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Committee on the Judiciary
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Good afternoon. Thank you for inviting me to testify and to share my thoughts on the constitutionality of the President's directive granting deferred action eligibility to approximately five million people who are currently in the United States in violation of our immigration laws.

I served as Principal Deputy Assistant Attorney General under President Bush. In that role, I litigated many immigration cases and advised the White House on immigration policy and reform.

In my view, President Obama's actions exceed his authority under the Constitution. The President was correct on the many occasions where he stated that he did not have the power to do what he has now done. While reasonable people can disagree over how best to fix our immigration system—and while there can and should be a robust public debate over how to address the status of the estimated 11 million people who are in this country illegally—there should be no doubt that by unilaterally acting through executive action rather than through the Congress, the President has circumvented the process our founders envisioned.

The framers of our Constitution were well aware of the dangers of executive overreach. That is why they wrote a Constitution providing for the separation of powers, and why the first sentence of Article I, Section 1 states that “All legislative Powers herein granted shall be vested in a Congress of the United States.”

The framers also spoke to the President’s duty to enforce the laws enacted by the Congress. Article II, Section 3 provides that the President “shall take Care that the Laws be faithfully executed.”

In my view, President Obama’s actions on immigration violate these constitutional provisions. His actions violate Article I, Section 1 and the separation of powers, by rewriting the laws of the United States not through legislative amendment but through executive fiat. They also violate Article II, Section 3 because they amount to an abdication of the executive’s duty to faithfully execute the laws of the United States.

Let me say a word about the Take Care Clause. As its text makes clear, the President’s duty is not optional: the Constitution says that he “shall” take care that the laws be faithfully executed. And the Constitution’s use of the word “faithfully” underscores that the President is to execute laws in a way that maintains fidelity to the congressional design. It is hard to see how an order directing that federal law not be enforced as to approximately five million people amounts to “faithful execution.”

The Take Care Clause does not give a President discretion to choose which laws he will enforce and which he will not. As the head of the Office of Legal Counsel under

President Clinton wrote, “the Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes.” The consequences of this issue are not confined to immigration: if the President may use executive authority to simply ignore laws that he does not like, then it will be possible for future presidents to unilaterally revise everything from federal criminal law, to tax law, to environmental law, and beyond.

Of course, President Obama’s directive goes beyond mere non-enforcement of the law. It has the effect of affirmatively granting benefits—including the right to apply for work permits—to those falling within its ambit.

The Administration has invoked prosecutorial discretion in an attempt to justify the President’s actions. Prosecutorial discretion is well established in our nation’s legal traditions. In fact, the concept predates the founding and finds its roots in the common law of England. Nowadays, no one can dispute that prosecutors—or in this context, executive branch officials with the constitutional duty to enforce immigration laws—may exercise discretion in setting enforcement priorities and in deciding what charges to bring, or whether to bring charges at all.

But there are limits on prosecutorial discretion. Generally speaking, it applies to individual cases—situations in which, in the judgment of the prosecutor, it would be unjust or otherwise inadvisable to apply the full force of the law based on the

circumstances of an individual case. When I served in the Justice Department, I can recall many instances where we, or the Department of Homeland Security, made a determination to exercise discretion in individual cases. Prosecutorial discretion, however, is not so elastic a concept that it can stretch to encompass what the President has done here—granting blanket relief to a potential class of five million people.

That is what makes President Obama’s actions different from prior instances in which Presidents—Republicans and Democrats alike—have granted immigration relief. The scale of President Obama’s directive significantly exceeds what past Presidents have done. Moreover, in prior instances, the Executive was acting to implement a new statute consistent with the will of Congress. Here, in contrast, the Executive is taking action precisely because Congress has refused to act in the ways that the president wants. Indeed, the President is attempting to write into law what Congress deliberately chose not to write into law.

Respect for Congress and for federal law is particularly warranted when it comes to immigration. Article I, Section 8 of our Constitution gives Congress the power to “establish a uniform Rule of Naturalization.” And the Supreme Court has held that “over no conceivable subject is the legislative power of Congress more complete” than it is over immigration.

As many on this Committee will recall, during the Bush Administration, we were strong advocates of immigration reform and we sought to get a bill through Congress.

When we were unsuccessful, many of us were disappointed and frustrated. But we did not attempt to achieve through executive fiat what we could not achieve through the legislative process. We respected the system the framers established.

Regardless of one's views of the merits of the President's policy, he does not have the power to enact it unilaterally and he does not have discretion to abdicate his duty to enforce the laws that the Congress has enacted. I thank the Committee for convening this hearing and look forward to your questions.