

Written Statement

Oversight Hearing on

**“U.S. Immigration and Customs Enforcement:
Priorities and the Rule of Law”**

Before the

Committee on the Judiciary,

United States House of Representatives

**David B. Rivkin, Jr., Partner
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036**

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Introduction

My name is David B. Rivkin, Jr. I am an attorney specializing in constitutional law at the firm of Baker Hostetler LLP and 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 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 and have been involved professionally in a number of cases, both in and out of government, that have implicated these important issues. As the most recent example of my engagement with federalism matters, my colleagues at Baker Hostetler and I serve as outside counsel to the 26 States that have challenged the constitutionality of the Patient Protection and Affordable Care Act of 2010. I am testifying today on my own behalf and do not speak either on behalf of my law firm or any of our clients.

Discussion

Immigration policy has been a much-debated issue, both at the national and state level, for a number of years now. The George W. Bush Administration tried, but failed, to enact a comprehensive immigration reform bill. The Obama Administration, while talking much about the need for reform, has not mounted a serious legislative effort in this area. Unfortunately, it has chosen a different path, whereby the President, solely on his own authority, sought to revise the existing immigration laws. In our constitutional system, however, it is Congress that has plenary constitutional authority to establish U.S. immigration policy and fundamental reform requires legislative action. The President cannot revamp immigration laws on his own, and his Administration's recent effort to do so, by announcing that it will seek deportation only for undocumented aliens who have committed non-immigration crimes in the United States, violates the separation of powers and is unconstitutional.

Of course, no President can hope to expel each and every undocumented alien now in the United States – perhaps upwards of 11 million individuals. Human and financial resources to identify, apprehend, process, and promptly deport millions of illegal aliens have been lacking for years and, arguably, so has been the political will to do so. In this environment, immigration enforcement authorities, under both Democratic and Republican administrations, have performed as best they could, given the available resources. Still, millions of illegal aliens have been deported over the years and, while many of them were persons convicted of serious criminal offenses, most deportees were not in that category.

But Obama's new policy, announced over the last several months, is fundamentally different from the admittedly imperfect immigration enforcement records of previous Presidents. The Administration has stated that, henceforth, deportation efforts will be focused solely on

aliens with criminal records and no enforcement resources will be expended on other types of cases. Undocumented individuals who have avoided apprehension at the border and not been convicted of a serious offense since arriving to the United States will no longer face the prospect of deportation, the most basic means of immigration enforcement.

Far from merely prioritizing the use of limited resources, the Administration's policy effectively rewrites the law. It means that the vast majority of undocumented aliens need no longer fear any immigration law enforcement. This applies even to those illegal aliens who are now in deportation proceedings. Limiting the possibility of deportation in this manner eliminates entirely any deterrent effect the immigration laws have, and also states plainly that those laws can be ignored with impunity. The President has, in effect, suspended operation of those laws with respect to a very large and identifiable class of offenders. This clearly exceeds his constitutional authority.

Federal agencies can, of course, establish enforcement priorities because Congress rarely appropriates adequate monies to allow perfect enforcement of any federal scheme, which may not be possible in any case. Law enforcement agencies like Immigration and Customs Enforcement ("ICE") therefore properly exercise "prosecutorial discretion" in deciding which offenses to investigate and prosecute. That discretion ultimately resides in the President and allows him to establish priorities – properly informed by his own policy preferences – on at least two levels. First, a President can determine to devote more resources to a particular problem – human trafficking or white collar crime, for example – with the inevitable result that other federal statutes or areas of concern – organized crime, say – will be less vigorously pursued and enforced. This is entirely lawful and appropriate. Presidents are elected for the very purpose of establishing such priorities.

Second, law enforcement officials must make determinations in particular cases whether and how to direct their efforts. For example, under the manual governing United States Attorneys, federal prosecutors must consider whether there is a sufficient federal interest before pursuing a particular case. This involves considerations such as the nature and seriousness of the offense, the potential deterrent effect on others, the defendant's previous record, alternatives to criminal prosecution, overall likelihood of success, and established law enforcement priorities. This enforcement discretion is also fully supported by the President's constitutional authority.

That authority, however, is not boundless. While the President can, for example, legitimately decide that, in the post-9/11 environment, most of the FBI's resources should be dedicated to the investigation and prosecution of terrorism cases, he cannot decree that no enforcement assets whatsoever would be allocated to securities fraud or counterfeiting cases. Because the Executive Branch has the exclusive license to enforce federal criminal laws in our constitutional system, this would effectively decriminalize securities fraud and counterfeiting, derogating from the federal statutes that prescribed such activities.

In this regard, the Constitution provides that the President "shall take care that the laws be faithfully executed," and the Framers did not include this imperative language by accident. Exactly one hundred years before the Constitution came into effect in 1788, Britain's king James II was deposed in no small part because he claimed the legal right to suspend generally, or dispense with in individual cases, laws enacted by Parliament.

King James was a Roman Catholic and hoped to benefit his co-religionists by issuing a "declaration of indulgence" suspending operation of the religious penal laws Parliament had enacted against Roman Catholics and non-Anglican Protestants. James pressed the point in the

face of near universal opposition throughout the English political nation, and he was promptly turned out in favor of his Protestant daughter and son-in-law, William and Mary.

Parliament's anger was not merely a product of religious bigotry. Admitting of a suspending or dispensing power would fatally warp any balance between executive and legislative authority. A legislature has no power to speak of if the Executive, whether king or President, can simply decide not to enforce the laws that it has enacted. Thus, both the suspending and dispensing powers were declared illegal in the English Bill of Rights. The Framers knew this history well and gave the President no choice but to execute laws passed by Congress. As the Supreme Court stated in 1838, in a case called *Kendall v. United States*, the power to dispense with laws enacted by Congress "has no countenance for its support in any part of the constitution."

President Obama has effectively announced his intent to suspend or dispense with the immigration law. This is a suspension as broad as any attempted by the British monarchy, and it is equally illegal. The President is entitled to establish enforcement priorities, but the ultimate goal must always be implementation of the law enacted by Congress. If the President disagrees with that law, he must convince Congress to change it.