary, Commissioner, INS, Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242 for the Ineligible Children and Spouses of Illegal Aliens (Feb. 2, 1990), *available at* http://cdn.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf.

[52] *See* 8 U.S.C. § 1229c.

[53] 1952 McCarran-Walter Immigration and Nationality Act § 244(e), Pub.L. 82–414, 66 Stat. 163 *available at* http://library.uwb.edu/guides/usimmigration/66%20stat%20163.pdf.

[54] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(a)(3), Pub. L. 104-208, 110 Stat. 3009, *available at* http://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html.

unlike DACA and DAPA beneficiaries—did not obtain any extra-statutory benefits as a result of the executive action.

In short, the 1990 FFP was qualitatively different from DACA and DAPA because it (1) did not alter legal status; (2) did not provide a remedy unauthorized by Congress; and (3) did not confer benefits upon a population unauthorized by Congress. The FFP was consonant with the then-existing voluntary departure statute, and as such was a faithful execution of the law.

III. BENEFITS: PRESIDENT OBAMA'S IMMIGRATION ORDERS CONFER BENEFITS UPON NEW CATEGORIES OF ILLEGAL IMMIGRANTS WHICH HAVE NOT BEEN AUTHORIZED BY CONGRESS

As discussed in the previous section, the President's DACA and DAPA policies grant "deferred action" to the policies' beneficiaries. The OLC memo concludes that the President's immigration actions "would not 'legalize' any aliens who are unlawfully present in the United States" because deferred action "does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship."[55]

Yet OLC acknowledges that granting the remedy of deferred action automatically triggers a regulation that grants work permits to deferred action recipients[56]—a rather significant benefit for DACA and DAPA recipients. This conferral of benefits makes DACA/DAPA a uniquely aggressive exercise of executive power. Indeed, in a July 2000 memo from the INS General Counsel, Bo Cooper, he concluded that the INS did not have discretion "to provide any immigration benefit to any alien ineligible to receive it."[57] Mr. Cooper noted that "an enforcement act must be distinguished from an affirmative act of approval, or a grant of a benefit, under a statute or other applicable law that sets guidelines for determining when approval should be given. . . . The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions."[58]

A decision to confer benefits upon a given population, in other words, is not a discretionary matter left to the executive branch (a matter discussed thoroughly in section IV below), but rather a matter left exclusively to Congress. Whether an individual is entitled to a particular benefit, therefore, can only be answered by reference to the applicable statutes and implementing regulations.

The regulation that OLC cites to support the conferral of a work permit upon DACA/DAPA recipients is 8 C.F.R. § 274a.12(c)(14) which states that those eligible to apply for a work permit includes "An[y] alien who has been granted deferred action, an act of administrative convenience

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[55] OLC Memo at 2.

[56] *Id*.

[57] Memorandum from Bo Cooper, Gen. Counsel, Immigration and Naturalization Service, INS Exercise of Prosecutorial Discretion 1 (July 11, 2000), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf.

[58] *Id*. at 4.

to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment."[59]

OLC asserts that this executive branch regulation authorizing work permits for deferred action recipients was promulgated "pursuant to authority delegated by Congress," citing 8 U.S.C. § 1103(a)(3) and 8 U.S.C. § 1324a(h)(3). Frankly, this is a questionable conclusion. Section 1103(a)(3) is the general rulemaking authority of the Department of Homeland Security, declaring that the DHS Secretary "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems *necessary for carrying out his authority under the provisions of this chapter*."[60] And Section 1324a(h)(3) adds nothing of any substance, merely stating that in determining who is an "unlawful alien" ineligible to work in the U.S., the term does *not* include any alien who is either an LPR or "who is authorized to be so employed by this chapter or by the Attorney General."[61]

The salient legal question, therefore, is whether granting work permits to deferred action recipients is "necessary for carrying out" the provisions of the Immigration and Nationality Act. This is debatable, since (1) deferred action (as discussed extensively in section II) has been explicitly sanctioned by Congress in only a handful of instances; and (2) even in those few instances where Congress has blessed deferred action as a remedy, there is no "necessary" logical relationship between being granted deferred action and obtaining work authorization. It is one thing to allow an individual illegally present to remain for a bit longer, but quite another to grant such individual the legal permission to work. It is doubtful, therefore, that the underlying regulation that allows deferred action recipients to legally work—8 C.F.R. § 274a.12(c)(14)—is "necessary for carrying out" the INA as required by the authorizing statute, 8 U.S.C. § 1103(a)(3).

Concededly, an argument can be made that once certain illegal immigrants' legal status has been administratively altered—from "deportable" to "not deportable"—and they are further granted the remedy of deferred action, it then becomes "necessary" to grant most/virtually all of the affected population a work permit so that they will not become public charges. As an initial matter, the bootstrapping nature of this argument—and its implications for the breadth of executive power—should be noted with a keen and nonpartisan eye. The logic essentially looks like this:

(1) We have the power to alter legal status (from deportable to non-deportable), even when it contradicts a statute;

(2) Once we have altered legal status, we have the further power to grant a remedy for the favored population, even if Congress has not sanctioned our chosen remedy for this population; and

(3) Once we accomplish (1) and (2), we can invoke a provision of statute authorizing regulations

[59] 8 C.F.R. § 274a.12(c)(14).

[60] 8 U.S.C. § 1103(a)(3) (emphasis supplied).

[61] 8 U.S.C. § 1324a(h)(3).

for any action "necessary" to carry out our authority.

If predicate arguments (1) and (2) are incorrect, however (as I have argued they are), then argument (3) is obviously incorrect as well. Indeed, if arguments (1) and (2) are incorrect, argument (3) becomes an obvious example of egregious bootstrapping, thus stretching the boundaries of executive power beyond anything seen before. Pursuant to the the Obama Administration's argument of executive power, the executive branch has virtually unlimited power to act in ways that are contrary to congressional will.

If Congress has not provided an explicit authorization for a benefit such as work authorization, or if providing such authorization cannot be administratively granted in a manner consistent with congressional intent, then granting work authorization is simply beyond executive power. While administrative agencies have broad administrative discretion when carrying out their duty to "faithfully execute" the laws written by Congress, their discretion is not so broad as to allow them to act in ways that fundamentally contradict or undermine those laws.
Granting work permits for the DACA/DAPA recipients fundamentally contradicts the INA, which classifies these individuals as "deportable" aliens who are not eligible for deferred action.

A. Work Permits for DACA/DAPA Recipients Undermines Obamacare

Beyond this obvious point, however, is a subtler, but equally pernicious example of how granting work permits to the DACA/DAPA population undermines federal law. Specifically, granting work permits to this population will undermine key provisions of the Affordable Care Act (ACA) by encouraging employers to hire individuals with DACA/DAPA status rather than U.S. citizens or other individuals lawfully present in the country.[62] At a recent hearing of the House Homeland Security Committee, DHS Secretary Jeh Johnson conceded that "Those who are candidates for and are accepted into the Deferred Action Program will not be eligible for comprehensive health care, ACA."[63]

This is a potentially significant consequence for employers under the ACA. Under the Act, employers with 50 or more full-time employees are potentially subject to an "employer responsibility" penalty/tax.[64] More precisely, the employer responsibility penalty/tax is triggered when just *one* full-time worker obtains a premium tax credit after purchasing qualifying health insurance on an exchange.[65] Because illegal aliens (including DACA/DAPA recipients) are not eligible to obtain tax-subsidized insurance on an exchange, the more illegal aliens an employer

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[62] *See* David North, Center for Immigration Studies, *ACA Gives Employers Even More Incentives to Hire Alien Workers*, Jan. 7, 2015, *available at* http://cis.org/north/aca-gives-employers-even-more-incentives-hire-alien-workers.

[63] *See* Melanie Hunter, *Jeh Johnson: Legalized Illegals Don't Need to Comply With Obamacare*, CNSnews.com, Dec. 2, 1014, *available at* http://cnsnews.com/news/article/melanie-hunter/jeh-johnson-legalized-illegals-dont-need-comply-obamacare [hereinafter Hunter].

[64] Questions and Answers on Employer Shared Responsibility Provisions under the Affordable Care Act, IRS, Q.1, *available at* http://www.irs.gov/Affordable-Care-Act/Employers/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act.

[65] *Id*. at Q.18.

hires, the more likely he will be able to evade the employer responsibility penalty. Expressed mathematically, it looks like this:

> illegal (DAPA/DACA) employees with work permits =

> employees who are <u>not</u> eligible for tax credits =

< employees who can trigger the ACA ER responsibility penalty/tax

Recent reports suggest that some three to five million individuals are who are eligible for ACA tax credits (by purchasing qualifying health insurance) are opting not to do so—choosing instead to pay the relatively small penalty/tax rather than the larger annual health insurance premiums.[66] It thus seems logical to conclude that granting work permits to the DACA/DAPA populations will encourage the hiring of these illegal aliens over U.S. citizens and other lawful residents, by further reducing the number of workers eligible to trigger the employer responsibility payment.

If this is the case, the Obama Administration's decision to grant work permits to DACA/DAPA recipients *will undermine the effectiveness of the ACA itself*, one of the primary goals of which is to extend health insurance coverage to the workforce.[67] If employers find ways to "game the system" and avoid the ACA employer responsibility payment by hiring DACA/DAPA recipients—who are not eligible for ACA-subsidized insurance—then by definition, the ACA's goal of expanding health insurance coverage via the workplace has been undercut. This is a instance, in other words, in which an Article II (executive branch) policy—granting work permits to DACA/DAPA recipients—has the effect of undermining the goal of Article I (Congress), as expressed through legislation (the ACA).

It is not permissible, in our constitutional regime, to allow the President to take an administrative action that undercuts the stated goal of a statute enacted by Congress. And it is no small irony that, by granting work permits to DACA/DAPA recipients, President Obama has done exactly this, undermining his own signature legislative achievement.

B. Work Permits for DACA/DAPA Recipients Provides a Potential Path to Citizenship

[66] *See* Tami Luhby, Millions to Owe Obamacare Tax Penalty, CNN Money, Jan. 28, 2015, *available at* http://money.cnn.com/2015/01/28/news/economy/obamacare-tax-penalty/.

[67] *See* U.S. Dep't of Health and Human Serv., Strategic Goal One: Strengthen Health Care, Objective A (stating that one of the goals of the ACA is to "Make coverage more secure for those who have insurance, and extend affordable coverage to the uninsured.").

OLC's assertion that DACA/DAPA's grant of deferred action "does not provide a path to obtaining permanent residence or citizenship" is highly misleading.[68] A similar assertion was made by President Obama in his November 20, 2014, televised statement announcing DAPA, "Now, let's be clear about what it isn't. This deal . . . does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive -– only Congress can do that."[69]

These assertions are misleading because USCIS concedes that DACA recipients are eligible to apply for "advance parole,"[70] which in turn can lead to an adjustment of status to LPR and eventually, citizenship. There is no reason to believe that DAPA recipients—who are also entitled to deferred action—will not likewise be considered eligible for advance parole and hence, a potential pathway to citizenship.

Advance parole is an advance permission granted by USCIS, authorizing an individual to leave the U.S. for broadly defined humanitarian, employment, or educational purposes, and then re-enter within a relatively short period of time.[71] Pursuant to a recent decision by the Board of Immigration Appeals (BIA), *Matter of Arrabally and Yerrabelly*, individuals who depart the U.S. pursuant to a grant of advance parole are not considered to have "departed" the U.S., and meaning that he or she isn't subject to the three- or 10-year bar on lawful readmission.[72] Those bars require that immigrants wait either three or 10 years (depending on how long they were illegally present in the U.S.) before being able to come back lawfully. Although *Matter of Arrabally and Yerrabelly* did not explicitly decide the applicability of advance parole for DACA recipients, a November 20, 2014 memo from DHS Secretary Jeh Johnson subsequently made it clear that, "in *all cases* where an individual physically leaves the United States pursuant to a grant of advance parole, that individual shall not have made a departure within the meaning of . . . the INA."[73]

The primary implication of this interpretation of *Arrabally* is that because DACA and DAPA recipients may apply for advance parole, they are considered to be "paroled" into the country when they return—entering with permission—and hence are potentially eligible to adjust their

[68] OLC Memo at 2.

[69] Remarks by the President in Address to the Nation on Immigration, Nov. 20, 2014, *available at* http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[70] DACA Frequently Asked Questions, USCIS, Q.57, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

[71] *See* 8 C.F.R § 212.5(f); USCIS Adjudicator's Field Manual, § 54.1(c). "Advance" parole is derived from language relating to parole in the INA. 8 U.S.C. § 1182(d)(5).

[72] Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771(BIA 2012).

[73] Jeh Charles Johnson, Secretary, Dep't of Homeland Security, *Directive to Provide Consistency Regarding Advance Parole*, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_arrabally.pdf (emphasis supplied).

status and become lawful permanent residents.[74] Once an individual has obtained LPR status, they are eligible—after a potential waiting period—to apply for U.S. citizenship.[75] Indeed, in the first two years of DACA implementation (2012-2014), more than 6,400 DACA recipients requested advance parole. Of the 4,566 cases adjudicated thus far, only 566 were denied, yielding an approval rate of 88 percent.

Table 1: Advance Parole for DACA Recipients (2012-2014)

# of DACA recipients requesting advance parole (2012-2014)	# of advance parole requests decided (as of end of 2014)	outcome	Net approval rate of advance parole requests by DACA recipients
6,400	4,566	566 denied 4,000 granted	88%

It is not known how many of the 4,000 DACA individuals granted advance parole have applied for an adjustment of status upon re-entry to the U.S. The USCIS has told members of Congress that it does "not have a way to track electronically" this information.[76]

While the number of DACA recipients requesting advance parole was relatively small in 2012-2014, the number can be expected to grow substantially pursuant to a newly announced USCIS policy. Specifically, at a "Congressional Update and Teleconference" sponsored by USCIS on February 12, 2015, the agency reported to Congress that, under the recently expanded DACA program, applicants will be allowed to file advance parole applications simultaneously with their DACA applications.[77] The simultaneous filing of DACA (and presumably, DAPA) and advance

[74] 8 USC 1255(a) provides that "The status of an alien who was . . . paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if
(1) the alien makes an application for such adjustment,
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
(3) an immigrant visa is immediately available to him at the time his application is filed."
Id. Paroled individuals eligible for adjustment of status could include, for example, children or spouses of U.S. citizens, or individuals who have an employer willing to sponsor them and are thus "eligible to receive an immigrant visa" within the meaning of subsection (2) above.

[75] *See Citizenship Through Naturalization*, USCIS, *available at* http://www.uscis.gov/us-citizenship/citizenship-through-naturalization. The waiting period varies. The default waiting period is five years of LPR status, though spouses of U.S. citizens only have to wait three years. Children of U.S. citizens and active duty military personnel do not face a waiting period.

[76] *See* Letter from Bob Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Representatives, to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Security 2 (Feb. 13, 2015), *available at* http://judiciary.house.gov/_cache/files/fede258e-55c4-45e1-885f-9ed9eefdcd00/021315-daca-letter.pdf.

[77] *Id*. at 1-2.

parole applications would ineluctably encourage a greater number of advance parole applications and, consequently, a pathway to U.S. citizenship.[78]

I think it is important to emphasize that regardless of the number of DACA/DAPA individuals who obtain advance parole and consequently adjust their status, *if even one DACA/DAPA recipient does this, DAPA/DACA will have infringed on Congress's core constitutional power.*

To be precise, if only one DACA/DAPA recipient obtains advance parole and subsequently adjusts his/her status to LPR, they will be placed on a path to U.S. citizenship—all because of a series of executive orders unilaterally imposed by President Obama. Whatever one thinks about Congress's constitutional power to legislate on matters of immigration,[79] it is undeniable that Congress possesses the power under Article I, section eight to "establish a uniform rule of naturalization." Congress possesses the sole constitutional authority to decide who should be granted U.S. citizenship,[80] and any executive action that interferes with this decision violates the very core of congressional authority. Because DACA and DAPA appear to allow some beneficiaries to obtain a path to citizenship (via advance parole), they have fundamentally altered the ability of Congress, and Congress alone, to determine who qualifies for U.S. citizenship.

IV. PRESIDENT OBAMA'S IMMIGRATION ORDERS ARE NOT AN EXERCISE OF "PROSECUTORIAL DISCRETION"

Prosecutorial discretion is a doctrine that allows the executive branch wide discretion regarding decisions as to which transgressions of criminal law should be prioritized for prosecution. It is a doctrine that speaks of "prosecutors" and "prosecution"—and hence, criminal law violations. It grants discretion to prosecutors based upon pragmatic considerations such as limited resources and strength of evidence. It is most decidedly *not*, however, a doctrine that gives the executive unfettered discretion to not enforce wholesale swaths of civil law with which the executive disagrees.

As an initial matter, deportation is a civil remedy, not a criminal punishment.[81] The President's order to defer deportation for some illegal immigrants, therefore, does not involve a "prosecutorial" decision as a fundamental matter. Instead, it is a *non-enforcement* decision.

A. Judicial Deference to Non-enforcement Decisions

[78] *Id*. at 2.

[79] *See* Ilya Somin, *Obama, Immigration and the Rule of Law*, WASHINGTON POST, Volokh Conspiracy, Nov. 20, 2014 (arguing that Congress's Article I, section eight power to "establish a uniform rule of naturalization" does not include the power to legislate on immigration). *But see* Sale v. Haitian Council, Inc., 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters.").

[80] Chirac v. Lessee of Chirac, 15 U.S. (1 Wheat) 259, 269 (1817) (Chief Justice John Marshall, writing for the Court asserted, "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted . . . .").

[81] Flemming v. Nestor, 363 U.S. 603 (1960). *See also* Galvan v. Press, 347 U.S. 522 (1954) (Ex Post Facto Clause does not apply to deportation proceedings as they are not criminal in nature).

Non-enforcement decisions by the executive are indeed entitled to judicial deference in certain circumstances. But non-enforcement decisions are not immune from judicial review generically, without regard to context. As the Supreme Court recently reaffirmed in *Utility Air Regulatory Group v. EPA, "*an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference."[82]

Indeed, in *UARG*, the Supreme Court rejected the EPA's elaborate carbon tailoring rule, holding that it violated separation of powers because it was contrary to congressional intent. The Solicitor General had asserted that a prior decision in *Morton v. Ruiz*[83] supported its position, but the *UARG* Court rejected this, saying,

> In *Ruiz*, Congress had appropriated funds for the Bureau of Indian Affairs to spend on providing assistance to " 'Indians throughout the United States' " and had not "impose[d] any geographical limitation on the availability of general assistance benefits. Although we held the Bureau could not deny benefits to off-reservation Indians because it had not published its eligibility criteria, we stated in dictum that the Bureau could, if it followed proper administrative procedures, "create reasonable classifications and eligibility requirements in order to allocate the limited funds available." That dictum stands only for the unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*. Nothing in *Ruiz* remotely authorizes an agency to modify unambiguous requirements imposed by a federal statute. An agency confronting resource constraints may change its own conduct, but it cannot change the law.[84]

UARG thus emphasizes that the executive branch's resource constraints may indeed allow it to "create reasonable classifications and eligibility requirements in order to allocate the limited funds available" when Congress has exercised its spending power to broadly assist, without any textual limitation, "Indians throughout the United States." But an agency may not, under *UARG*, adopt policies to prioritize its expenditures *outside the bounds established by Congress*. If Congress has provided an "unambiguous requirement" in a statute, the executive branch must faithfully execute the statute. The executive may "change its own conduct, but it cannot change the law."

Similarly, OLC tries to glean support for President Obama's immigration orders from the Supreme Court's 1985 decision in *Heckler v. Chaney*,[85] asserting that *Chaney* supports the conclusion that the President's orders are a legitimate exercise of "prosecutorial discretion."[86]

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[82] 134 S. Ct. 2427, 2442 (U.S. 2014) (internal citations and quotation marks omitted).

[83] 415 U.S. 199 (1974).

[84] *UARG*, 134 S. Ct. at 2445-46 (emphasis in original) (internal citations omitted).

[85] 470 U.S. 821 (1985).

[86] *See* OLC Memo at 4-5.

But OLC reads *Chaney* far too aggressively. *Chaney* involved an attempt by death penalty opponents to ban a drug cocktail used for lethal injection. The drugs used had been approved by the FDA, but were being used in combination, for an "off-label" use (lethal injection) other than the intended use specified at the time of FDA approval.[87] Such off-label use of drugs is very common, and is not banned by the Federal Food, Drug and Cosmetic Act (FFDCA).[88] Once the FDA approves a drug for any purpose, it is perfectly legal to use the drugs for other, off-label, purposes. Nonetheless, the plaintiffs in *Chaney* argued that the drug was "misbranded" under the FFDCA and should have been considered by the FDA as a "new drug" requiring an elaborate pre-market approval process.[89] The FDA Commissioner disagreed that the drug cocktail was a "new drug" under the meaning of the FFDCA, and further concluded that because the imposition of the death penalty by a State was a matter of state sovereignty, the FDA should decline any invitation to interfere with states' rights absent some compelling evidence that the drug posed a serious danger to the public.[90]

The Supreme Court unanimously ruled in favor of the FDA, concluding that the agency's decision not to initiate misbranding or adulteration proceedings against the drug manufacturer was presumptive unreviewable by courts because of section 701(a)(2) of the Administrative Procedure Act (APA), which states "agency action is committed to agency discretion by law."[91] Nothing in the FFDCA, furthermore, indicated that Congress desired courts to limit FDA's discretion to initiate adulteration or misbranding proceedings.[92]

As an initial matter, it should be noted that *Chaney* is a decision grounded solely on the APA. It did not involve, in any way, a constitutional challenge based on executive non-enforcement. To be succinct, *Chaney* involved:

(1) an APA challenge;
(2) against the executive (FDA);
(3) for failure to initiate misbranding provisions;

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[87] *Chaney*, 470 U.S. at 823.

[88] As the FDA's website explains it:

> If physicians use a product for an indication not in the approved labeling, they have the responsibility to be well informed about the product, to base its use on firm scientific rationale and on sound medical evidence, and to maintain records of the product's use and effects. Use of a marketed product in this manner *when the intent is the "practice of medicine"* does not require the submission of an Investigational New Drug Application (IND), Investigational Device Exemption (IDE) or review by an Institutional Review Board (IRB).

"Off-Label" and Investigational Use Of Marketed Drugs, Biologics, and Medical Devices - Information Sheet, U.S. Food and Drug Admin., *available at* http://www.fda.gov/RegulatoryInformation/Guidances/ucm126486.htm.

[89] *Chaney*, 470 U.S. at 823-24.

[90] *Id*. at 824-25.

[91] Codified at 5 U.S.C. § 701(a)(2). The *Chaney* Court concluded that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been "committed to agency discretion," and we believe that the Congress enacting the APA did not intend to alter that tradition." *Chaney*, 470 U.S. at 832.

[92] *Chaney*, 470 U.S. at 835-37.

(4) against a specific drug manufacturer.

Chaney involved a single, discrete instance of FDA non-enforcement—failure to initiate misbranding enforcement against a specific drug manufacturer, based upon the specific facts and circumstances. It did not involve an executive decision—like the ones made by President Obama regarding immigration—to cease enforcing a statute against an entire category of individuals, who were singled out for special legal exemption by the executive.

To be relevant and analogous to President Obama's immigration orders, *Chaney* would need to have involved a constitutional challenge to an FDA decision not to enforce the Federal Food, Drug and Cosmetic Act at all against a class of drug manufacturers who satisfied some criteria unilaterally established by the FDA, and inconsistent with the FFDCA itself.

For comparative purposes, the legal challenges against President Obama's executive orders on immigration involve:

(1) constitutional, separation of powers challenges;
(2) against the executive (DHS);
(3) for reclassification of status contrary to the INA
(4) for provision of a remedy (deferred deportation) contrary to the INA
(5) for conferral of benefits (work permits; LPR/citizen status) contrary to the INA
(6) granted to an entirely new category of people unilaterally identified by the executive

So while there is some surface similarity between *Chaney* and the legal challenges to the President's immigration actions, as a legal matter the similarity merely involves the fact that both situations involved a non-enforcement decision by the executive branch. But as OLC's memo conceded, "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering."[93]

OLC feebly attempts to make a case that the President's immigration orders are consonant with congressional desires. It asserts that the "principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration" because "the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to 'establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the [INA]."[94]

But this statute—8 U.S.C. § 1103(a)(3)—does not give the DHS Secretary authority to do anything he deems "necessary." Instead, it grants him authority to do what is necessary "for carrying out his authority" under the law. It does not grant the Secretary authority to act in a manner that is directly contradictory of the statutes enacted by Congress. OLC next cites the statute creating the Department of Homeland Security, which expressly charged the DHS Secretary with the responsibility to "establish[] national immigration enforcement policies and

[93] OLC Memo at 6.

[94] *Id*. at 4.

priorities."[95] And while undoubtedly DHS must set "priorities" within its budgetary constraints, those priorities cannot conflict with the will of Congress, reflecting a desire to achieve different policy goals than those specified in the statutes it has enacted. Any administrative "priorities" that undermine the purpose of existing statutes is not an exercise of enforcement discretion, it is an unfaithful execution of the law and thus a violation of the Constitution's separation of powers.

B. The Importance of Case-by-Case Enforcement Consideration

The OLC memo makes it clear that genuine case-by-case consideration is a necessary component of any exercise of prosecutorial discretion. Specifically, in advising President Obama on the constitutionality of DACA, OLC "orally advised" that its "preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis."[96] OLC stated further, "We explained, however, that extending deferred action to individuals who satisfied . . . specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program *require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria*."[97]

While the Obama Administration clearly knows the importance of giving lip service to "case-by-case" consideration, its regurgitation of important legal words cannot camouflage the reality of DACA implementation to date, which belies any meaningful case-by-case discretion. Indeed, USCIS's own website describing DACA states that "Under the direction of the Secretary of Homeland Security, if an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. *If individuals believe that, in light of this policy, they should not have been apprehended or placed into removal proceedings, contact the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week).*"[98] This rather strongly suggests that the Obama Administration has gone to unprecedented lengths to ensure that individuals who meet the DACA (and presumably DAPA) criteria are not apprehended or removed under any circumstances. Indeed, if an immigration officer in the field should happen to apprehend a DACA (or DAPA) qualifying individual, the existence of a 24/7 toll-free number will inevitably mean that a call will be made, and a decision to release will follow.

In addition, the DACA applications processed to date strongly indicate that, far from case-by-case consideration, DACA is being implemented as a rubberstamp. As of the end of 2014,

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[95] *Id*. at 4-5. The current statute is codified at 6 U.S.C. § 202(5).

[96] *Id*. at 18 n. 8.

[97] *Id*.

[98] DACA Frequently Asked Questions, USCIS, Q.9, *available at* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (emphasis supplied).

USCIS reports that it had received and accepted 685,544 requests for DACA status.[99] Of these accepted applications, 580,946 had been approved, 80,715 were still pending, and only 23,833 were denied.[100] Of the DACA applications processed thus far, this yields a *rejection rate of only 3.5 percent*.

It is absurd to assert that a mere theoretical possibility that a small percentage of applicants may be rejected constitutes meaningful "prosecutorial discretion. Instead, with an approval rate of almost 97 percent, USCIS's so-called "case-by-case" evaluation of DACA applications has, in reality, been a rubberstamp. Indeed, in the 26-state lawsuit led by Texas, an affidavit submitted by Kenneth Palinkas, President of the National Citizenship and Immigration Services Council (NCISC)—a union representing 12,000 employees of the USCIS—declared that "The approval rate is that high because USCIS leadership has prevented immigration officers from conducting case-by-case investigations of DACA applications. Leadership has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be rubber-stamped for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."[101] Palinkas further avers that USCIS has decided to route DAPA applications through service centers rather than field offices, "intentionally creat[ing] an application process that bypasses traditional in-person investigatory interviews with trained USCIS adjudications officers. That management decision prevents officers from conducting case-by-case investigations, undermines officers' abilities to detect fraud and national-security risks, and ensures that applications will be rubber-stamped."[102]

The characterization of DACA as a categorical, rubberstamping legal exemption rather than a case-by-case exercise of prosecutorial discretion is also reflected in the answers submitted by Leon Rodriguez, Director of USCIS, in a letter submitted to Senator Charles Grassley dated October 9, 2014. In this letter, Director Rodriguez reveals that of the DACA rejections, the top four reasons for rejection have been:

(1) using an expired version of the required Form I-821D;

(2) failure to provide a valid signature;

(3) failure to file the form I-765 (application for employment authorization), failure to pay the correct fee associated with that form, or filing an incomplete form I-765; and

(4) filing while under the age of 15.[103]

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[99] Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014, USCIS, *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_fy2014_qtr3.pdf.

[100] *Id*.

[101] Declaration of Kenneth Palinkas at ¶ 8, Texas v. U.S (N.D. Tex., Dec. 31, 2014) (No.1:14-cv-00254).

[102] *Id*. at ¶ 10.

[103] Letter from Leon Rodriguez, Director, USCIS, Dep't of Homeland Security to U.S. Senator Charles Grassley, Oct. 9, 2014, Enclosure 1, Q.1(c).

The information provided by Director Rodriguez strongly suggests that, of the 3.5 percent of DACA applications that are rejected, the vast bulk of them are being rejected because of technical glitches, not because the USCIS is using "case-by-case discretion" to determine whether to grant DACA status. In other words, *DACA is being operated as a categorical exemption from law*: If applicants properly fill out the correct forms, provide the right fee and meet the criteria established unilaterally by the executive branch, they will be granted an alteration of their legal status (deportable to non-deportable), a special remedy not endorsed by Congress (deferred deportation), and benefits not endorsed by Congress (work permit and advance parole, creating a pathway to citizenship).

C. Public Announcement and Resource Demands Negate Prosecutorial Discretion

Another strong indication that President Obama's immigration orders are an attempt to rewrite existing law rather than an exercise of prosecutorial discretion consistent with existing law is the very fact that he has stated, on numerous occasions, that he does not possess the constitutional authority to do what he has subsequently done.

For example, on May 5, 2010, when speaking at a Cinco de Mayo celebration, President Obama told the audience that he wanted Congress to pass comprehensive immigration remark and denied that he had the constitutional authority to go it alone, "Anybody who tells you . . . that I can wave a magic wand and make it happen hasn't been paying attention to how this town works. We need bipartisan support. But it can be done, and it needs to be done."[104] Similarly, in his October 25, 2010 interview with Univision, President Obama said, "I'm president, I'm not king. If Congress has laws on the books that says that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. *But there's a limit to the discretion that I can show because I am obliged to execute the law*. That's what the Executive Branch means. I can't just make the laws up by myself."[105] In a Univision town hall on March 8, 2011, the President similarly declared, "*With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed* -- and I know that everybody here at Bell [High School] is studying hard so you know that we've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. . . . *There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.*"[106] In a July 25, 2011 speech to the National Council of La Raza,

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[104] U.S. President Barack Obama, Remarks at a Cinco de Mayo Celebration (May 10, 2010), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=87844&st=immigration&st1=obama.

[105] Barack Obama, Interview with Eddie Sotelo, Univision (Oct. 25, 2010), *available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html (emphasis supplied).

[106] U.S. President Barack Obama, Remarks at Univision Town Hall, Bell Multicultural High School, Washington, D.C. (Mar. 28, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall (emphasis supplied).

President Obama again lamented his constitutional inability to unilaterally act, stating, "Now, I know some people want me to bypass Congress and change the laws on my own. . . . Believe me -- believe me, the idea of doing things on my own is very tempting. I promise you. Not just on immigration reform. But that's no how -- that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written."[107] In a Google+ Hangout interview on February 14, 2013—after implementing DACA—President Obama stated, "The problem is that I'm the president of the United States, I'm not the emperor of the United States. My job is to execute laws that are passed. And Congress right now has not changed what I consider to be a broken immigration system. And what that means is that we have certain obligations to enforce the laws that are in place even if we think that in many cases the results may be tragic. ... [W]e've kind of stretched our administrative flexibility as much as we can[.]"[108]

Once it became clear to President Obama that Congress was not going to pass the kind of legislation he desired, he began publicly stating his intention to bypass Congress altogether. In January 2014, the President famously announced his "pen and phone" strategy for bypassing Congress, announcing, "We are not just going to be waiting for legislation . . . I've got a pen, and I've got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward . . ."[109] Shortly thereafter, in his State of the Union address on January 28, 2014, the President again warned, "America does not stand still, and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do."[110] In late June 2014, President Obama was ready to take further unilateral immigration action, declaring in the Rose Garden, "Today, I'm beginning a new effort to fix as much of our immigration system as I can on my own, without Congress."[111] And most recently, in response to a heckler during an immigration speech on November 26, 2014 (shortly after announcing DAPA), President Obama tellingly quipped, "What you're not paying attention to is, *I just took an action to change the law*."[112]

These various public pronouncements from the President make it clear that he believes Congress does not support his vision of immigration reform, and he will accordingly take his own, unilateral action to effectuate the change he believes is desirable. These are not comments of a President who believes that Congress and existing law support his executive actions—to the

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[107] U.S. President Barack Obama, Remarks to the National Council of La Raza, Washington D.C. (July 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza.

[108] U.S. President Barack Obama, Video Remarks on Google+ Hangout (Feb. 14, 2013), *available at* https://www.youtube.com/watch?v=-e9lmy_8FZM&feature=youtu.be.

[109] Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBSNews.com (Jan. 14, 2014), *available at* http://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress/.

[110] U.S. President Barack Obama, State of the Union Address (Jan. 28, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address.

[111] Stephen Dinan, *Obama: I Will Bypass Congress to Fix Immigration*, WASHINGTON TIMES (June 30, 2014), *available at* http://www.washingtontimes.com/news/2014/jun/30/obama-i-will-bypass-congress-fix-immigration/?page=all.

[112] Eric Bradner, *Obama to Immigration Hecklers: "I Just Took an Action to Change the Law*," CNN.com (Nov. 26, 2014), *available at* http://www.cnn.com/2014/11/25/politics/obama-hecklers-immigration-chicago/.

contrary, they evince a belief that, despite congressional opposition, the President is determined to go it alone and defy Congress to achieve his desired ends.

The Obama Administration has repeatedly tried to explain its unilateral immigration orders as a run-of-the-mill means of prioritizing limited enforcement resources.[113] But it is clear that DACA and DAPA are *adding* to the resource burden of DHS, not easing it. In OLC's memo it admitted, "The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources."[114] DACA, for example, required DHS to hire around 900 new employees and spend an additional $280 million over a three-year period.[115] Indeed, DACA applications so overwhelmed USCIS that it had to divert workers from other agency priorities to process the backlog.[116] As for DAPA, DHS has admitted that it plans to hire over 1,000 new federal workers to process the DAPA applications alone, at a cost of around $48 million per year.[117]

Despite these increased resource demands, OLC noted that "DHS as informed us that the costs of administering the proposed program would be borne *almost entirely* be USCIS through the collection of application fees."[118] It further noted that "DHS has indicated that the costs of administering the deferred action program would therefore not detract *in any significant way* from the resources available to ICE and CBP—the enforcement arm of DHS—which rely on money appropriated by Congress to fund their operations."[119] OLC thus concluded, "The proposed program, in short, might help DHS address its severe resource limitations, and at the very least *likely would not exacerbate* them."[120]

It is difficult to know what to make of OLC's qualified language. What does it mean when DHS informed OLC that DAPA's costs would be borne "almost entirely" from application fees? Similarly, what does it mean when DHS informed OLC that DAPA would not detract "in any significant way" from ICE and CBP resources? And what does OLC mean when it says the program "likely would not exacerbate" the agency's resource constraints? The answers are not

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[113] *See* OLC Memo at 10 ("[A]n agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion").

[114] *Id*. at 26.

[115] Josh Gerstein, *Bureaucratic Nightmare on Immigration?*, POLITICO (Nov. 21, 2014), *available at* http://www.politico.com/story/2014/11/immigration-action-government-implement-113108.html.

[116] *Id*. ("One widely-reported effect of the DACA rollout was an increase in delays for other kinds of immigration applications. In some instances, waits for green cards for immigrant spouses of U.S. citizens jumped from about five months to 15 months — a delay attributable at least in part to personnel being diverted to handle the deferred action program.").

[117] Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES (Dec. 25, 2014), *available at* http://www.nytimes.com/2014/12/26/us/politics/little-noticed-in-immigration-overhaul-a-government-hiring-rush.html?_r=0.

[118] OLC Memo at 26 (emphasis supplied).

[119] *Id*. (emphasis supplied).

[120] *Id*.

clear. The waffling language employed, and the reliance on DHS's "word" as to the resource demands should raise some congressional eyebrows and warrant follow-up.

A unilateral executive action that costs millions of extra dollars, requires the hiring of thousands of additional workers, and causes resources to be diverted from other legitimate activities is not, by any fair construction of the term, an exercise designed to "prioritize limited resources." To the contrary, such an action may amplify resource limitations, result in greater inefficiency and erect an expensive, long-term bureaucracy.

A President merely "prioritizing resources" would do what prior Presidents have done: enforce the entirety of immigration law, while allowing prosecutors to make case-by-case determinations about which cases to pursue first. By publicly announcing a global policy of non-enforcement against certain categories after repeatedly saying that he does not have the authority to implement such changes, President Obama is willfully bypassing the democratic process in order to achieve results he (and his political base) wants. In so doing, the President is also condoning unlawful behavior, weakening the force of existing immigration law, and allowing lawbreakers to remain without fear of legal consequences. This is not "prosecutorial discretion" as that term has ever been understood before.

D. The Implications of Endorsing President Obama's Immigration Actions as "Prosecutorial Discretion"

Prosecutorial discretion recognizes the reality of finite executive resources. But it does not mean that the executive branch may alter a law, transforming an act from illegal behavior (with certain consequences, such as deportability) into legal behavior (ignoring congressionally specified remedies, such as deportation, and even rewarding such behavior with benefits). Such transmogrification is simply not prosecutorial discretion at all; it is the suspension of law, and a violation of the President's constitutional duty to "take Care that the Laws be faithfully executed."

A couple of simple hypotheticals will help illustrate the distinction between genuine prosecutorial discretion versus suspension of the laws.

First, assume the Attorney General issues a memo instructing U.S. Attorneys that they generally should not initiate prosecutions of marijuana offenses involving less than one kilo of marijuana, reasoning that there are not enough DOJ resources to prosecute marijuana offenses involving lesser amounts, and that state prosecutors could be expected to pick up the slack and prosecute these lesser amounts if so desired. Is this a legitimate exercise of prosecutorial discretion? Yes.

The legitimacy of such a decision hinges upon 5 factors that make it distinguishable from President Obama's immigration executive actions. First, the AG in this hypothetical has made his non-enforcement decision based upon true resource constraints. There is no evidence that the AG disagrees with the enforcement of the Controlled Substances Act's classification of marijuana as an illegal Schedule I substance and that his decision is based upon a policy disagreement with Congress. He is simply acknowledging that, given the raw number of

marijuana offenses, his offices only have sufficient resources to prioritize the most pressing, large-scale offenses.

Second, the AG would presumably not publicly pronounce this non-enforcement policy, much less go on national television to explain it, since doing so would send a clear signal to marijuana dealers and users that they now have carte blanche to violate the CSA, so long as they stay under one kilo. Third, presumably under the AG's memo, U.S. Attorneys throughout the country would be perfectly free to continue prosecuting marijuana offenses involving less than one kilo, and would not be punished for doing so, as the illegal status of possessing marijuana would not be altered. Fourth, in the event of a prosecution involving less than one kilo, the AG's memo would not alter the remedies provided by the CSA and applicable sentencing guidelines. It would not, in other words, purport to specify some new, "better" remedy than the ones specified by Congress. Fifth, under the AG's memo, there is no indication that marijuana offenses of less than one kilo will be rewarded in any way. Users or dealers of marijuana would not suddenly qualify for new government benefits that Congress had not decided to convey.

A closer analogy to President Obama's executive actions on immigration would be as follows: Suppose the U.S. Attorney General issues a memo directing U.S. Attorneys that they should not prosecute any marijuana offenses at all, if the offender is less than 30 years old, has completed high school, and has no other criminal record. The AG's memo is the result of a public crusade by the President to get Congress to amend the CSA and exempt marijuana offenses for such individuals. After much debate and deliberation, Congress decided not to amend the CSA in this fashion, angering the President and his political base. Consequently, the President took to the airwaves, declaring that if Congress will not enact needed CSA reforms, he would "work around" Congress to achieve his goals. He blames Congress for being to "harsh" in its marijuana law, and promises his political base of young people that he will find a way to exempt many of them from the CSA anyway.

When the AG issues his memo exempting this new category of young people from the operation of the CSA's marijuana prohibition, he simultaneously announces that individuals in this category will be eligible for a new, civil remedy, and this, in turn will allow them to qualify for federal disability benefits. Does anyone honestly believe that this hypothetical situation is properly characterized as "prosecutorial discretion"? I doubt it. It patently involves presidential defiance of congressional will, a failure to faithfully execute the laws written by Congress, and a dangerous violation of separation of powers.

Second, consider the hypothetical *du jour* of those who support President Obama's immigration orders: Suppose a local police chief instructs his officers not to bother pulling over any speeders going less than 5 mph over the speed limit. Is this a legitimate exercise of enforcement discretion and, if so, why is it any different from President Obama's immigration orders?

As an initial matter, the speeding hypothetical is, indeed, a classic case of the proper exercise of enforcement discretion. This is so for three reasons. First, the police chief's instructions do not alter the legal status of any speeder. They are still "speeders" under the law, and have not been transmogrified into "non-speeders" by the policy. Unlike President Obama's immigration orders, the police chief 's policy is not publicly and proudly announced so that all speeders know

realize that they will not longer be pulled over so long as they keep it within 5 mph of the posted speed limit. The police chief in the hypothetical merely instruct his officers that, as a general matter, these speeders are not a high priority. But the police chief's policy, unlike President Obama's immigration orders, would allow each police officer in the field to decide, on a case-by-case basis, whether any speeders should be pulled over.

Second, unlike President Obama's immigration orders, the police chief's policy is not providing an alternate punishment/remedy for speeders' behavior. The police chief is not unilaterally defying a statute, declaring that affected speeders can now perform community service or pay a fine of only $1.00, when the applicable statute mandates a fine of at $100, and does not allow community service. And finally, unlike President Obama's immigration actions, the police chief's action does not confer any affirmative benefits on the affected speeders and thus reward them for speeding. He does not instruct his field officers to give the affected speeders a gift card or arrogate onto himself the unilateral power to grant them government benefits.

If "prosecutorial discretion" grants the President a Bermuda Triangle power to alter legal status, alter legal remedy, and confer benefits, the implications are vast and unacceptable in a republic such as ours. The President would have the power to refuse to enforce (or delay enforcement of) any provision of law with which he disagrees. This, in turn, would essentially give the President a "dispensing power" such as that possessed by the monarchs of England.

It would give the President the power to grant "privileges" exempting from various laws categories of individuals—perhaps wealthy donors or other important members of the President's political base. A President with the power to grant such privileges will inevitably invite supplication by other groups, who would beg for a similar opportunity to suck at the presidential teat.

If the President has the further authority to not only define and grant such categorical exemptions from law but also to confer affirmative benefits upon those within the defined category (e.g., work permits, drivers' licenses, LPR status, citizenship and other benefits), there would be massive distortion of the rule of law, encouraging willful disregard by "favored" groups of the President. There would be, in other words, a permanent invitation to lawlessness and corruption.

If allowed to stand, therefore, President Obama's unilateral executive actions on immigration would destroy the relevance of Congress as in institution, undermine the rule of law, and destroy democracy itself. It would be the very antithesis of the "faithful" execution of our laws.

V. PRESIDENT OBAMA'S IMMIGRATION ORDERS VIOLATE FEDERALISM

The President's various executive actions on immigration—particularly DAPA because it is the largest in scope—violates the Constitution's vertical separation of powers, or federalism. It profoundly harms the States, as they must bear the costs of educating, providing health care and various other state benefits to millions of illegal immigrants now allowed to remain.

But beyond these palpable financial harms, the President's immigration executive actions injure state sovereignty by occupying a field and preempting state law—and hence, state police power—when the executive lacks constitutional power, acting alone, to occupy this field. To put it another way, while a duly enacted immigration law of Congress may occupy the field of immigration and preempt state power, there can be no constitutionally valid preemptive scope given to immigration policies unilaterally designed by the President, as he lacks any constitutional power to impose such policies in the first place.

In *Arizona v. United States*, the Supreme Court ruled that federal immigration law field preempts much of States' power over immigration.[121] But when a President unilaterally acts, it deprives States of both their police power and representation in Congress, imposing changes without democratic deliberation. All of the States exercise their police power in the shadow of the Supremacy Clause.[122] But when the President becomes a lawmaker, his actions are not entitled to preemptive scope because they are not legitimate exercises of constitutional power. By taking these unilateral executive actions on immigration, President Obama has not merely bypassed Congress and the people, but in so doing, he has deprived the States of their representative voice in the national political process.

In the words of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, "The principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure of the Federal Government itself*."[123] By giving the States a role in the selection of membership in Congress, they provided a means by which States could help shape federal policy emanating from the national legislature. When a President acts unilaterally to formulate policy, by contrast, the States' ability to shape national policy is significantly thwarted, forcing States to negotiate with one person, elected by a nationwide population, rather than 535, elected from within each of the fifty States. This dilutes the States' input and leverage in policy formation, depriving them of the opportunity that our federalist regime originally contemplated. So while unilateral executive action deprives *individuals* of their ability to have their voice heard—via their elected representatives in Congress—in the formulation of important policies such as immigration, it also equally deprives *States* of their ability to have their voice heard through the deliberative legislative process as well. As such, President Obama's unilateral orders on immigration not only violate the horizontal separation of powers, by trenching on the lawmaking prerogative of Congress, but also the vertical separation of powers, by undermining the principle of federalism.

VI. CONCLUSION

President Obama's unilateral executive actions on immigration advance a view of presidential power that has never been advanced by even the boldest presidential advocates. If this view holds, future Presidents will have the authority to unilaterally gut tax, environmental, labor or securities laws, by enforcing only those portions with which they agree. As President Obama

[121] 567 U.S. _____ , 132 S. Ct. 2492 (2012).

[122] U.S. CONST. art. VI.

[123] 469 U.S. 528, 552 (1986) (emphasis supplied).

acknowledged in his commencement remarks at Miami-Dade College on April 29, 2011, unilateral executive action on immigration reform sets a dangerous precedent for our democracy, "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one."

President Obama was right. Democracy *is* sometimes hard. It is not easy to get a diverse country to agree on highly controversial matters such as immigration reform. It may well be that, in the end, We the People, represented by our elected members of Congress, do not wish to change the existing immigration law in a comprehensive way. Or perhaps we believe change should come incrementally, not all at once. Whatever our reason for not enacting "comprehensive" immigration reform of the type desired by President Obama, our collective inaction as a people does not give the President the constitutional authority to bypass Congress. Indeed, by their very nature, the unilateral immigration reform policies enacted by President Obama have done the opposite of what he recognized was important in this speech: Unilateral executive action does not do the "hard work" of "changing minds and changing votes, one by one," but instead hastily imposes the will of one man over the will of many. This is not how our constitutional republic is supposed to work.