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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

June 20, 2012

The Honorable Barack Obama  
President of the United States  
1600 Pennsylvania Ave., N.W.  
Washington, D.C. 20500

Dear Mr. President,

I was dismayed by your recent decision to grant amnesty in the guise of "deferred action" and work authorization to potentially millions of illegal immigrants. Your action represents a breach of faith with the American people and our Constitution, blatantly ignoring the rule of law and the separation of powers that are the foundations of our democracy.

As a constitutional law professor, you understand the core principle embedded in our Constitution of separation of powers. As James Madison said in the Federalist Papers, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>1</sup> You therefore spoke the truth when you stated on multiple occasions in the past that only Congress can suspend the deportations of the millions of illegal immigrants who would apply for relief under various iterations of the DREAM Act. For example, on March 28, 2011, you stated that:

With respect to the notion that I can just suspend deportations through executive order, that's just not the case, because there are laws on the books that Congress has passed . . . . The executive branch's job is to enforce and implement those laws. . . . 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.

Yet, last week you indicated your intent to do exactly what you had earlier said you had no power to do – to encroach upon Congress's rightful role and suspend these very deportations.

The American people and Congress have a right to know what your legal justification is for engaging in an action that a little over one year ago you believed was beyond the scope of the authority of the Executive Branch.

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<sup>1</sup> The Federalist No. 47.

Did you solicit or receive a legal opinion from the Justice Department indicating that your former statements were in error? If so, would you be willing to share that document with the American people? And if not, please explain what, if anything, beyond crass political calculation on the eve of an election led to your reversal.

I understand that in exercising your responsibility to see that the laws be faithfully executed, the executive branch has the inherent power of prosecutorial discretion. However, incantation of the term “prosecutorial discretion” cannot be used as a smokescreen to cover the executive branch’s decision to simply not enforce the laws enacted by Congress.

Article II, Section 3, of the Constitution places a duty on the president to “take Care that the Laws be faithfully executed.” That duty is not fulfilled when the President knowingly and willingly approves the violation of constitutional laws enacted by Congress.

At a hearing of the Judiciary Committee’s Subcommittee on Immigration Policy and Enforcement last October, former Justice Department official David Rivkin testified that:

[When] the President has, in effect, suspended operation of [immigration] laws with regard to a very large identifiable class of offenders. . . . it clearly exceeds his constitutional authority and sets an extremely unfortunate record.

Now we have heard a lot about enforcement priorities; and, of course, we all recognize that Federal agencies do . . . exercise prosecutorial discretion and the President can properly inform the exercise of such discretion. But that authority is not boundless.

....

The President is entitled to establish enforcement priorities, but his ultimate goal must be the implementation of a law enacted by Congress. If a President disagrees with this law, his sole recourse is to convince Congress to change it.<sup>2</sup>

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<sup>2</sup> U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the House Comm. on the Judiciary, 112<sup>th</sup> Cong. 58-59 (2011).

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Mr. Rivkin's analysis is consistent with Supreme Court precedent going back a century and a half. In his testimony, he referenced the 1838 decision in Kendall v. U.S., in which the Supreme Court stated that "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."<sup>3</sup>

The separation of powers between three co-equal branches of government is the hallmark of American democracy. But your Administration's decision to abandon our democratic principles and impose this policy without legislation flies in the face of the intent of our Founders. And it raises serious constitutional questions about the legitimacy of the policy.

As such, I respectfully request that you provide to the House Judiciary Committee any legal opinions from the Justice Department regarding what authority the Administration has to impose immigration policies without congressional approval. I appreciate your prompt response to this important inquiry.

Sincerely,



Lamar Smith  
Chairman

cc: The Honorable John Conyers, Jr.

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<sup>3</sup> 37 U.S. 524, 613 (1838).