Written Statement

Hearing On

"Reining In Amnesty: *Texas v. United States* and Its Implications"

Before the

Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Committee on the Judiciary

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Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts: I thank you for the opportunity to testify today about legal problems associated with President Obama's unprecedented immigration executive orders, which constituted a unilateral presidential rewriting of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* I hope that my testimony will contribute to the Subcommittee's work.

Introduction

My name is David B. Rivkin, Jr. I am an attorney specializing in matters of constitutional law at the firm of BakerHostetler, LLP, and I co-chair the firm's Appellate and Major Motions practice. Over the years, I have served in a number of legal and policymaking capacities in the federal government, including service in the White House Counsel's Office, the Office of the Vice President, and the Departments of Justice and Energy.

I have a particularly keen interest in the structural separation of powers, both vertical—between the federal government and the States—and horizontal—among Congress, the Executive and Judiciary. I have written extensively about these issues and I have also been involved professionally in a number of cases, both in and out of government, that have implicated the constitutional separation of powers. To name but some examples of my engagement with separation of powers matters, my colleagues at BakerHostetler and I served as outside counsel in the District and Circuit Court proceedings to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010, and represented the State of Louisiana in its challenge to the constitutionality of the 2010 census and the State of Texas in several of its challenges to EPA's regulations under the Clean Air Act.

I am testifying today on my own behalf and do not speak on behalf of either my law firm or any of our clients.

Analysis

On February 16, 2015, the Honorable Andrew S. Hanen, Judge of the United States District Court for the Southern Division of Texas, Brownsville Division, granted the preliminary injunction (PI) to the plaintiffs in *Texas v. United States*, No. 14-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). This case, as it happens, was also brought by 26 States, and challenged the Administration's recently announced immigration program, collectively entitled "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA). As described by the Administration, DAPA is intended to legalize the presence of over 4 million individuals, who presently illegally reside in the United States, and would qualify these individuals to receive a variety of state and federal benefits, including work authorization.

However, a brief disclaimer first: I am planning to focus solely on the legality, or more precisely, the lack thereof, of the President's new immigration policy, to wit: DAPA. Being a constitutional lawyer, I am not going to get into the policy merits of what he is trying to do, nor do I plan to address whether or not the pre-existing immigration regime, based upon the duly-enacted INA, is dysfunctional or even broken. Aside from my own predilection for constitutional law issues, the main reason for not getting into the policy merits of what the President is trying to do is that those merits are not at all dispositive on the issue of the legality of his actions.

And, as to the INA's alleged dysfunctional nature, in my view, *most* of the statutory components of the modern administrative state are dysfunctional and even incoherent. In this

regard, the flawed nature of a duly-enacted statute provides absolutely no basis for the President to engage in an utterly unconstitutional practice of rewriting that statute, arrogating to himself in the process the lawmaking power that is vested exclusively in Congress and violating his solemn constitutional duty to faithfully execute the law.

Let me also say at the outset that I am going to give short shrift to the argument, advanced by some pundits, that the scope of duly-enacted federal laws has grown so vast that no President can faithfully execute all of them across-the-board, but must target for compliance some subset thereof and, as a result, inevitably under-enforce others. This isn't to say that I am not concerned about how much the administrative state has grown and, in particular, at how many things are criminalized at the federal level. These regrettable phenomena do not, however, provide any basis for the President to suspend any validly enacted statute or dispense with its application to certain categories of people or entities or circumstances.

But please, don't take my word for this. What matters is that the Supreme Court confronted in 1838 this very question of whether the President can exercise suspending or dispensing power. The case was called *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), and the President's lawyers there argued, rather forthrightly—which is more than we can say for the current President's lawyers—that Congress has simply passed too many statutes, that the federal government could not faithfully execute them all, and that the most faithful way to proceed would be to enforce *well* a portion of them at a time and defer enforcing others entirely, instead of doing an across-the-board *poor* enforcement. The Supreme Court did not buy this argument, calling the suspending and dispensing power utterly alien to our constitutional tradition.

This controversy, by the way, did not originate in 1838, but dates to a much older confrontation between King James II and the Parliament, which eventually culminated in the Glorious Revolution. An interesting historical footnote, worthy of mention: King James refused to enforce parliamentary laws that were not just dysfunctional, but which blatantly and viciously discriminated against Catholics. So the policy merits were very much on his side. But the law was not on his side, for to endow the King with suspending or dispensing power would've rendered the Parliament utterly irrelevant, enabling the King to amass all powers in his hands.

It is this historical backdrop that led the Framers to adopt the faithful execution language, which is one of the only two places in the Constitution that imposes a duty of faithfulness—it imposes on the *President* the duty of good faith when enforcing congressional statutes. In this regard, Article II, Section 3, requires that the President "shall take Care that the Laws be faithfully executed." (The other such provision is the Full Faith and Credit Clause—Article IV, Section 1, requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State" - - which imposes on the *States* the duty to give full faith and credit to the acts and decisions of other States.)

In my view, in both instances, the party doing the enforcing is carrying water for another entity and thus, the all-powerful self-interest that usually animates individuals and governments alike may be missing. The Framers, who generally viewed ambition counteracting ambition as the key mechanism to make the separation of powers work, clearly appreciated the fact that it *wouldn't* work when one branch was supposed to enforce the writ of another branch. To address this problem, Congress came up with an obligation to act in "good faith." So the faithful-execution and full faith-and credit-provisions are the very important glue that holds together our separation of powers architecture.

And so, the *Kendall* Court was right in rejecting the President's claim of suspending or dispensing power, for unless decisively rejected, such a power would eviscerate Article I and enable Article II to amass all power in its hands. This would be a disaster for individual liberty and threaten the very survival of our body politic. Thus, the President's duty of faithful execution is a compelling constitutional obligation, to be discharged vigorously, subject only to the proper constraints of enforcement discretion and resource limitations.

Judge Hanen's excellent 123-page Memorandum Opinion in justifying his grant of the PI focuses primarily on the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, *see, e.g.*, 2015 WL 648579, at *37-61, deferring the disposition of most of the constitutional issues towards the later stages of litigation. By contrast, I will now focus primarily on describing why DAPA is indeed an exercise of constitutionally-proscribed dispensing power and is neither an exercise of constitutionally-permissible enforcement discretion nor a permissible prioritization of government's limited resources. In so doing, I will focus on the opinion that President Obama received from the Office of Legal Counsel (OLC) a few hours before announcing DAPA.

I do want to say a few things, however, about Judge Hanen's Opinion. First, it does discuss at some length why DAPA cannot be justified as a legitimate exercise of agency discretion, the relevant agency here being the Department of Homeland Security (DHS). "[T]he government claims that the DAPA program is merely general guidance issued to DHS employees, and that the delineated elements of eligibility are not requirements that DHS officials are bound to honor. The government argues that this flexibility, among other factors, exempts DAPA from the requirements of the APA." 2015 WL 648579, at *9.

Judge Hanen, of course, decisively rejects these arguments. His analysis strongly suggests that he is at least favorably disposed towards the plaintiffs' constitutional arguments.

Indeed, one can say that, because enforcement discretion lies at the heart of the Administration's defense of DAPA, Judge Hansen has rejected it pretty vigorously. This is very significant.

Second, the plaintiffs' APA claims, far from being a mere technical statutory argument, provide an additional powerful indictment of DAPA and are further indicia of its fundamental illegality. Let's briefly consider what the significance is of the Administration's violation of APA in this instance? Statutes like APA, and the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. § 1501 *et seq.*, represent a considered congressional effort to cabin the exercise of authority by the Executive Branch in the context of broad congressional delegation of power to that branch. The notice and comment requirements, the requirement for public participation, coupled with the requirement to consult with the States when the federal action is imposing costs on them—found in UMRA—and the eventual opportunity for judicial review are all meant to discipline what essentially amounts to the executive exercise of delegated legislative power. So, the combination of the Obama Administration's rewriting of the INA—arrogating to itself the core aspects of Congress's lawmaking authority and doing so without deliberation that is appropriate for all lawmaking—its decision not to comply even with the APA and UMRA, followed by its effort to claim that its actions were beyond judicial review, all manifest a stubborn determination by the Administration to function as a sole lawmaker, accountable to no one.

Switching now to the OLC opinion, while it has blessed DAPA' legality, regrettably, OLC's legal analysis is shockingly flawed in five major respects. First, OLC justified DAPA as a prioritization of government's "limited resources." But it isn't merely a prioritization of resources—it rewrites existing law. Now, illegal immigrants won't be deported if they aren't a

threat to national security, public safety, or border security. Beyond these three categories, deportation may be pursued only if it would serve an "important federal interest."

But, under INA, by contrast, whoever enters the country illegally, is a "deportable alien" who "shall, upon the order of the Attorney General, be removed." DAPA thus transforms an entire category of aliens deemed deportable—those who've entered illegally—into two different categories, whereby some are deportable and some aren't. This is a shift in kind, not merely degree.

A President merely prioritizing resources would do what prior Presidents have done: enforce the entirety of immigration *law*, while allowing prosecutors to make case-by-case determinations about which *cases* to pursue first. By announcing a *global* policy of non-enforcement against certain categories, President Obama condones unlawful behavior, weakening the law's deterrent impact, and allows lawbreakers to remain without fear of deportation. In the President's own words, "All we're saying is we are not going to deport you." These individuals are no longer deportable, although Congress has declared them so.

Second, OLC incorrectly claims that DAPA involves case-by-case scrutiny. As OLC properly admits, "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." This is indeed the case, both because the Supreme Court said so in the leading case called *Heckler v. Chaney*, 470 U.S. 821 (1985) and, more fundamentally, because an across-the-board categorical non-enforcement policy amounts to the very constitutionally-proscribed suspending or dispensing power already rejected 175 years ago in *Kendall*. The OLC argues, however, that there are no "removable aliens whose removal may not be pursued under any circumstances." And although the policy "limits the discretion of immigration officials . . . it

does not eliminate that discretion entirely." But it's absurd to assert that a mere theoretical possibility that a small percentage of 4+ million applicants may be rejected amounts to meaningful enforcement discretion.

This absurdity is illustrated by the Administration's 2012 Deferred Action for Childhood Arrivals (DACA) policy. Of 521,815 DACA applications considered on a "case-by-case" basis, *only three percent* have been rejected. With an approval rate of ninety-seven percent, a claim of meaningful discretion falls flat. In reality, those meeting the President's criteria are rubberstamped. This is a categorical exemption from—and rewriting of—the law. And numbers aside, since millions of claimants to Obama's immigration largesse would be applying by mail, the administrative context chosen by the President to implement DAPA is inherently not susceptible to the use of case-by-case discretion.

Third, even if DAPA is accepted as involving case-by-case discretion, it creates a remedy—deferred deportation—for a category Congress hasn't allowed and the President lacks authority to create. The OLC memo blithely lumps deferred deportation together with other kinds of deportation relief, such as parole, temporary protected status, and deferred enforced departure. But each of these other types of relief either has been specifically authorized by Congress, or—in the case of deferred enforced departure—is supported by the President's independent foreign affairs power. (I should note here that one feature of the OLC opinion that I quite like is that it correctly disclaims any possibility that the President has an inherent constitutional authority to defer deportation across-the-board. To be sure, given the teaching of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the notion that the President's foreign affairs power gives him a generic deportation deferral authority, despite the congressional statute that says otherwise, would be an utterly specious claim.)

What matters here is that, while Congress has authorized deferred deportation for specific categories, it hasn't authorized it for those to whom President Obama wishes to extend it—the parents of U.S. citizens and lawful permanent residents. OLC claims this isn't important because, although the President lacks statutory authorization, deferred deportation "has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court." In support, it cites the Supreme Court decision, *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AAADC*). Its analysis is flat-out wrong.

In *AAADC*, members of the Palestinian Liberation Front asserted that the INS's refusal to defer their deportation constituted discrimination. The Court disagreed, ruling that a recently passed statute was "clearly designed to give some measure of protection to 'no deferred action' decisions" and deny adjudication of such discrimination claims. Thus, *AAADC* merely acknowledged that Congress didn't want federal courts entertaining discrimination lawsuits *from deportees* based on a failure to grant deferred action in a particular instance. It didn't consider or endorse the legality of the broader program of deferred deportation *itself*.

OLC next claims that Congress has "acquiesced" to deferred deportation. In support, it cites statutes specifically authorizing deferred deportation for battered spouses of U.S. citizens, and instances where individuals entitled to visas—such as victims of human trafficking or college students affected by Hurricane Katrina—needed more time to obtain their visas or fulfill the visa's purpose. However, Congress's authorization of deferred deportation for specific narrow categories of individuals doesn't allow a President to create broad new categories, particularly since his deferred deportation creates entitlement to benefits such as work permits and different types of government's largesse, *e.g.* the earned income tax credit, and because the

category of aliens created by President Obama's policy weren't entitled to stay in the United States, either now or in the future.

These two points are worth a brief elaboration. Enforcement discretion, in addition to having to be exercised on a true case-by-case basis and not across-the-board, is limited only to a simple decision not to prosecute a person who has technically broken the law. It never entails granting this person some other boons or benefits. Thus, if the IRS decides, in the exercise of its enforcement discretion, not to seek jail time or monetary penalties for a taxpayer who has broken tax laws, it does not send that taxpayer a financial reward.

And, in all previous instances where Congress opted to defer deportations of specific narrow categories of individuals, said individuals were entitled under INA eventually to stay in the United States. This is emphatically not the case with the new President Obama-created broad category of deferred deportation recipients.

Fourth, OLC claims past Presidents have taken analogous deportation deferral actions, yet fails to acknowledge the actual legal basis for them. The primary example it cites is the 1990 Family Fairness Policy (FFP) of President George H.W. Bush, which affected an estimated 1.5 million children and spouses of those granted amnesty by the 1986 Immigration Reform and Control Act. The FFP, however, was consonant with existing statutes. And the FFP granted not deferred deportation, but "voluntary departure," for up to one year. Voluntary departure allows deportable individuals to voluntarily depart the country, on their own dime, in lieu of being forcibly removed. Their status as "deportable" individuals never changes.

In this regard, the FFP was grounded in the then-existing voluntary departure statute, which stated, "[t]he Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of

deportation." The FFP certainly didn't contradict existing law or attempt to re-categorize deportable aliens.

Fifth, OLC totally ignored DAPA's adverse impact on federalism, specifically its violation of States' rights. It profoundly harms the States, who must bear the costs of educating and providing health care to millions of illegal immigrants now allowed to remain. Equally important, DAPA unconstitutionally injures state sovereignty.

To elaborate on this point briefly, in *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court ruled that federal immigration law field-preempts much of the States' power over immigration. But when a President unilaterally acts, it deprives States of both their police power and their representation in Congress, imposing changes without democratic deliberation. To emphasize, all of the States exercise their police power, which is to say their sovereignty, in the shadow of the Constitution's Supremacy Clause.

But the Framers, who drafted the Constitution in Philadelphia, and the people of the 13 States who ratified it, have agreed to this arrangement because they were given a formidable set of tools to shape preemptive federal legislation, primarily through the States' representation in the Senate. These tools are inapposite when the President becomes the sole law maker. Thus, while duly-enacted federal immigration law can preempt state power, there can be no preemption when a President exceeds his constitutional authority by rewriting the law. Yet, INA's preemptive effect remains in place, even though the statute has been rewritten by President Obama.

DAPA, and OLC's memo that blesses it, reflect an utterly unconstitutional view of imperial presidency President as a sole law-maker—that has never been advanced by even the boldest presidential power advocates. If this view holds, future Presidents can unilaterally gut

tax, environmental, labor, or securities laws, by enforcing only those portions of them with which they happen to agree and rewriting the rest at will. President Obama's actions on immigration set a dangerous precedent that warps the separation of powers, which is the primary way in which the Constitution protects individual liberty. It cannot be allowed to stand, and I have every confidence that the 26 States, plaintiffs in *Texas v. United States*, will emerge victorious.