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Ten Immigration Agents Challenge ICE's Non-Deportation Policy

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Ten Immigration and Customs Enforcement (ICE) officers, represented by Kansas Secretary of State Kris Kobach, filed a lawsuit last Thursday in federal district court in Texas against Department of Homeland Security Secretary Janet Napolitano and ICE Director John Morton. The ICE officers are seeking to invalidate the Obama Administration's recently implemented "deferred action" initiative, which defers for at least two years the removal of an estimated 1.76 million illegal alien minors and young adults who meet certain eligibility requirements, some of whom may also be eligible for temporary work permits.

The lawsuit claims that ICE agents have been ordered to release any illegal alien who merely *claims* he is eligible for the benefits conferred by the initiative. The Administration has defended this initiative as an exercise of "prosecutorial discretion," claiming that it needs to devote its resources to removing other non-qualifying illegal aliens.

Imposing the DREAM Act by Fiat. President Obama tried and failed on multiple occasions to persuade both Democratic-controlled and Republican-controlled Congresses to pass his Development, Relief, and Education for Alien Minors (DREAM) Act. For apparently partisan reasons, and to appeal to Hispanic constituents, President Obama chose to play ethnic politics by attempting to implement most of the DREAM Act through a new initiative, thereby undercutting the legislative process as well as eroding respect for the rule of law. Imagine the hue and cry if, under the guise of wishing to encourage investment, a president were to announce that he was exercising "prosecutorial discretion" by directing Internal Revenue Service agents and federal prosecutors not to investigate or prosecute those who fail to pay capital gains taxes.

Even President Obama, when he was further removed from the sturm und drang of the election cycle, admitted to a group of Hispanic activists that he lacks the constitutional authority to implement the DREAM Act by executive fiat, informing them that "[t]he idea of doing things on my own is very tempting, I promise you, not just on immigration reform. But that's not how our system works. That's not how our democracy functions."[1]

The Plaintiffs' Allegations. The plaintiffs allege that deferred action has traditionally been utilized for the benefit of a small number of aliens facing unusually distressing situations (such as those who would be removed to countries devastated by civil war or natural disasters) for limited periods of time. They also allege that in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress sought to reduce executive discretion when it came to enforcing federal immigration laws.

The plaintiffs note Section 1225 of Title 8, which provides that unlawful aliens found in the U.S. "shall" be deemed applicants for admission, that all such applicants "shall be inspected by immigration officers," and that unless an officer determines that an applicant is "clearly and beyond a doubt entitled to admission, the alien shall be detained" for removal proceedings. The plaintiffs claim they have been placed in

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the untenable position of having to choose between following a directive from their superiors to violate federal law or facing disciplinary action (or possible civil liability if they release somebody who subsequently commits a crime) if they refuse to comply. Indeed, one of the plaintiffs alleges that he is facing a three-day suspension for having arrested an illegal alien in violation of the new policy.

The plaintiffs will have a tough row to hoe, regardless of how abusive this new initiative may be in terms of violating the spirit—if not the letter—of the Constitution's separation of powers, as well as the executive's obligation to "take Care that the Laws be faithfully executed." Although the challenge is by no means frivolous, a court may be reluctant to conclude that the plaintiffs have standing.

Even if they are able to establish an "injury in fact," a court may be tempted to cite prudential standing rules in order to avoid reaching the merits, and to avoid encouraging federal officials to defy orders of their supervisors as a prelude to challenging the legality of those orders in court. As the Supreme Court stated in *Gladstone, Realtors v. Village of Bellwood* (1979), "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."

Previous Rulings Provide Challenges. Even if a court concludes that the plaintiffs have standing, courts have shown great reluctance to intrude in areas, such as enforcement or non-enforcement decisions, where agencies have traditionally exercised a great deal of discretion. Just this past term in *Arizona v. United States*, Justice Kennedy, writing for the majority, stated that a "principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."[2] The Supreme Court has on prior occasions stated that, absent extraordinary circumstances, exercises of prosecutorial discretion by federal agencies should not be subject to judicial review. In *Heckler v. Chaney* (1985), for instance, the Court stated:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved.[3]

The *Heckler* Court also stated that the presumption against reviewability of an agency decision may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," and that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it pursues." While the plaintiffs in this current case appear to be arguing that Congress did exactly that when it enacted IIRIRA, in *Reno v. American-Arab Anti-Discrimination Comm.* (1999), Justice Scalia, for the eight-member majority, stated that it "can fairly be said to be the theme of" many of the provisions of the IIRIRA to protect the executive's discretion from review by the courts. The Court noted that at the time that IIRIRA was enacted, the IRS had been engaging in the "regular practice" of deferred action by exercising its "discretion for humanitarian reasons or simply for its own convenience."

Congress Should Take Action. Although the plaintiffs are understandably aggravated by what President Obama has done, they may well have a difficult time prevailing. Furthermore, given the significance of this issue, Congress ought to weigh

1. Ian Schwartz, "Obama: The Idea of Doing Things On My Own is Very Tempting," *Real Clear Politics* video, July 25, 2011, http://www.realclearpolitics.com/video/2011/07/25/obama_the_idea_of_doing_things_on_my_own_is_very_tempting.html (accessed August 28, 2012).
2. *Arizona v. United States*, 641 F. 3d 339 (9d Cir. 2012).
3. *Heckler v. Chaney*, 470 U.S. 821 (1985).

in and not wait for the issue to bubble up through the court system. Either way, this standoff will most likely be resolved in a political forum rather than in a court of law.

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