

# ISSUE BRIEF

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## President Obama's Executive Action on Immigration Sets a Dangerous Precedent

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It is no secret that President Obama is a supporter of the DREAM Act—legislation that has been debated and rejected numerous times by Congress. Yet, instead of doing the tough work of building trust, engaging in intense negotiating, and making compromises in search of a bipartisan solution, the President has decided to “go it alone” by implementing broad swathes of that proposed act by fiat. Setting aside the substance of the President’s policies, which others have effectively addressed,<sup>1</sup> this unilateral approach is wrong and sets a dangerous precedent.

### Limited Authority over Domestic Affairs

While the President has broad authority when acting as the “Commander in Chief” in the areas of foreign affairs and national security, he has more limited authority with regard to domestic affairs, particularly when Congress has spoken on a particular issue.<sup>2</sup> Indeed, prior to implementing his current plan, even the President acknowledged that he lacked the constitutional authority to engage in this executive action. For example, when speaking on this topic in 2011 to the National Council of La Raza (a group of Hispanic activists), President Obama said:

The 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. That’s not how our Constitution is written.<sup>3</sup>

Additionally, in a March 2011 Univision Town Hall, President Obama was asked whether he would grant “temporary protected status” to undocumented students. He responded that:

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.<sup>4</sup>

And in February 2013, during a Google Hangout session, President Obama said:

The problem is that you know 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.<sup>5</sup>

President Obama is now arguing, “If you don’t want me to take executive action, then just send me a bill that I like.”<sup>6</sup> Congress, however, has the right, if it wants to, to say, “No, we won’t. Too darn bad.”

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This paper, in its entirety, can be found at <http://report.heritage.org/ib4313>

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If the President let it be known that he thought that federal judges were being too harsh or too lenient in the sentences they gave, and if they refused to hand down sentences that he liked better, would the President have the right to start issuing sentences to criminal defendants? Of course not. The President has been vested with executive authority. He doesn't get to exercise judicial authority. And he does not get to exercise legislative authority either.

In the famous steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court stated in no uncertain terms that the President's "power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.... [T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."<sup>7</sup> The separation of powers is one of this nation's core principles of governance. Although the President may not like congressional intransigence, at least as he sees it through his eyes, this does not give him the authority to act unilaterally.

The extent of the President's authority to ignore the will of Congress with respect to domestic policy has previously been considered by the Supreme Court. In *Train v. City of New York*,<sup>8</sup> President Richard Nixon tried to impose his domestic priorities over the will of Congress by ignoring laws that Congress had passed. Nixon, desiring to cut the deficit and not wanting to fund certain programs he disliked (primarily environmental laws, farm programs, and subsidized housing), decided to impound funds dedicated to those programs. Congress react-

ed by enacting the Impoundment Control Act of 1974, which ordered the President to spend appropriated funds as directed by Congress.

This was challenged in court, and ultimately, a unanimous Supreme Court held that the President could not frustrate the will of Congress by killing a program through impoundment. Specifically, the Court determined that the President must carry out all of the objectives and the full scope of programs for which budget authority is provided by Congress.

### A Duty to Enforce the Law

Article I, Section 8 of the Constitution gives Congress exclusive authority to "establish a uniform Rule of Naturalization...." The Supreme Court, in *Immigration and Naturalization Service v. Chadha*, clearly stated that "[t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question...."<sup>9</sup> This determination was reiterated in *Arizona v. United States*,<sup>10</sup> when the Court held that Congress could trump state laws dealing with illegal aliens through the preemption doctrine but competing executive branch enforcement priorities could not.

The President's constitutional duty to enforce the laws derives from Art. II, sec. 3, which states that the President "shall take Care that the laws be faithfully executed." This is imperative language: It instructs that the President "shall take Care," not "take Care if he feels like it." His duty is to execute "the laws"—not some of the laws, not just the ones the President likes, but all of the laws. And he has to "faithfully" execute those laws.

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1. Derrick Morgan and David Inserra, "Administrative Amnesty: Unjust, Costly, and an Incentive for More Illegal Immigration," Heritage Foundation *Background* No. 2944, August 14, 2014, <http://www.heritage.org/research/reports/2014/08/administrative-amnesty-unjust-costly-and-an-incentive-for-more-illegal-immigration>.
  2. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).
  3. President Barack Obama, remarks at the National Council of La Raza (July 25, 2011), <https://www.youtube.com/watch?v=5wD5Y88UWno> (accessed December 4, 2014).
  4. President Barack Obama, remarks at the Univision Town Hall, Mar. 28, 2011, <http://thefederalist.com/2014/11/19/watch-obama-admit-that-obamas-immigration-executive-order-is-illegal/> (accessed December 4, 2014).
  5. Google Hangout Interview with President Barack Obama, Washington, D.C., Feb. 14, 2013, [https://www.youtube.com/watch?v=FSV9n-v\\_OKI](https://www.youtube.com/watch?v=FSV9n-v_OKI) (accessed December 4, 2014).
  6. President Barack Obama, remarks announcing executive action on immigration (Nov. 20, 2014), <https://www.youtube.com/watch?v=wejt939QXko> (accessed December 4, 2014).
  7. 343 U.S. at 587.
  8. 420 U.S. 35 (1975).
  9. 462 U.S. 919, 940 (1983).
  10. 567 U.S. \_\_\_\_ (2012).

Citing a memorandum from the Department of Justice's Office of Legal Counsel,<sup>11</sup> the President has said that his actions are grounded in the executive's inherent authority to exercise prosecutorial discretion. Prosecutorial discretion with respect to an executive's enforcement duties is based on equitable considerations in an individual case or a small set of cases.

Yet the Immigration and Nationality Act of 1952<sup>12</sup> already provides authority for many equitable exceptions. For instance, U.S. immigration laws permit asylum or "Temporary Protected Status" for those who will, if returned to their home country, be subjected to hardships from civil war or natural disasters or those who will be subjected to persecution because of race, religion, nationality, membership in a particular social group, or political opinion.<sup>13</sup> These are all exceptions that Congress created based on special considerations, that can be taken into account in particular cases, and which fulfill the objectives of our nation's immigration laws.

What President Obama is doing with regard to immigration law has nothing to do with responding to a natural disaster, civil strife, political persecution, or foreign affairs and everything to do with a disagreement with Congress about domestic immigration policy. He is implementing by executive fiat a policy—based on his policy preferences—that exempts a huge class of people from a law's applicability, against the will of Congress.

Kings and dictators give themselves the authority to grant dispensations, to determine, based on benevolence, a whim, a bribe, or perceived political advantage, that the law will not apply to certain favored individuals. Presidents do not have that authority.

Furthermore, prosecutorial discretion is designed to help achieve statutory objectives—which in this case would include promoting the integrity of the U.S. legal immigration system and deterring violations of our immigration laws—not to frustrate statutory objectives or to effectuate a change in policy.<sup>14</sup>

As former Immigration and Naturalization Service Commissioner Doris Meissner, who served under President Bill Clinton, once stated, prosecutorial discretion should not become "an invitation to violate or ignore the law."<sup>15</sup> But that is exactly what the President's actions will do.

The President has essentially announced that roughly half of the illegal immigrants in this country, if you include those covered by the President's 2012 Deferred Action for Childhood Arrivals (DACA) policy—clear lawbreakers—have nothing to worry about. The President has encouraged them to "come out of the shadows"—guaranteeing that the immigration laws will not be applied to them and that they will, in fact, be given work permits.

## Conclusion

The President has turned the notion of prosecutorial discretion upside down. Under normal circumstances, the law applies to everyone; prosecutorial discretion applies only in exceptional circumstances. With regard to immigration reform, the President has announced that the law will not apply to an extremely large group of people, but that it might apply to someone in that group based on exceptional circumstances—an ephemeral theoretical possibility if there ever was one.<sup>16</sup>

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11. 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, 38 Op. O.L.C. 1 (2014) ("OLC Memorandum"), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (accessed December 4, 2014).

12. 8 U.S.C. §§ 101 *et seq.*

13. See, e.g., 8 U.S.C. § 1254a; 8 CFR § 244; 8 U.S.C. § 1158; 8 CFR § 208.

14. The OLC memorandum upon which President Obama relies provides that "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." OLC Memorandum, *supra* note 11, at 6.

15. Doris Meissner, "Exercising Prosecutorial Discretion Memo," Nov. 17, 2000, <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view> (accessed December 4, 2014).

16. The OLC Memorandum notes that "[i]mmigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion." OLC Memorandum, *supra* note 11, at 24. However, it is this theoretical possibility of removal of a "non-priority" illegal immigrant that led OLC to opine that, "[a]lthough the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely." *Ibid.* at 11.

This rationale may end up squeaking by in a court of law,<sup>17</sup> assuming it is challenged by a plaintiff who is able to establish the legal requirements of standing,<sup>18</sup> but it is too cute by half. This sleight of hand may be many things, but it is not the “faithful execution” of our immigration laws, and it is not a proper exercise of prosecutorial discretion.

In his concurring opinion in the *Youngstown Steel* case, Justice Felix Frankfurter wrote that “[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”<sup>19</sup> By taking such unprecedented unilateral action, the President has established a dangerous precedent that violates fundamental principles of separation of powers—those Founding ideals that established a government of laws and not of men and continue to serve as a bulwark, protecting Americans’ liberties.

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17. In *Heckler v. Chaney*, 470 U.S. 821, 833 & 833 n.4 (1985), the Supreme Court held that the presumption against the reviewability of discretionary enforcement decisions can be overcome “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers” and that an agency might be subjected to a more exacting standard of review if it “consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.” Nonetheless, no court has ever invalidated as a violation of the Take Care Clause a non-enforcement policy premised on prosecutorial discretion. In a case filed by 10 Immigration and Customs Enforcement agents and the State of Mississippi against federal officials responsible for implementing immigration policy, a federal district court judge ruled, at least preliminarily, that the President’s DACA policy likely violated federal immigration laws and undermined the agents’ duty to enforce the law. See Opinion and Order, *Crane et al v. Napolitano*, Civil Action No. 3:12-cv-03247-O, [http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3\\_12-cv-03247/pdf/USCOURTS-txnd-3\\_12-cv-03247-1.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_12-cv-03247/pdf/USCOURTS-txnd-3_12-cv-03247-1.pdf) (accessed December 4, 2014); however, that same judge subsequently dismissed the case on unrelated grounds. The case is now pending on appeal before the United States Court of Appeals for the Fifth Circuit.

18. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (discussing three standing requirements: injury-in-fact, causation, and redressability); John Malcolm & Elizabeth Slattery, “*Boehner v. Obama*: Can the House of Representatives Force the President to Comply with the Law?” Heritage Foundation *Legal Memorandum* No. 132. July 24, 2014, at 4–5, <http://www.heritage.org/research/reports/2014/07/boehner-v-obama-can-the-house-of-representatives-force-the-president-to-comply-with-the-law>.

19. 343 U.S. at 594 (Frankfurter, J., concurring).