How Obama's Immigration "Executive Action" Respects the Rule of Law

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It's December, 2008. President Bush foresees economic calamity if the U.S. auto industry collapses. Congress has failed to enact his recommended rescue plan despite majority support in both Houses. His party has just taken a drubbing at the polls. What happens? He is advised that, under the technical wording of the *Emergency Economic Stabilization Act of 2008*, the Treasury Department can use the Troubled Assets Relief Program (TARP) to effectuate the needed rescue. Presumably with Bush's approval, it does so. The president states explicitly that he is responding to Congress's inability to enact the needed legislation. Was this "declaring war on the American people?" No, it is how governance and the rule of law work in the modern administrative state. The executive branch, facing a problem to which Congress has not responded, canvasses its existing statutory authorities to see if discretion already exists to address a national need.

Fast forward nearly six years. President Bush's successor confronts three realities on immigration policy. The first is that Congress has not funded – and cannot plausibly finance – a system of immigration enforcement adequate to its caseload. The Pew Research Center estimates that the number of undocumented immigrants in the U.S. was 11.3 million in 2013.

The Obama Administration deported a record 400,000 persons in 2012. If the government continued at that pace, deporting the current population of undocumented persons would take more than 28 years. Even that massive effort would clear the decks, so to speak, only if no undocumented persons were to cross our borders between now and the year 2042.

The second reality is that, without well-articulated criteria to guide the exercise of discretion by the Departments of Homeland Security and Justice, the practice of deportation is likely to be rife with arbitrary decision making and resistant to public oversight. The most elementary principle of justice is

that like cases should be treated alike. The alternative to priority-setting standards to guide the handling of 11.3 million potential cases is going to be arbitrary decision making of Kafka-esque proportions. Many of the millions of families caught in the nightmare will – except for the circumstances of their entry into the U.S. – be law-abiding, productive, exemplary people.

The third is that, despite majority support in Congress for a comprehensive legislative fix to our broken immigration system, Congress will not send him a bill to sign.

What does President Obama do? He signs off on a plan by which the Department of Homeland Security will use its statutory authority – authority vested in the executive branch by Congress – to prioritize the removal of certain aliens unlawfully present in the United States while implementing a deferred action program for parents of U.S. citizens and legal permanent residents. And perhaps just as remarkably from a rule of law point of view, he follows the advice of Justice Department lawyers not to implement a proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program.

The President's actions respect, even advance, the rule of law in at least five ways. First, they are firmly rooted in statutory authority. The *Homeland Security Act of 2002* vests DHS with responsibility for “[e]stablishing national immigration enforcement policies and priorities.” The Immigration and Naturalization Act likewise gives the Attorney General and Secretary of Homeland Security broad power to regulate as they “deem necessary” to carry out the immigration laws. The new DHS policy is consistent with repeated congressional directives, noted in a 2013 Congressional Research Service report, to “give priority to the removal of ‘criminal aliens.’”

Second, the President has advanced no innovative claim of inherent executive authority to support the DHS programs. The opinion of the Office of Legal Counsel (OLC) approving those programs repeats the Justice Department's longstanding position that presidential prosecutorial discretion is rooted in the Article II duty to “take care that the laws be faithfully executed.” There is no claim, however, that Congress lacks authority to channel the President's discretion or that he has some unspecified reservoir of inherent power regarding immigration. The latter omission is telling because the Constitution actually says nothing to demark the respective immigration authorities of our two elected branches, and the Supreme Court has referred to immigration control as a power “entrusted by the Constitution to the political branches of government.” A president with genuinely dictatorial ambitions might well be

expected to run with that ambiguity. The President's acquiescence in OLC's conclusion that DHS lacks authority to defer action for parents of young people registered with the Deferred Action for Childhood Arrivals program is a remarkable act of restraint.

Third, the Justice Department has articulated limiting principles for DHS nonenforcement discretion that plainly and persuasively distinguish the DHS programs from other cases in which courts have condemned administrative inaction as an abdication of statutory responsibility. In *Adams v. Richardson*, for example, the D.C. Circuit in 1973 approved an injunction against the Nixon-era Department of Health, Education and Welfare which had been utterly neglecting its responsibilities under Title VI of the *Civil Rights Act of 1964*. Title VI obligates federal agencies to terminate the flow of federal funds to programs and activities that discriminate on the basis of race. Among other things, Nixon's HEW refused even to investigate the existence of race discrimination in ten states that either rebuffed requests to submit desegregation plans for systems of higher education that had been segregated under state law or to fix deficiencies that the Johnson Administration identified in earlier plans that had never been revised.

Fourth, the programs will enhance DHS accountability for the administration of our deportation system. Anticipating presidential action on immigration, conservative critics of President Obama have acknowledged that the executive branch enjoys prosecutorial discretion that it may exercise routinely on a case-by-case basis. Case-by-case discretion, however, is extremely difficult to monitor. Not only does it leave the public in general and Congress in particular largely ignorant of the bases on which an agency is acting, but even high-level agency officials may find it challenging to know what individual field offices are doing and why. DHS Secretary Johnson's implementation memorandum and the OLC opinion that supports it offer everyone concerned a clear picture of the Department's actions and its underlying reasoning. Congressional oversight, judicial review, and public debate will all be well informed as a result.

Fifth, the new programs will greatly reduce the exercise of arbitrary discretion in the handling of individual cases involving undocumented immigrants. Where programs of administration affect the freedoms of individual persons, clear rules and formal procedures give those touched by such programs the maximum capacity to exercise their liberty under law. When President Obama said to the putative beneficiaries of the new policies, "You can come out of the shadows and get right with the law," this is the rule of law value he promoted.

Of course, Americans concerned that the expansionist tendencies of the modern presidency threaten to destabilize checks and balances and the rule of law have plenty to worry about. We should worry when presidents make novel claims of inherent constitutional authority that would put them beyond the oversight of courts and Congress. We should worry about a humongous intelligence establishment that

operates largely in secret and systematically frustrates rigorous oversight. We should worry about presidential assertions of authority to command every subordinate officer in the exercise of his or her policy making authority regardless of where Congress has determined decision making authority should lie.

But President Obama's immigration initiatives should give us no cause for worry, at least from a constitutional standpoint. What we see is how governance and the rule of law work – and ought to work – in the modern administrative state. Next steps are up to Congress.

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