



President Obama's "Deferred Action" Program for Illegal Aliens Is Plainly Unconstitutional

By Jan Ting

In 2010 Congress declined to enact the DREAM Act, which would have bestowed lawful resident status on illegal aliens who had arrived in this country as minors.¹ In September 2011, when pressured by illegal alien advocates to implement the DREAM Act "on his own," President Obama responded: "I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true."² In June 2012, the president did what nine months before he had insisted he could not do, unilaterally instituting the Deferred Action for Childhood Arrivals program ("DACA"), under which illegal alien "Dreamers" can request a two-year deferral of any action to remove them, along with employment authorization documents.³ To date, over 600,000 illegal aliens have been accepted into the program.⁴

In 2013 Congress again declined to enact an immigration bill supported by the president, a so-called "comprehensive immigration reform" that would have given legal status to more than 11 million illegal aliens, including the Dreamers. In November of that year, in response to an illegal alien's insistence that the president had the power to issue an executive order stopping deportations, President Obama responded: "Actually, I don't. ... if in fact I could solve all these problems without passing laws through Congress, then I would do so. But we're also a nation of laws."⁵ On November 19, 2014, the president did what a year before he insisted he hadn't the power to do, allowing approximately four million illegal aliens who are the parents of U.S. citizens and legal permanent residents to request a three-year deferral of removal, along with employment authorization documents.⁶ He also extended the stay of DACA beneficiaries by three years and expanded the number of illegal aliens eligible for DACA by about 200,000.

As explained in this report, (1) the president's deferred-action program involves three separate legal steps, (2) each of the three steps is plainly illegal, and (3) the three steps, taken together, amount to an unconstitutional usurpation of Congress's exclusive constitutional authority to formulate immigration policy.

Jan C. Ting teaches courses in citizenship and immigration law and tax law at Temple University Beasley School of Law in Philadelphia, where he joined the faculty in 1977. He served as Assistant Commissioner of the Immigration and Naturalization Service of the U.S. Department of Justice from 1990 to 1993. He is a graduate of Oberlin College and Harvard Law School, and received a graduate degree in Asian Studies at the East-West Center of the University of Hawaii. He is a member of the Center for Immigration Studies board of directors.

Table of Contents

- I. The Statutory Immigration System
 - II. Deferred Action” Is Not “Prosecutorial Discretion”
 - A. Facilitating Unlawful Behavior is not “Prosecutorial Discretion”
 - B. The Program Exceeds the Constitutional Bounds of “Prosecutorial Discretion”
 - C. The Program Exceeds the Statutory Bounds of “Prosecutorial Discretion”
 - D. There are No Valid Precedents for the Administration’s “Deferred Action”
 - E. The President’s “Prosecutorial Discretion” Claim Is Plainly Specious
 - 1. Illegal Alien Expulsions Have Fallen by 50 Percent under President Obama
 - 2. Criminal Aliens Never Had It So Good
 - 3. The “Record Deportations” Narrative Is “Deceptive”
 - 4. “Deferred Action” vs. Mass Deportations Is a False Choice
 - 5. Using “Deferred Action” to Husband Resources is a Contradiction
 - III. Grants of “Advance Parole” Are Plainly Illegal
 - IV. The Issuance of EADs Is Plainly Illegal
 - A. IRCA Does not Authorize Issuing EADs to Deferred-Action Beneficiaries
 - B. The Issuance of EADs to “Deferred Action” Beneficiaries is Unconstitutional
-

I. The Statutory Immigration System

The Supreme Court is the ultimate judge of how the Constitution divides the power of government between the legislative, executive, and judicial branches. Article I, Section 8, of the Constitution empowers Congress “to establish an Uniform Rule of Naturalization.” Concerning Article I, Section 8 and U.S. immigration policy, the Court has held that:

- “Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,”⁷
- the “formulation” of policies “pertaining to the entry of aliens *and their right to remain here*” is “exclusively entrusted to Congress,”⁸
- “over no conceivable subject is the legislative power of Congress more complete,”⁹
- “the power to exclude or expel aliens ... is to be regulated by treaty or by act of Congress, and to be executed by the executive authority *according to the regulations so established*,”¹⁰
- Congress supplies the conditions of the privilege of entry into the United States” unless that power has been “lawfully placed with the President” by Congress,¹¹
- The exclusive authority of Congress to formulate immigration policy “has become about as firmly embedded in the legislative and judicial tissue of our body politic as any aspect of our government.”¹²

Hundreds of millions of aliens, especially those residing in countries stricken with poverty and violence, would eagerly come to live and work in our country if permitted to do so. The U.S. Congress, recognizing the need to impose realistic and humane limits on immigration, has enacted and repeatedly amended immigration statutes that (1) limit the number of aliens who may be admitted to reside and work in the United States and (2) determine which aliens will receive those privileges. In every case, these statutes were signed into law by the incumbent president of the United States.

Our current immigration law, the Immigration and Nationality Act (“INA”), protects the wages and job security of American workers from excessive immigration by limiting the number of employment-based immigrant visas to approximately

140,000 per year. With some exceptions¹³ the INA also limits the number of employment-based nonimmigrant visas to approximately 150,000 per year.

In the 1970s it became evident that the numerical limits on employment-based visas were being undermined by large numbers of alien workers entering the country without a visa or overstaying a nonimmigrant visa. In 1986 Congress reacted by enacting the Immigration Reform and Control Act (“IRCA”).¹⁴ As amended by IRCA, the INA makes it unlawful for any person to hire an “unauthorized alien” and requires job applicants to present employers documentation of their identity and of their authorization to work.¹⁵ Aliens not authorized to work by virtue of their immigration status must present an “employment authorization document” (“EAD”), issued by the Department of Homeland Security.¹⁶

Illegal aliens covered by the president’s deferred-action program enjoy the most important privileges of a nonimmigrant employment visa: the privileges of residing in the United States, of traveling to and from the United States without a visa, and of competing for work with American citizens in the U.S. job market. To qualify for the programs, an alien must “have no lawful status.”¹⁷ Thus, if two aliens with a U.S. child are working side by side, one with a legal work visa and the other working illegally, the alien who has been authorized by Congress to work in the United States must leave when his visa expires, while the alien who has been forbidden by Congress to work in the United States is permitted to stay.

In effect, the president’s deferred-action program constitutes an alternate immigration system authorized by a cabinet secretary’s memoranda. While the statutory system limits the number of employment-based visas to several hundred thousand per year, the presidential immigration system in a single year allots comparable privileges to several million illegal aliens. In light of the many Supreme Court rulings on the “plenary,” “complete,” and “exclusive” authority of Congress to fashion immigration policy, an alternative presidential immigration system that nullifies the limits of the statutory immigration system is plainly unconstitutional.

On what grounds does the president assert authority to ignore the Supreme Court’s jurisprudence and override the Constitution’s exclusive entrusting of immigration policy to Congress? Although the administration was not forthcoming concerning its authority to implement DACA, its announcement of the expanded deferred-action program was accompanied by the release of a 33-page “memorandum opinion” by the Office of Legal Counsel in the Department of Justice (hereinafter the “OLC opinion”).¹⁸ Based on an analysis of the OLC opinion and of the administration’s guidance under the DACA program, it appears that the administration has cobbled together three separate assertions of authority to justify its alternative presidential immigration system:

- First, the president exercises “prosecutorial discretion” to “defer action” by U.S. Immigration and Customs Enforcement (“ICE”) to remove illegal aliens whose removal is not considered a “priority” by the administration, in order to concentrate immigration-enforcement resources on “priority” categories such as spies, terrorists, and “aliens convicted of certain felony offenses.”¹⁹
- Second, the president exercises his statutory “parole” authority to allow deferred-action illegal aliens to leave the United States and return without a visa.
- Third, the president claims and exercises unilateral authority to exempt unlimited numbers of deferred-action illegal aliens from the definition of “unauthorized aliens” for purposes of IRCA, thereby permitting the Secretary of Homeland Security to issue EADs to the very aliens that IRCA aims to exclude from the U.S. labor market.

As explained in this report, each of these exercises directly violates the nation’s constitutionally enacted immigration laws:

- Ordering ICE agents not to inspect and place into removal proceedings illegal aliens they encounter violates 8 U.S.C. § 1225, which expressly curtails the president’s discretion concerning inspection and detention of aliens not lawfully admitted to the United States.
- Granting “advance parole” to “deferred action” recipients so that they may travel back and forth between the United States and their native countries violates 8 U.S.C. § 1182(d)(5), amended in 1996 specifically to prevent the use of “parole” to “admit aliens who do not qualify for admission under established legal immigration categories.”
- Granting EADs to millions of illegal aliens ignores nearly a century of case law, including Supreme Court decisions, holding that the Executive Branch may not circumvent the statutory employment-based visa system by opening the

labor market to aliens not eligible for such visas, thereby defeating “Congress’ purpose of protecting American laborers from an influx of skilled and unskilled labor.”²⁰

In other words, the president’s deferred-action program sits on a plainly unconstitutional stool, which itself rests upon three plainly illegal legs.

II. “Deferred Action” Is Not “Prosecutorial Discretion”

The OLC opinion (at page 9) concludes that the administration’s policy of deferring the removal of non-priority illegal aliens “falls within the scope of its lawful discretion to enforce the immigration laws.” As explained below, this “prosecutorial discretion” argument fails at many levels.

A. Facilitating Unlawful Behavior Is Not “Prosecutorial Discretion”

In the first place, claiming that the president’s deferred-action program is simply the lawful exercise of “prosecutorial discretion” turns the concept of “prosecutorial discretion” on its head. The president proposes, not only to refrain from detaining and expelling millions of illegal aliens, but also to award them a three-year shield from prosecution along with work and travel privileges that Congress has by statute reserved to a much smaller number of law-abiding aliens. As the OLC opinion admits (at page 20), “a decision to openly tolerate an undocumented alien’s continued presence in the United States for a fixed period” differs from “more familiar and widespread exercises of enforcement discretion.”

It is one thing to prioritize the use of resources that are considered insufficient to expel the whole illegal population; it is altogether another thing actively to facilitate the continuation of their unlawful residence. A district attorney in a city devastated by narcotics abuse may focus her attention on wholesale cocaine dealers and decline to prosecute retail marijuana salesmen. Yet, in what city has the district attorney handed the marijuana salesmen written guarantees that they will be safe from prosecution for the next three years along with documents that authorize them to continue selling marijuana?

B. The Program Exceeds the Constitutional Bounds of “Prosecutorial Discretion”

To be sure, the scope of “prosecutorial discretion” is inevitably ambiguous, especially when the Constitution’s separation of powers is implicated. In particular, an exercise of such discretion by the president with respect to the laws enacted by Congress must be reconciled with Article II, Section 3 of the Constitution, which states that the president “shall take Care that the Laws be faithfully executed.”

A number of law professors have reportedly written letters to the administration that support the legality of its intention not to enforce the immigration laws against broad categories of illegal aliens. However, the most comprehensive analysis of the administration’s deferred-action policies that has been produced to date is a 77-page law journal article published last year by Berkeley law professor John Yoo and St. Thomas law professor Robert Delahunty.²¹ In that article the professors catalogued and reviewed “the most commonly offered and generally accepted excuses or justifications for the breach of [the president’s] duty to execute the laws” and concluded that the DACA program “does not fall within any of them.”²²

The conclusions of Professors Yoo and Delahunty have been repeatedly endorsed during the past three years by a well-regarded former professor of constitutional law at the University of Chicago Law School, Barack H. Obama II. In a March 28, 2011, interview with Univision, the former professor explained: “With respect to the notion that I can just suspend deportations through executive order, that’s just not the case. ... 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 ignoring those congressional mandates would not conform with my appropriate role as president.”²³ He reiterated this point in a July 25, 2011, speech to the National Council of La Raza: “Now, I know some people want me to bypass Congress and change the laws on my own. ... But that’s not how – that’s not how our system works. That’s not how our democracy functions. That’s not how our Constitution is written.”²⁴

For the avoidance of doubt, former Professor Obama underscored his understanding of “how the Constitution is written” in a September 28, 2011, address to the Hispanic Roundtable: “I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. ... But the fact of the matter is there are laws on the books that I have to enforce.

And I think there's been a great disservice done ... by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true. ... We live in a democracy. You have to pass bills through the legislature, and then I can sign it.”²⁵ To dispel any thought that he might need to reconsider his interpretation of the Constitution if Congress declined to pass “comprehensive immigration reform,” the president responded as follows in a June 16, 2013 interview with Univision:

Interviewer: “If this bill failed on the House of Representatives, will you, can you actually use your executive power to legalize these 11 million people?”

*President Obama: “Probably not. I think that it is very important for us to recognize that the way to solve this problem has to be legislative.”*²⁶

Later that year, in a November 25 address at the Betty Ann Ong Chinese Recreation Center in San Francisco, the president reiterated: “If, in fact, I could solve all these problems without passing them through Congress, then I would do so. But we’re also a nation of laws.”²⁷

The OLC opinion concedes (at page 7) that “a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses ‘special risks’ that the agency has exceeded the bounds of its enforcement discretion” and (at page 24) that “any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement.” The authors of the opinion find that the necessary “individualized evaluation” is present in the president’s deferred-action program because the program leaves an ICE Field Office Director with “case-by-case” discretion to deny deferred action if “removing such alien would serve an important national interest.”

The attorneys who authored the OLC opinion had a mission to argue the president’s best legal case, but to distinguish the president’s deferred-action program from “a general policy of non-enforcement” on the grounds that applications will be accepted or denied on a discretionary, case-by-case basis is a departure from reality that ought to make even a government attorney blush. The Department of Homeland Security cannot be unaware that, just last year, Kenneth Palinkas, president of the union representing 18,000 employees of U.S. Citizenship and Immigration Services (“USCIS”), issued a public statement declaring that DACA, the model for the new deferred-action program, was reporting a 99.5 percent approval rating because DHS and USCIS leadership had “intentionally” put in place practices “to stop proper screening and enforcement” and to “guarantee that applications will be rubber-stamped for approval.”²⁸

The OLC opinion (at page 26) argues that the deferred action program, which is limited to illegal aliens who are parents of a U.S. citizen or permanent resident alien, is “consonant with congressional policy embodied in the INA” because the INA affords citizens and permanent resident aliens the opportunity to secure immigrant visas for spouses, minor children, and, on a more limited basis, parents and siblings. Given that Congress has deliberately imposed ceilings on the number of such family members who may be admitted each year, it is exceedingly odd that a presidential program designed to circumvent those limits is “consonant with congressional policy.” Moreover, while Congress has allowed a certain number of Americans each year to apply for family-member visas, this does not mean that Congress sees “family unity” as a one-way street in which unity is achieved only by importing family members not residing in the United States.

Children born to an illegal alien while the alien resides in the United States, not to mention children born to tourists, students, temporary workers, and other aliens while they are lawfully present in the United States, are with rare exceptions entitled to citizenship in the parent’s country. If a worker with a nonimmigrant visa gives birth to a U.S. child, she is nevertheless required by law, even under the president’s deferred-action program, to return to her home country when her visa expires, and the whole world expects her to take her child with her. In that respect legal and illegal aliens are “in the same boat” with millions of American fathers and mothers who have had to leave their home towns to find a better job, not to mention the hundreds of thousands of soldiers, sailors, airmen, and marines who every few years must relocate their families across the country, if not around the world. If a deported alien has American relatives, they have a right to join him in his country, but he has no right to join them in ours, except as provided by Congress under our statutory immigration system.

C. The Program Exceeds the Statutory Bounds of “Prosecutorial Discretion”

The president, like other law enforcement officers, ordinarily enjoys discretion in allocating resources among his many law-enforcement duties. However, the legislature may have an interest in the priority given to enforcement of various statutory provisions and may by statute direct or limit the prosecutor’s discretion in determining priorities. The OLC opinion (page 3)

acknowledges the authority of Congress to enact “legislation to limit the Executive’s discretion in enforcing the immigration laws” and cites numerous examples.

Were there any doubts about the priority given by Congress to enforcing immigration laws that protect American workers from job competition with illegal aliens, that doubt was erased by section 115 of IRCA, which declared it to be the “sense of Congress” that “the immigration laws of the United States should be enforced vigorously and uniformly.” Ten years later, out of concern that those laws were not being enforced “vigorously” enough, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

To facilitate the expulsion of illegal aliens, IIRIRA limited court challenges to expulsion proceedings, a limitation upheld in 1999 by the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, in which eight legally resident aliens who belonged to a group designated by the government as a terrorist organization unsuccessfully challenged their deportations as unconstitutional.²⁹ Towards the same end, IIRIRA limited the discretion of the Executive Branch to defer initiation of such proceedings against aliens who had never been legally admitted (as opposed, for example, to aliens who had been admitted under a lawful nonimmigrant visa but had overstayed the term of the visa).

Specifically, in a section of the act now codified at 8 U.S.C. § 1225, IIRIRA amended the INA to state that every alien who is present in the United States without having been admitted shall be deemed an “applicant for admission,”³⁰ that every such alien “shall be inspected by immigration officers,”³¹ and that every alien so inspected “shall be detained” by the inspecting officer for “removal proceedings” if the officer determines that the alien “is not clearly and beyond a doubt entitled to be admitted.”³² The president’s deferred-action programs, whereby he declines to inspect and detain for removal proceedings millions of unadmitted aliens, plainly violates this statutory limit on his prosecutorial discretion.

In March 2013, 10 ICE officers and agents filed a lawsuit against the Secretary of Homeland Security in the U.S. district court for the Northern District of Texas.³³ The officers and agents claimed that they had been threatened with disciplinary action if, in compliance with 8 U.S.C. § 1225, they detained or attempted to remove any illegal alien who claimed to be eligible for DACA. In other words, the secretary had decreed that immigration officers “shall not” do what a statute recently enacted by Congress plainly stated that they “shall” do.

In August 2013, the federal court held that 8 U.S.C. § 1225 “mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien ‘who is not clearly and beyond a doubt entitled to be admitted.’”³⁴ Concerning the ICE officers’ lawsuit, the judge found that the officers “were likely to succeed on the merits of their claim that the Department of Homeland Security has implemented a program contrary to congressional mandate.”³⁵

Unfortunately for these officers, the court then dismissed the complaint on the technical grounds that the officers must first seek relief under the mandatory collective bargaining process for federal employees. The bargaining process is now underway, and the procedural dismissal has been appealed, but while the process and appeal are pending, it remains the case that the only federal court that has reviewed the legality of the president’s deferred-action policies found that they were “likely” to be illegal.

D. There are No Valid Precedents for the Administration’s “Deferred Action”

A large part of the OLC opinion (pages 14-20) is devoted to reciting instances of deferrals of immigration enforcement action by past presidents, which the opinion treats as precedents for President Obama’s own deferred-action program. In fact none of the alleged precedents, which were short-term and involved limited numbers of very specific categories of aliens, was ever subject to judicial review, so their value as constitutional precedent cannot be assumed. As the OLC opinion recognizes (at page 5), “the exercise of enforcement discretion generally is not subject to judicial review.” In any event, as explained below, even if these prior actions were lawful, they are readily distinguished from the president’s proposal to defer the detention and removal of nearly four million illegal aliens.

Many instances of presidential discretion in the expulsion of alien groups are no longer relevant because Congress reacted to them by expressly limiting or removing that discretion. For example, prior to the Immigration Act of 1990, the Attorney General, at the request of the Secretary of State, would on occasion extend the enforced departure date for certain nationals from a particular country (“extended voluntary departure” or “EVD”). The 1990 Act sought to circumscribe that practice by establishing a statutory Temporary Protected Status (TPS) program that it defined as the “exclusive authority” of the Attorney

General (now the Secretary of Homeland Security) to permit deportable aliens to remain in the United States on account of their nationality.³⁶

Subsequent to passage of the 1990 Act, neither the Attorney General nor the Secretary of Homeland Security has granted EVD to aliens based upon their nationality.³⁷ However, presidents since then have still on occasion ordered a deferral of enforced departure (“deferred enforced departure” or “DED”) for certain nationality groups. For example, in 2007 President George W. Bush ordered DED for certain Liberians who were no longer eligible for TPS, and President Obama extended DED for those Liberians in 2009.³⁸ In 2010, the Obama administration amended 8 C.F.R. § 274a.12(c)(11) to exclude the beneficiaries of presidential DED orders from the definition of “unauthorized alien,” which if lawful would allow the Secretary of Homeland Security to issue them EADs under IRCA.³⁹

The post-1990 DEDs ordered by President Obama and his predecessors arguably contradict the 1990 Act’s “exclusive authority” provision. However, these extraordinary deferrals of removal and grants of employment authorization have been explicitly justified as an exercise of the president’s constitutional authority to conduct the nation’s foreign affairs. For example, in ordering the extension of DED for Liberians, President Obama cited “compelling foreign policy reasons” for his action.⁴⁰

The field of foreign affairs is an area in which Congress may “accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”⁴¹ Concerning immigration in particular, the Court has recognized that the power to exclude aliens “is inherent in the executive power to control the foreign affairs of the nation,” and for that reason “Congress may in broad terms authorize the executive to exercise the power.”⁴² Whether any or all of the post-1990 DEDs fall within that “degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved” is an important legal question, but the post-1990 DEDs and their constitutionality are irrelevant to the legality of President Obama’s deferred action program, since he has not justified the program as compelled by “foreign policy reasons,” but instead as an exercise of “prosecutorial discretion” in response to an imbalance between the number of immigration law-breakers and the amount of immigration law-enforcement resources.

A review of the deferral actions cited in the OLC opinion indicates that they applied to limited classes of people, mostly those whose departure was impeded by events outside their control or who had been entitled by Congress to remain in the United States but needed more time to complete the application process. The examples seemingly most helpful to the administration’s case are the actions of Presidents Reagan and Bush to grant “voluntary departure” (“VD”) to some of the spouses and children of illegal aliens who had been authorized by IRCA in 1986 to apply for and receive permanent residence.

Presidents Reagan and Bush regarded these individuals as victims of an oversight in the drafting of IRCA and worked with Congress to fix it, achieving the fix in 1990, when Congress extended the 1986 amnesty to approximately 140,000 spouses and children.⁴³ President Reagan did not authorize the aliens to work, and he required that the aliens have independent grounds for avoiding removal. President Bush did grant work authorizations, but only for a period of months while the 1990 law was under active consideration. As explained by the Executive Director of the nonpartisan Center for Immigration Studies (“CIS”), Presidents Reagan and Bush were working with Congress to fulfill what they and many in Congress believed to be the intent of Congress in passing IRCA.⁴⁴ President Obama, in contrast, is by his own admission attempting by executive fiat to achieve a result that every Congress under his administration has rejected.

Finally, the OLC opinion (at page 6) acknowledges that “the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.” In all of the actions cited as precedent in the OLC opinion, many (if not most or all) of the beneficiaries were aliens who had lawfully entered the United States and had reasons persuasive to the Executive Branch why they could not immediately depart. The groups were identified on the basis of having a special need, such as time to complete an immigration application, and not on the basis of engaging in unlawful conduct. In contrast, the group to which the president’s new deferred-action program applies is essentially the same group of illegal alien workers that Congress sought to exclude from the U.S. workforce by enacting IRCA. First, the program applies only to aliens who “have no lawful status.” Second, although the program does not require that the alien have a job, advocates on both sides of the immigration debate agree that the overwhelming majority of illegal aliens come here to work (and the minority who come to commit crime or engage in terrorism are supposedly excluded from the program). Under these circumstances, the inescapable conclusion is that the president, “under the guise of exercising enforcement discretion,” is engaged in an “attempt to effectively rewrite the laws to match its policy preferences.”

E. The President's "Prosecutorial Discretion" Claim is Plainly Specious

Finally, but perhaps most importantly, the president's claim that "deferred action" is necessitated by an insufficiency of resources to detain and remove illegal aliens is plainly specious. As explained below, expulsions of illegal aliens have fallen nearly by half under the current administration, the president himself has admitted that the claim of "record deportations" is a deception, career immigration enforcement officials have in testimony and public statements repeatedly disclosed that they have been barred from doing their jobs, the "Secure Communities" program that enlisted state and local police in the effort to detain and expel criminal aliens has been eliminated, and obvious means of discouraging illegal immigration have been neglected.

1. Illegal Alien Expulsions Have Fallen by 50 Percent under President Obama

The factual premise of the OLC opinion (at pages 1 and 9) is that "Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year" even though there are believed to be more than 11 million illegal aliens residing in the United States. The source of this crucial statistic is an email message from a departmental attorney (the "Shahoulian email message").

The focus of the Shahoulian email message on congressional funding for "removals" is extremely misleading, since removal is only one of several means available to ICE to expel illegal aliens or to encourage them to obey the law. Indeed, as a means of expelling an illegal alien, removal is for both the alien and the government the most expensive and cumbersome means of securing the alien's departure, and removal has traditionally been reserved for aliens arrested in the interior of the country, for criminals, and for repeat offenders. Historically, the overwhelming majority of illegal aliens detained by the government have been afforded the choice of returning voluntarily to their native countries, and they have overwhelmingly chosen to be "returned" rather than "removed."

According to the 2013 DHS Yearbook of Immigration Statistics, 1,171,058 aliens were expelled from the United States in FY2008, the final full year of the Bush administration, and the total number of expulsions has declined *in every year* of the Obama administration, falling nearly 50 percent to 616,793 in FY2013.⁴⁵ Did this unprecedented decline in expulsions happen because President Obama has had fewer resources to enforce the immigration law than his predecessor? In fact, the opposite is true: the 50 percent decline in expulsions of illegal aliens is largely due, not to declining resources, but instead to President Obama's deliberate policy of not detaining illegal aliens in the first place.

According to a report last month by CIS, "statistics kept by ICE to measure interior enforcement activity reveal that it is in a state of collapse, with declining arrests and deportations, tens of thousands of criminal aliens being released back to American communities, and many more illegal residents who have been declared immune from enforcement."⁴⁶ For example, ICE removals declined 15 percent from FY2013 to FY2014.⁴⁷ If only removals from the interior were counted, removals dropped an astonishing 34 percent in the same period.⁴⁸

Over the past two years, a number of career immigration agency officials have attested to the breakdown of enforcement evidenced by these ICE statistics. On February 5, 2013, Chris Crane, president of the union representing ICE officers, testified to the House Judiciary Committee that federal immigration agents were "regularly prohibited" by the president's political appointees from arresting illegal aliens, including some that had assaulted or taunted ICE officers or had been arrested by local police for serious crimes.⁴⁹ On May 20, 2013, Kenneth Palinkas, president of the USCIS employees' union, confirmed Crane's testimony by issuing a statement that "USCIS officers who identify illegal aliens that, in accordance with law should be placed into immigration removal proceedings before a federal judge, are prevented from exercising their authority and responsibility."⁵⁰ In an April 1, 2014, interview with the *Los Angeles Times*, a former acting director of ICE under President Obama said: "If you are a run-of-the-mill immigrant here illegally, your odds of getting deported are close to zero – it's just highly unlikely to happen."⁵¹

2. Criminal Aliens Never Had It So Good

And what about criminal aliens, whose removal has supposedly so exhausted ICE resources that the government has nothing left for the arrest and removal of less dangerous illegal aliens? In fact, the FY2014 ICE statistics reveal that the number of criminal aliens removed from the interior has declined 39 percent since FY2011 and that nearly 167,000 convicted criminals who have been released by ICE are currently at large.⁵²

Once again, the testimony of career officials belies the administration's propaganda. In his 2013 testimony to Congress, ICE officer Chris Crane explained that, contrary to the claim that "deferred action" was freeing up resources to focus on detaining criminals, DACA was being used to *prevent* ICE officers from inspecting and detaining jailed illegal aliens:

News has spread quickly through illegal alien populations within jails and communities that immigration agents have been instructed by the agency not to investigate illegal aliens who claim protections from immigration arrest under DACA. ICE immigration agents have been instructed to accept the illegal alien's claim as to whether or not he or she graduated or is attending high school or college or otherwise qualifies under DACA. Illegal aliens are not required to provide officers with any kind of proof such as a diploma or transcripts to prove they qualify before being released. ... As one immigration agent stated last week, "every person we encounter in the jails now claims to qualify for release under DACA."

In October of this year USCIS union president Palinkas published an open letter declaring that USCIS employees had been "denied mission support" and had been "blocked in their efforts" to ensure "that terrorists, diseases, criminals, public charges, and other undesirable groups are kept out of the United States."⁵³ On November 6, 2014, Patricia Vroom, a career ICE prosecutor, filed suit in U.S. district court, alleging that she had been punished for resisting orders to drop prosecutions of illegal aliens convicted of drunk driving, identity theft, and illegally voting.⁵⁴

Claiming that the administration's deferred-action program is warranted by its zeal for expelling criminal aliens is hypocrisy. On the same day that the president announced his deferred-action program, the Secretary of Homeland Security informed ICE that the "Secure Communities" program "will be discontinued."⁵⁵ Secure Communities is part of a larger program under which state and local police departments share with the FBI fingerprints of individuals booked for criminal offenses. The FBI, in turn, shares those fingerprints with ICE, which matches them against prints of aliens in DHS databases and, based on the results, may instruct the state or local police department not to release the suspect for up to 48 hours if the fingerprint scan comparison discloses that the alien is removable. Secure Communities has been endorsed by the National Sheriff's Association,⁵⁶ and ICE itself claims that "more than 283,000 convicted criminal aliens have been removed as a result of Secure Communities interoperability."⁵⁷

Federal law enforcement resources are always more efficiently deployed when leveraged against state and local police forces. Since the United States (unlike Mexico and some other countries) does not have a general-purpose "federal police force," the first encounter of many federal lawbreakers, including kidnappers and terrorists, is often with state and local police. Like other U.S. law enforcement agencies, the federal immigration agency has always relied on state and local police departments as an information source and as a partner in apprehending and detaining federal lawbreakers. Cutting back on a successful program that enlists state and local resources to ensure that illegal aliens booked for criminal offenses are removed from the country undermines both the claim that the deferred-action program is driven by a resource shortage and the claim that its aim is to focus on deporting criminal aliens.

Finally, the president described his program to the public as "going after felons, not families."⁵⁸ What he fails to mention is that, while he will go after illegal aliens who are "suspected" of terrorism and espionage, illegal aliens charged with rape, murder, burglary, and child molestation will be not be detained or expelled unless and until they are "convicted."⁵⁹ In other words, if an illegal alien has been booked and jailed by local police, but has not yet been tried and convicted, ICE is not permitted to detain the alien no matter how heinous the crime and no matter how much evidence of his guilt is presented to them. Most Americans would be shocked to learn that the federal government refuses to detain and expel tens of thousands of potentially dangerous aliens, who are not supposed to be in the country to begin with, who are already under arrest, and whom the local police are eager to have removed from their communities.

3. The "Record Deportations" Narrative Is "Deceptive"

Notwithstanding two years of public witness to the collapse of immigration law enforcement by career public servants on the front lines of immigration law enforcement, much of the media has accepted and to this day continues to repeat the claim that "record deportations" have occurred under the Obama administration.⁶⁰

When the claims of "record deportations" are compared to removal and return statistics in the Department of Homeland Security's Yearbooks of Immigration Statistics,⁶¹ it is clear that the administration is counting as "deportations" only "removals" and not "returns," which in prior administrations accounted for the overwhelming majority of expulsions. Even though expulsions are at their lowest level since the Nixon administration, "removals" are in fact about 20 percent higher than under

the final full year of the Bush administration. However, according to official data sources tapped by CIS, the increase in removals has occurred because the Border Patrol has been turning over to ICE for “removal” tens of thousands of aliens who had been arrested at the border and who in the past would have been “returned.”⁶² In effect, the president has distracted attention from the plummeting numbers of illegal aliens expelled under his administration by shifting expulsions from one category to another and then bragging about the artificially expanded category.

If one hasn’t the time to pore over the data discovered by CIS, then just take President Obama’s own word that the claim of “record deportations” is deceiving. During a 2011 roundtable with Hispanic reporters, the president responded as follows to criticism of the “record deportations” under his administration: “The statistics are actually a little deceptive because ... we’ve been apprehending folks at the border and sending them back. That is counted as a deportation, even though they may have only been held for a day.”⁶³ Although the President’s 2011 admission was not intended for public consumption, Secretary of Homeland Security Jeh Johnson was forced to admit in testimony before a congressional committee on March 11, 2014, that the higher “deportation” figures claimed by the Obama administration were not comparable to figures from prior administrations because “a very large fraction of [the 368,000 aliens “removed” in 2013] are basically border removals, where they’re apprehended in or around the border” and are “in the country for a very short period of time.”⁶⁴

4. “Deferred Action” vs. Mass Deportations Is a False Choice

In a November 23, 2014, ABC interview, President Obama made the following statement in defense of his deferred-action policies: “Everybody knows, including Republicans, that we’re not going to deport 11 million people.”⁶⁵ Plainly, this is a false choice. No Republican has proposed that ICE can or should invest the resources that would be required to apprehend, detain, and expel so many people. No country, including the United States, relies mainly on expulsions to persuade illegal aliens to return home.

In 2013 nearly 180 million aliens entered the United States to work, study, visit relatives, or see the sights.⁶⁶ To ensure that they go home when their visas expire, the United States obviously cannot rely upon the “hard power” of returns and removals. For the overwhelming majority of alien visitors who might be inclined to stay illegally, we rely instead on the “soft power” of making illegal overstays inconvenient by denying the aliens employment, driver’s licenses, government benefits, and other conveniences. The OLC opinion, in its exclusive focus on removals, gives no consideration to how illegal aliens who are unlikely to be physically expelled might nevertheless be induced to return home.

Since most illegal aliens come here to work, the most effective means of inducing them to go home, or not to immigrate illegally in the first place, is to make it difficult to find and keep a job. Millions of Americans are finding it hard to find and keep a job, so putting illegal aliens in the same boat can hardly qualify as a crime against humanity. The notion that there are no humane but effective legal tools to exclude illegal aliens from the workforce is belied by reality. In the construction industry electricians and plumbers require a license, while carpenters and bricklayers do not. As a result of fairly simple, routine, state-run licensing programs, nearly all U.S. electricians and plumbers are citizens or lawful immigrants, earning a middle-class income. In contrast, hundreds of thousands of American carpenters and bricklayers have been driven from the industry, many into poverty, by illegal alien workers. Consider also the public service unions, among the most powerful unions in the country. On the whole, they are dominated by Democrats who support the administration’s immigration policies, but you will find almost no illegal aliens holding jobs in their unionized workplaces. In other words, when American workers, whether plumbers, electricians, or public employees, have some control over entry into their professions, illegal aliens are few and far between. Unfortunately, states and towns that have attempted to use their licensing laws and other regulatory tools to reserve jobs for their citizens have faced an avalanche of lawsuits, usually supported by the administration.

If there is some reason why states and municipalities, entrusted with denying employment to unlicensed professionals, cannot also be trusted to deny employment to aliens not entitled to work at all, then what can the federal government do in their place? Were any additional evidence needed that the Obama administration has not exhausted the resources available to dissuade illegal aliens from unfairly competing with American workers, consider a very simple technique for curtailing employment of illegal aliens that some have called “G-Verify” (a play on E-Verify, the voluntary online system enabling employers to check the employment eligibility of new hires).⁶⁷ Although employers have little to fear from violating immigration laws under the current administration, nearly all U.S. employers endeavor to avoid difficulties with the Internal Revenue Service (“IRS”). Thus, employers who are otherwise nonchalant about hiring an illegal alien ordinarily insist that the alien produce or invent a Social Security Number (“SSN”) for submission by the employer to the IRS, which the IRS in turn shares with the Social Security Administration (“SSA”). Although the SSA knows which of these SSNs are invalid (starting with the 200,000

that reportedly read 000-00-0000) or suspicious (e.g., belonging to children or being used by multiple workers), the Obama administration has not allowed the SSA to share that information with ICE.

If SSA shared its data on invalid and suspicious SSNs with ICE, ICE could then notify the implicated employers that an ICE agent would be coming to interview each employee with an invalid or suspicious SSN unless within 60 days the employee resolved the discrepancy at his local Social Security office. Some of these employees would be legal (e.g., women sometimes fail to notify the SSA upon adopting a husband's surname), and those employees should be glad of the opportunity to rectify an error in their Social Security records, but employees who are working illegally would have little choice but to quit their jobs. G-Verify would make it difficult for them to find other employment, except among the narrow sector of business that is willing to defy the IRS as well as the immigration authorities. Like a nonimmigrant alien with an expired work visa, most of them would have to go home, with ICE having expended only a fraction of the resources that would have been needed to apprehend, detain, and expel them.

5. Using “Deferred Action” to Husband Resources is a Contradiction

If the administration hasn't a dime to spare on the removal of illegal aliens that have not yet been convicted of a violent crime, where did it find the resources to receive, review, investigate, and approve 600,000 DACA applications for deferred action, advance parole, and work authorization? Where will it find the resources to handle the nearly four million applications that will be generated by the president's new deferred-action program?

The OLC opinion (at page 26) assumes, again based solely on the Shahoulian email message, that the costs of administering the President's deferred-action program “would be borne almost entirely by USCIS through the collection of application fees” and such costs “would therefore not detract in any significant way from the resources available to ... the enforcement arms of DHS.” Whether this will be so is questionable.

According to a memorandum issued by the Secretary of Homeland Security the day after the OLC opinion was released, applicants for deferred action will pay only for “the work authorization and biometric fees, which currently amount to \$465.”⁶⁸ Yet, an official USCIS analysis estimated that the costs of processing comparable applications for a prior legalization program warranted a \$1,130 fee in addition to the fee for adjudicating a work permit.⁶⁹ The Homeland Security Department's attestation to the Office of Legal Counsel that deferred-action program costs would be covered by application fees was especially cynical in light of the following complaint in USCIS union president Palinkas' 2013 statement: “While illegal aliens applying for legal status under DACA policies are required to pay fees, DHS and USCIS are now exercising their discretion to waive those fees.”

Even if the application fees were sufficient to cover processing costs and were not waived, the reasoning of the OLC opinion does not account for the diversion of USCIS human resources from their other duties, including the review of applications for visas, asylum, TPS, etc. Many of those applicants are legal aliens who will be put to the back of the line so that the deferred-action applications of millions of illegal aliens may be processed. In his recent open letter to the public, Palinkas warned that the onslaught of applications under DACA had turned USCIS into a “rubber stamp” and that the president's anticipated “executive amnesty” would make matters “exponentially worse.”⁷⁰

III. Grants of “Advance Parole” Are Plainly Illegal

The “advance parole” provisions of DACA also plainly violate federal law. Although the administration has not formally announced whether beneficiaries of the president's expanded deferred-action program will also be eligible for “advance parole,” that is likely to be the case given that the beneficiaries of the expanded program have otherwise been treated the same as DACA beneficiaries.

The president's “parole” authority originated as an exception to the limits on the number and categories of aliens who could be admitted to the United States on a temporary or permanent basis under the INA. The parole authority, now codified at 8 U.S.C. § 1182(d)(5), originally authorized the president to “parole” into the United States an otherwise inadmissible alien “for emergent reasons or for reasons deemed strictly in the public interest.” According to the House Judiciary Committee, the use of the parole authority to waive the INA's “strict qualitative tests” for admission “should be surrounded with strict limitations.”⁷¹

Congress demonstrated that it was serious about these “strict limitations” when in 1965 it revoked a power it had granted to the President in 1960 to parole entire groups of refugees. In explaining the revocation, the Senate Judiciary Committee declared: “The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, isolated cases, and not for the immigration of classes or groups outside the limit of the law.”⁷²

In 1994, in order to induce the Cuban government to collaborate in ending a surge of unlawful Cuban migrants, the Clinton administration promised that it would use its “parole” authority to ensure that not less than 20,000 Cuban nationals would be admitted to the United States every year. In 1996 Congress responded to this defiance of its intention that parole be employed only in “emergent, individual, isolated cases” by amending 8 U.S.C. § 1182(d)(5) to authorize grants of parole “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” According to the House Judiciary Committee: “Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. *It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.*”

The recipients of “advance parole” under the president’s deferred-action program could number in the hundreds of thousands. The aliens eligible to apply for “advance parole” under the program are defined mainly by their ineligibility for an immigrant or nonimmigrant work visa. Could any federal court hold that DACA parole is not being used “to admit aliens who do not qualify for admission under established legal immigration categories”?

IV. The Issuance of EADS Is Plainly Illegal

A. IRCA Does not Authorize Issuing EADs to Deferred-Action Beneficiaries

The “deferred action” component of the president’s program is nothing new. As explained above, the president’s policy of not detaining illegal aliens who get past the border unless and until they are convicted of a serious, non-immigration crime has been in place for years. What does change for those illegal aliens under the program is the availability of Employment Authorization Documents.

The OLC opinion (at page 20) concedes that the issuance of EADs to deferred-action beneficiaries is a benefit “in addition to non-enforcement itself” that makes it “unlike most exercises of enforcement discretion.” However, the opinion (at page 21) argues that Congress itself bestowed upon the Executive Branch unlimited authority to issue EADs to illegal alien workers when it enacted IRCA in 1986.

As amended by IRCA, the INA makes it unlawful “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”⁷³ The term “unauthorized aliens” was defined at 8 U.S.C. § 1324a(h)(3) as all aliens other than aliens authorized to work “under this Act or by the Attorney General.” A federal regulation, 8 C.F.R. § 274a.12, contains an “exclusive listing” of the categories of alien who are not “unauthorized aliens” for purposes of IRCA and who may therefore qualify for an EAD.⁷⁴

According to the OLC opinion (page 21, fn. 11), the Attorney General has interpreted the clause “by the Attorney General” as conferring unlimited discretion to use “the regulatory process” to except any class of alien from the definition of “unauthorized alien.” According to the OLC opinion (page 1), the exception applicable to illegal aliens awarded deferred action under the president’s new program is found at 8 C.F.R. § 274a.12(c)(14), which refers to aliens who have been granted “deferred action, defined as an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment.”

A 2007 memorandum from the USCIS Ombudsman says that section 274a.12(c)(14) had a more modest scope: “There is no statutory basis for deferred action ... According to informal USCIS estimates, the vast majority of cases in which deferred action is granted involve medical grounds.”⁷⁵ So narrowly based a regulation, having no basis in the statute, cannot serve as authority for the indiscriminate issuance of millions of EADs contemplated by the president’s new deferred-action program. While the courts must normally defer to a secretary’s interpretation of his own regulations, this does not apply when an “alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.”⁷⁶

However, whether or not that regulation was ever intended to have the colossal scope attributed to it by the OLC opinion, the more important question is whether a regulation of that scope is in fact authorized by 8 U.S.C. § 1324a (h)(3). In other words, when Congress wrote and passed IRCA, were the four words “by the Attorney General” inserted into the statute to empower the president to grant EADs to unlimited numbers of aliens, including millions of the very illegal alien workers whose employment IRCA was intended to prevent?

According to Chapman University law professor John C. Eastman, ascribing any such intention to Congress would be illogical. Had Congress intended the phrase “or by the Attorney General” to confer such broad and potentially limitless discretion on the Executive Branch, then “none of the carefully circumscribed exemptions would be necessary. ... [T]he more likely interpretation of that phrase is that it refers back to other specific exemptions in Sections 1101 or 1324a that specify when the Attorney General [or Secretary of Homeland Security] might grant a visa for temporary lawful status.”⁷⁷

In other words, IRCA’s reference to aliens authorized to work “by the Attorney General” has a more obvious and rational explanation than a carte blanche to invite the whole world to work here. As noted above, the INA provides for the issuance of specified numbers and categories of immigrant and nonimmigrant visas and prescribes which of those visas entitles the alien to work in the United States “under this Act.” At the same time the INA authorizes the entry and residence of various categories of aliens without visas, including refugees, asylum applicants, and aliens eligible for TPS: in those cases the INA separately authorizes or requires the Attorney General to provide the aliens with EADs.⁷⁸ IRCA itself, which authorized certain illegal aliens to apply for legal status, provided that the Attorney General should issue EADs to these aliens while their applications were being adjudicated.⁷⁹ As Professor Eastman reasons, “by the Attorney General” surely refers to those statutory authorizations and not to wholesale surrender to the president of the Congress’s otherwise exclusive authority to determine whether an alien may enter, remain, or work in the United States.

Post-IRCA legislation is consistent with Professor Eastman’s analysis. On at least three occasions in the two decades after IRCA became law, Congress has enacted immigration legislation providing that the Attorney General (or the Secretary of Homeland Security) “*may* authorize” a class of aliens “to engage in employment in the United States.”⁸⁰ The aliens that might be authorized to work included “battered spouses,” as well as certain nationals of Cuba, Haiti, and Nicaragua. Why would Congress pass bills granting the Executive Branch discretionary authority to issue EADs to such narrowly defined categories of aliens if Congress had already empowered the Executive Branch in 1986 with discretion to issue EADs to anyone in the world?

To summarize, the question presented by 8 U.S.C. § 1324(h)(3) is whether the more reasonable interpretation of IRCA’s reference to “by the Attorney General” was that (1) Congress intended to exclude from the definition of “unauthorized alien” those aliens for whom the Attorney General was permitted or required by IRCA and numerous other provisions of the INA to issue EADs or (2) Congress intended to empower the president to nullify IRCA with the stroke of his pen by granting EADs to the very aliens whose employment IRCA was enacted to prevent? The question answers itself. To quote the D.C. Circuit Court of Appeals, an Executive Branch procedure that exposes American workers to substandard wages and working conditions “cannot be the result Congress intended.”⁸¹

B. The Issuance of EADs to “Deferred Action” Beneficiaries Is Unconstitutional

In its discussion of the scope of “prosecutorial discretion,” the OLC opinion (at page 6) states that “the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.” Here, the president has abundantly and frequently made clear that he thinks that the INA is “broken,” that he has specific policy preferences that should be enacted into legislation, and that unless and until the INA is so amended he will exercise enforcement discretion to “fix” the system “on his own.”

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that “when the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”⁸² As explained in this section, more than a century of case law leaves no doubt that the will of Congress, as expressed in the INA, is that the chief purpose of the INA is to “protect American workers from an influx of foreign labor” and that the president enjoys *no* constitutional authority to facilitate the employment of aliens outside of the categories and beyond the numbers authorized by Congress, including by artful interpretation of the INA, unless such authority has been “lawfully placed” with the president by Congress.

The constitutional supremacy of Congress on immigration matters does not mean that securing a judicial remedy against unlawful immigration acts by the president is easy. On the contrary, access to judicial relief is hampered by the difficulties of

showing that any particular citizen or group of citizens has “standing” to challenge what is likely to be a generalized economic and social impact.⁸³ However, standing has been less of a barrier for court challenges to Executive actions that circumvent the statutory limits on the number of aliens authorized to compete for work in the U.S. labor market, since such actions may harm specific workers and groups of workers. As a result, much of the case law that defines constraints on the president’s authority to fashion immigration policy “on his own” relates to work authorizations.

For nearly a century, ever since Congress began to restrict the number of immigrants into the United States, the Supreme Court has repeatedly held that protecting American workers was one of Congress’s “great” or “primary” purposes.” In 1929, the Court held in *Karnuth v. United States*: “The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor.”⁸⁴ A half-century later, in *Sure-Tan v. United States*, the Court held that a “primary purpose in restricting immigration is preservation of jobs for American workers.”⁸⁵

To this end, the federal courts have repeatedly and consistently held that the Executive Branch may not through administrative action circumvent the INA’s qualitative or numerical limits on employment visas. In 2002, in *Hoffman Plastics v. N.L.R.B.*, the Supreme Court itself invalidated a federal agency’s award of back pay to an illegal alien. The Court held that the IRCA amendments to the INA were a “comprehensive scheme that made combatting the employment of illegal aliens in the United States central to the policy of immigration law,” that awarding back pay to an illegal alien was “contravening explicit congressional policies” to deny employment to illegal immigrants, and that such an award would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy” and “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”⁸⁶

The federal circuit and district courts have followed the Supreme Court’s lead by invalidating agency decisions that enabled employers to avoid their collective bargaining contracts by hiring unauthorized alien workers. In May of 1985, the D.C. Circuit found in *International Union of Bricklayers and Allied Craftsmen v. Meese* that labor unions had standing to challenge the issuance of temporary worker visas to aliens who plainly did not qualify for those visa categories.⁸⁷ The court reasoned that, in construing the immigration laws, the courts “must look to the congressional objective behind the Act,” which was “concern for and a desire to protect the interests of the American workforce.”⁸⁸ In 1985, citing the Supreme Court’s decision in *Karnuth v. United States* and the D.C. Circuit’s decision in *Bricklayers*, the U.S. District Court for the Northern District of California declared that an “INS Operations Instruction” that expanded the category of aliens eligible for temporary work visas beyond those specified in the statute was “unlawful” and that its enforcement was “permanently enjoined.”⁸⁹

Four years later, in *International Longshoremen’s and Warehousemen’s Union v. Meese*, the Ninth Circuit found that the INS’s overbroad definition of “alien crewman” (who did not require labor certification in order to work near the docks) failed to promote “Congress’ purpose of protecting American laborers from an influx of skilled and unskilled labor.”⁹⁰ Fifteen years later, in *Mendoza v. Perez*, the D.C. Circuit ruled that the Department of Labor had used improper procedures to create special rules for issuing temporary visas in the goat and sheepherding industry.⁹¹ The court held that the “clear intent” of the temporary worker provisions enacted by Congress was “to protect American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working conditions” and that an Executive Branch procedure that exposed American workers to substandard wages and working conditions “cannot be the result Congress intended.”⁹²

A very recent case that may provide a precedent for standing in any challenge to the issuance of EADs to illegal aliens under the president’s deferred-action program is *Washington Alliance of Technology Workers v. USDHS*,⁹³ a case in which American technology workers are challenging the legality of the Department of Homeland Security’s 17-month extension of a program that permits foreign students to work in the United States after completing their studies. In a decision dated November 21, 2014, the U.S. District Court for the District of Columbia denied the government’s motion to dismiss that claim, holding that the plaintiffs enjoyed “competitor standing,” a doctrine which recognizes that a party suffers a cognizable injury when “agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.”⁹⁴ The competitive advantage enjoyed by the alien students was exemption from employment taxes, which made them less expensive to hire. Reportedly, the illegal alien beneficiaries of the president’s deferred-action program will also enjoy a competitive advantage by virtue of their exemption from the employer mandates of the Affordable Care Act.⁹⁵

Based on the statutes, legislative history, case law, and analysis presented above, I conclude that each of the three assertions of legal authority needed to implement President Obama’s “deferred action” program for some four million illegal aliens plainly violates our statutory immigration laws. The deferral of removal is based on spurious claims, clearly exceeds the bounds of prosecutorial discretion, and directly violates a provision of the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996; grants of advance parole also directly violate a provision of the 1996 Act; and granting employment authorization to millions of illegal aliens directly contradicts numerous court decisions holding that the Executive Branch may not under color of its power to administer the immigration laws circumvent the statutory limits on the number of aliens allowed to compete in the U.S. labor market. Taken together, the three illegal steps amount to a usurpation of Congress's exclusive constitutional authority to formulate immigration policy.

End Notes

- ¹ David M. Herszenhorn, [“Senate Blocks Bills for Young Illegal Immigrants”](#), *The New York Times*, December 18, 2010.
- ² [Remarks by President Obama in an “Open for Questions” Roundtable](#), September 28, 2011.
- ³ [“Remarks by the President on Immigration”](#), June 15, 2012.
- ⁴ [“Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2014”](#), data as of September 30, 2014, published November 21, 2014.
- ⁵ Carrie Dann, [“Obama tells heckler: No executive action to halt deportations”](#), NBC News, November 25, 2013.
- ⁶ [“The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others”](#), U.S. Department of Justice, November 19, 2014, p. 30.
- ⁷ *Boutilier v. INS*, 387 U.S. 118, 123 (1967).
- ⁸ *Galvan v. Press*, 347 U.S. 522, 531 (1954).
- ⁹ *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 214 U. S. 339 (1909).
- ¹⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).
- ¹¹ *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).
- ¹² *Galvan v. Press*, 347 U.S. 522, 531 (1954).
- ¹³ E.g., seasonal farmworkers, athletes, entertainers, and “specialized knowledge” workers.
- ¹⁴ Pub. L. No. 99–603, 100 Stat. 3445.
- ¹⁵ 8 U.S.C. § 1324a(a)(1)(A).
- ¹⁶ 8 U.S.C. § 1324a(b)(1)(C).
- ¹⁷ [“Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents”](#), Memorandum from Secretary of Homeland Security J. Johnson for USCIS Director Leon Rodriguez et al., November 20, 2014, p. 4.
- ¹⁸ [“The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others”](#), U.S. Department of Justice, November 19, 2014, p. 30.
- ¹⁹ *Id.* at 8.
- ²⁰ *International Longshoremen’s and Warehousemen’s Union v. Meese*, 891 F.2d 1374, 1384 (9th Cir. 1989).
- ²¹ [“Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause”](#), *Texas Law Review*, vol. 91, pp. 781-857 (2013).
- ²² *Id.* at 786.
- ²³ [“Remarks by the President at Univision Town Hall”](#), March 28, 2011.
- ²⁴ [“Remarks by the President to the National Council of La Raza”](#), July 25, 2011.
- ²⁵ [“Open for Questions with President Obama”](#), September 28, 2011.

- ²⁶ [“Univision News Transcript: Adriana Vargas’ interview with President Barack Obama”](#), July 16, 2013.
- ²⁷ [“President Obama Speaks on Immigration Reform”](#), November 25, 2013.
- ²⁸ [“USCIS Union President: Lawmakers should Oppose Senate Immigration Bill, Support Immigration Service Officers”](#), Press Release, National Citizenship & Immigration Services Council, May 20, 2013.
- ²⁹ 525 U.S. 471.
- ³⁰ 8 U.S.C. § 1225(a)(1).
- ³¹ 8 U.S.C. § 1225(a)(3).
- ³² 8 U.S.C. § 1225(b)(2)(A).
- ³³ *Crane v. Napolitano*, Civil Action No. 3:12-CV-03247.
- ³⁴ Memorandum Opinion and Order of Judge Reed O’Connor, *Crane v. Napolitano*, Civil Action No. 3:12-CV-03247-O, page 10 (April 23, 2013).
- ³⁵ *Id.* at page 1.
- ³⁶ 8 U.S.C. § 1254a(g).
- ³⁷ 75 Fed. Reg. 33446, 33457 (June 11, 2010).
- ³⁸ “<http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia>” target=”_blank”>DED Granted Country – Liberia”, U.S. Citizenship and Immigration Services, October 1, 2014.
- ³⁹ 75 Fed. Reg. 3346, 33457 (June 11, 2010).
- ⁴⁰ [“Presidential Memorandum: Deferred Enforced Departure for Liberians”](#), September 26, 2014.
- ⁴¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).
- ⁴² *Knauf v. Schaunghnessy*, 338 U.S. 537, 543 (1950).
- ⁴³ The statutory amnesty was even more generous than the Bush administration’s DED. The fact that only 140,000 aliens applied contradicts the OLC opinion’s assertion that the DED was comparable in size to the Obama administration’s Deferred Action programs because DED potentially covered 1,500,000 illegal aliens.
- ⁴⁴ Mark Krikorian, [“Obama’s Unprecedented Amnesty”](#), National Review Online, November 18, 2014.
- ⁴⁵ [Yearbook of Immigration Statistics: 2013, Enforcement Actions](#).
- ⁴⁶ Jessica Vaughan, [“ICE Enforcement Collapses Further in 2014”](#), Center for Immigration Studies, October 2014.
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*
- ⁴⁹ [Statement by Chris Crane, President, National Immigration and Customs Enforcement Council 188 of the American Federation of Government Employees, House Judiciary Committee, February 5, 2013.](#)

⁵⁰ [“USCIS Union President: Lawmakers should Oppose Senate Immigration Bill, Support Immigration Service Officers”](#), Press Release, National Citizenship & Immigration Services Council, May 20, 2013.

⁵¹ Brian Bennett, [“High deportation figures are misleading”](#), *Los Angeles Times*, April 1, 2014.

⁵² *Id.*

⁵³ [“Immigration officer union sounds alarm over DHS order for millions of blank work permits, green cards”](#), Fox News, October 28, 2014.

⁵⁴ [Vroom v. Johnson](#), Case 2:14-cv-02463-DKD, D. Ariz. (filed November 6, 2014).

⁵⁵ [“Secure Communities”](#), memorandum from Secretary Jeh Johnson for Acting ICE Director Thomas Winkowski et al., November 20, 2014.

⁵⁶ [“National Sheriffs’ Association Supports U.S. Immigration and Customs Enforcement \(ICE\) Criminal Alien Enforcement Programs”](#), June 29, 2010.

⁵⁷ [“Secure Communities”](#).

⁵⁸ Jim Acosta and Stephen Collinson, [“Obama: ‘You can come out of the shadows’”](#), CNN, November 21, 2014.

⁵⁹ [“Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants”](#), memorandum from Secretary of Homeland Security Jeh Johnson for Acting ICE Director Thomas Winkowski et al., November 20, 2014, p. 3.

⁶⁰ E.g., [“Deportations by Obama Administration Set Record”](#), *Dallas Morning News*, October 1, 2014.

⁶¹ [Yearbook of Immigration Statistics: 2013, Enforcement Actions](#), Table 39.

⁶² Jessica Vaughan, [“Where are all the deportations?”](#), *Washington Times*, December 29, 2013.

⁶³ [“Open for Questions with President Obama”](#), September 28, 2011.

⁶⁴ [“DHS Chief Jeh Johnson Confirms Inflation of Deportation Numbers”](#), The Daily Signal, March 14, 2014.

⁶⁵ [“Obama defends using executive action to tackle immigration and insists: ‘Everybody knows...that we’re not going to deport 11 million people’”](#), MailOnline, November 24, 2014.

⁶⁶ [Nonimmigrant Admissions to the United States: 2013](#).

⁶⁷ William Chip, [“Immigration Made Right”](#), *The American Conservative*, May/June 2013.

⁶⁸ [“Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are Parents of U.S. Citizens or Permanent Residents”](#), memorandum from Secretary of Homeland Security J. Johnson for USCIS Director Leon Rodriguez et al., November 20, 2014, p. 5.

⁶⁹ The source of this figure is a USCIS document, [“FY 2010/2011 Immigration and Examinations Fee Account Fee Review Supporting Documentation”](#), page 64, in Appendix Table 10 – “Costs by Unit (Fees) with SAVE and Office of Citizenship Appropriations”. This table shows the costs of each type of benefit, excluding any subsidies for other USCIS programs. The most comparable benefit to Deferred Action for Childhood Arrivals is associated with Form I-687, Application for Status as a Temporary Resident, which was used by applicants in a prior legalization program, showing a unit cost/fee of \$1,130, with additional fees for biometrics and a work permit.

⁷⁰ [“Immigration officer union sounds alarm over DHS order for millions of blank work permits, green cards”](#), Fox News, October 28, 2014.

- ⁷¹ H.R. Rep. No. 1365, 82d Cong., 2d Sess. 51 (1952).
- ⁷² S. Rep. No. 748, 89th Cong., 1st Sess. 17 (1965).
- ⁷³ 8 U.S.C. 1324a(a)(1)(A).
- ⁷⁴ 52 Fed. Reg. 16205, 16220 (May 1, 1987).
- ⁷⁵ [“Recommendation from the CIS Ombudsman to the Director, USCIS”](#), April 6, 2007.
- ⁷⁶ *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U. S. 415, 430 (1988)).
- ⁷⁷ John C. Eastman, [“President Obama’s ‘Flexible’ View of the Law: The DREAM Act as Case Study”](#), *Roll Call*, August 28, 2014.
- ⁷⁸ E.g., 8 U.S.C. §§ 1158(c)(1)(B)(asylum), 1254a(1)(1)(B)(TPS), 1738 (refugees).
- ⁷⁹ 8 U.S.C. § 1182(e).
- ⁸⁰ Pub. L. No. 105-100, Title II, § 202 (1997) (Cuban and Nicaraguan nationals); Pub. L. No. 105-277. div. A, § 101(h) (1998) (Haitians); Pub. L. No. 109-62, Title VIII, 814(c) (2006) (battered spouses).
- ⁸¹ *Mendoza v. Peres*, 754 F.3d 1002, 1017 (2014).
- ⁸² 343 U.S. 579, 637 (1952).
- ⁸³ See, e.g., *Federation for American Immigration Reform v. Reno*, 93 F.3d 897 (D.C. Cir. 1996).
- ⁸⁴ 279 U.S. 231, 244 (1929).
- ⁸⁵ 467 U.S. 883, 893 (1984).
- ⁸⁶ 535 U.S. 137, 138, 140-141, 148 (2002).
- ⁸⁷ 761 F.2d 798, 804 (D.C. Cir. 1985).
- ⁸⁸ *Id.* at 804.
- ⁸⁹ *Int’l Union of Bricklayers v. Meese*, 616 F. Supp. 1387 (1985).
- ⁹⁰ 891 F.2d 1374, 1384 (9th Cir. 1989).
- ⁹¹ 754 F.3d 1002 (2014).
- ⁹² *Id.* at 1017.
- ⁹³ Civil Action No. 14-529, U.S. District Court for the District of Columbia.
- ⁹⁴ [Washington Alliance of Technology Workers v. USDHS](#).
- ⁹⁵ Jed Graham, [“Immigration Bill Gives New Legals \\$3,000 Hiring Edge”](#), *Investor’s Business Daily*, April 17, 2013.