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"Keeping Families Together: The President's Executive Action On Immigration And The Need To Pass Comprehensive Reform"

I. Introduction

I first want to thank Chairman Leahy, Ranking Member Grassley, and all members of the Senate Judiciary Committee for the invitation and opportunity to testify on President Obama's recent executive action on immigration. I also want to tell Presiding Senator Hirono that my wife and I are both graduates of the University of Hawaii where we met as graduate students. Hawaii will always be our favorite place in the world to vacation and visit.

Like Senator Hirono, both my parents were immigrants. And I grew up in a working class suburb of Detroit where every family seemed to include at least one parent or grandparent who was an immigrant, from places all over the world including Mexico, Syria, and Iraq. So of course I admire and respect immigrants, as we all should because every American is either an immigrant or the descendent of ancestors who came here from somewhere else. And we're told that includes Native Americans.

Whether we should admire and respect immigrants is not what the immigration controversy is really about. Given that we should admire and respect immigrants, the question at the heart of the controversy is, how many should we take? And specifically, should we accept everyone in the world who wants to come to the United States to live and work? Or alternatively, should we try to enforce a numerical limit on how many immigrants we accept every year?

That's a binary choice, either no limits, or an enforced limit. And it's a hard choice, especially for our elected officials, because advocating no limits does not sound like a path to election or re-election. But trying to enforce a numerical limit presents numerous administrative challenges, and requires a willingness to turn away people who are neither criminals nor national security threats, who just want to work hard for a better life for themselves and their families, and who remind us of our own ancestors. And if they come anyway in violation of our numerical limit, we have to try to remove them to defend the numerical limit. Can we do that?

Many lawyers like to think they can argue both sides of any controversy, and I'm no exception. I can make the historical, philosophical, libertarian, economic, and religious arguments for open borders. But I can also, and do, defend the decision of Congress to enforce a numerical limit on immigration.

Although it's become a cliché to say that everyone agrees that our immigration system is broken, I don't agree with that. I believe that what's broken is our willingness to make the hard choice between simply allowing unlimited immigration, as we did for the first century of the republic, or alternatively enforcing a numerical limit on immigration, with all the attendant difficulty, complexity and expense that entails.

It is perhaps understandable that many citizens including elected officials keep looking for a third, easier choice. Not open borders and no limits, but not turning away and removing would-be immigrants who remind us of our own ancestors either, just to enforce a numerical limit on immigration.

How about this for a third choice? We can pretend we have a numerical limit, keep it on the books, but not enforce it. And whenever that policy choice produces a large number of illegal immigrants, we can just enact a big amnesty or legalization. How does that sound?

If we do nothing at all to reform our immigration system, we are left with the most generous legal immigration system in the world, admitting every year more legal permanent residents with a clear path to full citizenship than all the rest of the nations of the world combined. When I last gave testimony to this

committee in 2013, I described that immigration system as worthy of our nation of immigrants. But it needs to be defended and enforced to deter excess, illegal immigration, unless we prefer the alternative of unlimited immigration. And Congress can adjust the numerical limit to be enforced at any time as long as we are committed to enforcing it.

II. President Obama's Deferred Action Plan is Unwise and Bad Policy

Ever since Congress began to limit 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 in *Karmuth v.United States* found that, "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."[1] 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."[2]

What is the impact of an executive order that adds 5 million illegal immigrant workers to the labor market in America? How does that affect the job prospects of the 9.1 million unemployed Americans (of whom 2.8 million are long-term unemployed) and the 7 million involuntary part-time American workers who want but can't find full-time work, and the 700,000 discouraged workers who have stopped looking for work? How does the addition of 5 million illegal immigrant workers to the American labor market affect the future prospects for the 46 million Americans, almost one in six, who are receiving food stamps? And how will giving 5 million illegal immigrants work authorization affect the groups with the highest unemployment rates? The official unemployment rate is still 5.8 percent, five years after the official end of the Great Recession, but it's 11.1 percent for African

[1] 279 U.S. 231, 244 (1929).

[2] 467 U.S. 883, 893 (1984).

Americans, 17.6 percent for American teenagers, and 28.1 percent for African-American teenagers.[3] Should Congress be concerned?

Wages remain stagnant, and even employed Americans feel job insecurity. President Obama says that rising income inequality is tearing at the social fabric of America. Indeed, even while wages stagnate, corporate profits are up and the stock market is hitting new record highs seemingly every week. Does adding five million illegal immigrant workers to the legal work force increase or decrease economic inequality in America?

Let's consider the millions of people abroad who might be considering illegal immigration to the U.S. How does President Obama's granting of work authorization to 5 million illegal immigrants affect them? The poor people of the world may be poor, but they are not stupid. They are as capable as anyone else of using cost-benefit analysis to determine what is in their self-interest. If we want to deter them from illegally immigrating to the U.S., we should raise the costs of doing so — through more enforcement — and we should reduce the benefits. Conversely, if we want to encourage more illegal immigration, we should lower the costs through less enforcement and increase the benefits by providing work authorization — exactly as President Obama has just done in his executive order.

Finally, what is the impact of President Obama's executive order on qualified legal immigrants to the U.S.? Many recently arrived legal immigrants will have to compete for jobs with the newly work-authorized 5 million illegal immigrants. And what of the millions of qualified immigrants still waiting outside the U.S. for their chance to immigrate legally? Because the number of immigrant visas available each year is limited, some immigrants eager to come here legally have been waiting outside the U.S. for a visa for more than 20 years. How do they feel when they see that those who entered illegally as recently as five years ago are now going to be rewarded with work authorization and deferred action? Does the executive order make them feel like fools for respecting American law instead of violating it?

[3] Employment statistics from the Bureau of Labor Statistics monthly economic situation report for November 2014, released December 5, 2014. http://www.bls.gov/news.release/empsit.nr0.htm

III. Instead of Paying Taxes, Illegal Immigrants Receiving Work Authorization Under President Obama's Executive Order May Receive Refundable Earned Income Tax Credits, Even for Prior Years When Working Illegally

The earned income tax credit (EITC) is a refundable tax credit for qualifying low-income taxpayers, in effect a transfer of wealth to them from higher income taxpayers, an anti-poverty program built into the Internal Revenue Code. The EITC was originally enacted in 1975, and has been expanded several times since so that some qualifying low-income taxpayers with children can today get EITC benefits in the form of tax refunds exceeding $5,000.[4]

To qualify for the EITC, taxpayers must provide valid Social Security numbers for themselves and their children. This requirement disqualifies non-citizens who are working in the U.S. in violation of U.S. immigration law. Undocumented aliens cannot obtain valid Social Security numbers.

Supporters of amnesty for illegal immigrants and President Obama's deferred action plan have argued that illegal immigrants need employment authorization so they can pay taxes like everyone else. In fact many beneficiaries of deferred action may not have to pay taxes, and may in fact qualify for a large payment from the U.S. Treasury in the form of a refundable earned income tax credit.

Furthermore, a little-known ruling, by obscure officials of the Internal Revenue Service (IRS) in the last year of the Clinton administration, opened the door to illegal aliens claiming and receiving EITC benefits even for years when they are undocumented.

On June 9, 2000, a "Chief Counsel Advice" was published in the name of "Mary Oppenheimer, Acting Assistant Chief Counsel (Employee Benefits)", though it was signed by "Mark Schwimmer, Senior Technician Reviewer". This document advises IRS employees that illegal aliens who are disqualified from receiving the EITC can retroactively receive EITC benefits for years worked

[4] See generally Internal Revenue Code Section 32.

without a valid Social Security number if, after receiving a valid Social Security number, they file an amended return for the previous years worked. This document is still available through the official IRS website.[5]

Thus, illegal aliens who obtain work authorization, either by qualifying for a legal visa or by executive order from the President, and who then obtain a valid Social Security number, can apparently claim the EITC for previous years worked without a Social Security number as long as such claims are not barred by a statute of limitations, generally within three years.

The document does state that, "Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent." But for an advisor to taxpayers described in this document, who previously worked illegally but now have work authorization, a published IRS document like this constitutes sufficient authority for filing an amended or new tax return to claim the EITC for previous years not barred by statute of limitations, even if this ruling appears to be in conflict with both the language and the intent of the Internal Revenue Code that the EITC should not be paid to anyone working without a Social Security number.

Here is the document last accessed on December 7, 2014: http://www.irs.gov/pub/irs-wd/0028034.pdf .

I encourage members of Congress to determine the net impact on the U.S. Treasury of allowing five million illegal immigrants to qualify for refundable tax credits including the EITC and the Child Tax Credit (Internal Revenue Code. Sec. 24).

IV. President Obama's Executive Order for Deferred Action for Illegal Aliens Announced November 19, 2014, is both Unconstitutional and Without Legal Authority.

[5] http://www.irs.gov/pub/irs-wd/0028034.pdf (last accessed on December 7, 2014)

President Obama has repeatedly and publicly stated that he as president does not have the constitutional power or legal authority to issue an executive order deferring the removal of illegal aliens. Representative Robert Goodlatte, Chairman of the Committee on the Judiciary, U.S. House of Representatives, played a video compilation of President Obama's denials of his legal and constitutional authority to issue such an executive order at that committee's December 2, 2014, hearing on "President Obama's Executive Overreach on Immigration."[6]

President Obama is a lawyer and former teacher of constitutional law at the University of Chicago Law School, and so understands the meaning and significance of the words he uses. He deserves to be believed when he states that he lacks legal and constitutional authority to defer the removal of illegal aliens by executive order.

The basic reason why President Obama's unilateral executive immigration order is illegal and unconstitutional is that it violates the fundamental concept of the U.S. Constitution, that we the people govern ourselves through our elected representatives through a deliberative process of checks and balances, not through the unilateral pronouncements of one "great leader" as in North Korea.

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]

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[6] Transcript: http://fednews.com/homeland.php?item=557529&op=hg . I also quoted five of President Obama's public statements from 2011 to 2013 in commentary published in the Philadelphia Inquirer on November 18, 2014: http://www.philly.com/philly/opinion/20141118_Ready_to_ignore_the_people.html .

[7] Boutilier v. INS, 387 U.S. 118, 123 (1967).

- "over no conceivable subject is the legislative power of Congress more complete," [9]

- "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,[10]

- 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."[11]

President Obama relies upon a November 19, 2014, 33-page opinion from the Office of Legal Counsel at the U.S. Department of Justice for its conclusion that the deferred action program he has announced "would constitute a permissible exercise of DHS's enforcement discretion under the INA." In reaching that conclusion, the Office of Legal Counsel relied on the Supreme Court decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), a case involving the Food and Drug Administration, for the proposition that an agency's decision not to take enforcement action should be presumed immune from judicial review under the Administrative Procedures Act.

But the Supreme Court in *Heckler* also said this: "In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting

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[8] Galvan v. Press, 347 U.S. 522, 531 (1954).

[9] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

[10] Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

[11] Galvan v. Press, 347 U.S. 522, 531 (1954).

substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."[12]

I believe that each component of the immigration executive order announced on November 19, 2014, violates substantive priorities of Congress as expressed by statute.

A. The Deferred Action Exceeds the Statutory Bounds of Prosecutorial Discretion

Section 115 of the Immigration Reform and Control Act of 1986, enacted by Congress and signed into law by President Reagan, declared it to be the "sense of Congress" that "the immigration laws of the United States should be enforced vigorously and uniformly."[13]

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). Among the reforms ordered by Congress in IIRIRA were new limits on the discretion of the Executive Branch to defer initiation of removal proceedings against aliens who are present without having ever been legally admitted.

Specifically, Congress declared in new Section 235(a)(1) of the INA (codified as 8 U.S.C. Section1225(a)(1)) that every alien present in the United States without having been admitted "shall be deemed for purposes of this Act an applicant for admission." And Congress also specified in Section 235(b)(2) that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a (removal) proceeding under section 240."

In March of 2013, ten ICE officers and agents filed a lawsuit against the Secretary of Homeland Security in the U.S. district court for the Northern District

[12] 470 U.S. 821, 832-833 (1985).

[13] http://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-15.html .

of Texas.[14] The officers and agents claimed that they had been threatened with disciplinary action if, in compliance with 8 U.S.C. § 1225 (INA Section 235), 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 of 2013, the federal court held that 8 U.S.C. § 1225 (INA Section 235) "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.'" [15] 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."[16] 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.

A large part of the OLC Opinion (pages 14-20) is devoted to reciting instances of deferrals of immigration enforcement action by former 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. In any event, even if these prior actions were lawful, they are readily distinguished

[14] Crane v. Napolitano, Civil Action No. 3:12-CV-03247.

[15] 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).

[16] *Id*. at page 1.

from the President's proposal to defer the detention and removal of nearly 5,000,000 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.[17]

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. However, Presidents since then have still on occasion ordered a deferral of enforced departure ("deferred enforced departure" or "DED") for certain nationality groups. 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.

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."[18] 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."[19]

[17] INA Sec. 244(g) (8 U.S.C. Sec. 1254a(g)).

[18] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[19] Knauff v. Shaunghnessy, 338 U.S. 537, 543 (1950).

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" may be 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 example seemingly most helpful to the Administration's case is the 1990 "Family Fairness" program implemented under President George H.W. 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 (cited on page 14 of the OLC opinion).

President Bush regarded these individuals as victims of an oversight in the drafting of IRCA and worked with Congress to fix it, achieving the fix as part of the Immigration Act of 1990, which provided legal immigrant visas to such spouses and children. The enactment by Congress of this legislation within months of the announcement of the "Family Fairness" initiative demonstrates the close consultation between the Bush administration and Congress, and the concurrence of Congress in efforts to fix the particular problem.

As Justice Jackson famously said in *Youngstown Sheet and Tube v. Sawyer*, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," but, "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[20]

[20] 343 U.S. 579, 635-636 (1952).

The OLC Opinion itself (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." . My conclusion is that the precedents cited in the OLC opinion are distinguishable, and that President Obama, "under the guise of exercising enforcement discretion," is engaged in an "attempt to effectively rewrite the laws to match its policy preferences."

B. Grants of "Advance Parole" to Deferred Action Beneficiaries, like those to DACA Beneficiaries, Exceed the President's Authority.

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.[21]

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 Section 212(d)(5) (8 U.S.C. § 1182(d)(5)), authorizes the President to "parole" into the United States an otherwise inadmissible alien "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."

According to the House Judiciary Committee in 1996 when that restrictive language was added to the statute: "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

[21] See Q. and A. 57 of USCIS's "Frequently Asked Questions", http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#travel .

circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories."[22]

Could any federal court hold that DACA parole or parole granted to deferred action beneficiaries is not being used "to admit aliens who do not qualify for admission under established legal immigration categories"?

C. The Issuance of Employment Authorization Documents to Deferred Action Beneficiaries Exceeds the President's Authority

The OLC Opinion (at page 20) identifies three features of President Obama's initiative that even it concedes are "somewhat unusual among exercises of enforcement discretion": open toleration of an undocumented alien's continued presence in the United States for a fixed period of time, the ability to seek employment authorization and suspend unlawful presence for purposes of Section 212(a)(9)(B) and (C) of the INA, and the invitation to individuals who satisfy specified criteria to apply for deferred action status.

Regarding the ability to seek employment authorization, the OLC Opinion (at page 21) argues that Congress itself bestowed upon the Executive Branch unlimited authority to issue Employment Authorization Documents to illegal alien workers when it enacted the Immigration Reform and Control Act of 1986.

New Section 274A(a) of the INA, added by IRCA in 1986 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."[23] The term "unauthorized aliens" was defined at Section 274A(h)(3) as all aliens other than aliens authorized to work "under this Act or by the Attorney General."[24] A federal regulation, 8 C.F.R. § 274a.12, contains a list of the categories of alien who are not "unauthorized aliens" and who may therefore qualify for Employment Authorization.

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[22] Section 523, House REPT. 104–469, on HR 2202 (March 4, 2996), https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf .

[23] Codified as 8 U.S.C. Section 1324a(a).

[24] 8 U.S.C. Section 1324a(h)(3).

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." So narrowly based a regulation, having no basis in the statute, cannot serve as authority for the indiscriminate issuance of millions of Employment Authorization Documents 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."[25]

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) (INA Sec. 274A(h)(3)). In other words, when Congress wrote and passed the IRCA in 1986, 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

[25] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988).

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." [26]

In other words, Section 274A(h)(3)'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. 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.[27] 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."[28] 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

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[26] John C. Eastman, *President Obama's 'Flexible' View of the Law: The DREAM Act as Case Study*, ROLL CALL, Aug. 28, 2014, http://www.rollcall.com/news/Obamas-Flexible-View-of-the-Law-The-DREAM-Act-as-Case-Study-235892-1.html?pg=2&dczone=opinion .

[27] E.g., INA Sec. 208(c)(1)(B) (asylum), 244(a)(1)(B) (temporary protected status), 8 U.S.C. Sec. 1738 (refugees).

[28] 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).

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."[29]

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, following Supreme Court pronouncements in *Karnuth*[30] and *Sure-Tan*[31]that the policy and purpose of immigration law is preservation of jobs for American workers against the influx of foreign labor.

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

[29] Mendoza v. Peres, 754 F.3d 1002, 1017 (2014).

[30] See footnote 1.

[31] See footnote 2.

successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[32]

Other federal circuit and district courts have invalidated executive branch 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. 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."[33] In 1985, citing the Supreme Court's decision in *Karnuth* 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."[34]

Four years later, in *Longshoreman 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."[35]

Earlier this year, 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. 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

[32] 535 U.S. 137, 138, 140-141, 148 (2002).

[33] 761 F.2d 798, 804 (D.C. Cir. 1985).

[34] Int'l Union of Bricklayers v. Meese, 616 F.Supp. 1387 (1985).

[35] 891 F.2d 1374, 1384 (9th Cir. 1989).

Executive Branch procedure that exposed American workers to substandard wages and working conditions "cannot be the result Congress intended."[36]

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*,[37] a case in which American technology workers are challenging the legality of the Department of Homeland Security's 18-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."[38]

The competitive advantage enjoyed by the alien students in that case was exemption from employment taxes, which made them less expensive to hire. The illegal alien beneficiaries of the President's deferred-action program may also enjoy a competitive advantage by virtue of their exemption from the employer mandates of the Affordable Care Act.

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 five million illegal aliens violates our statutory immigration laws. The deferral of removal is based on dubious claims, exceeds the bounds of prosecutorial discretion, and violates Section 235(a)(1) and (b)(2) of the INA; grants of advance parole also directly violate Section 212(d)(5) of the INA as amended in 1996; 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

[36] 754 F.2d 1002, 1017 (2014).

[37] Civil Action No. 14-529, U.S. District Court for the District of Columbia.

[38] https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0529-17 .

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.