PREPARED WRITTEN TESTIMONY OF

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"President Obama's Executive Overreach on Immigration**"**

Chairman Goodlatte, Ranking Member Conyers, and distinguished Members of the Committee, on behalf of the American Center for Law & Justice, thank you for allowing me to address the subject of whether the President's most recent executive action on immigration, which he carried out on November 20, 2014, is within the bounds of his constitutional authority. This hearing today is not about determining the merits of immigration reform or the wisdom behind the President's executive action. Instead, this hearing is about preserving the delicate balance of the separation of powers, a doctrine fundamental to the health of our republic.

Article I, Section 1, of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[1] Specifically regarding immigration, the Constitution vested Congress with the exclusive authority to "establish an uniform Rule of Naturalization."[2] While the Constitution certainly vests considerable power in both the Executive and Judicial Branches, the exclusive authority to make and change law lies with Congress. Yet despite this exclusive grant to Congress, President Obama boldly proclaimed that his recent executive action was an action he took to "change the law."[3]

The founding fathers—after careful study of the writings of John Locke, Montesquieu, and Sir William Blackstone—intentionally separated powers among the branches, fearing that a

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[1] U.S. CONST. art. I, § 1.

[2] *Id.* § 8, cl. 4.

[3] Daniel Halper, *Obama Admits: 'I Just Took an Action to Change the Law'*, WEEKLY STANDARD, Nov. 25, 2014, *available at* http://www.weeklystandard.com/blogs/obama-admits-i-just-took-action-change-law_820167.html. Responding to a group of aliens, the President said, "Now, you're absolutely right that there have been significant numbers of deportations. That's true. But what you are not paying attention to is the fact that *I just took an action to change the law*." *Id.* (emphasis added).

concentration of power in any one branch, being unchecked, would become tyrannical. Their conscious design to strengthen the government through this separation of powers is articulated in *The Federalist Papers*[4] and visible in the structure of Articles I, II, and III of the U.S. Constitution. In this design, the powers were not separate to ensure governmental efficiency, rather the separation restrains the natural tendency of men, including presidents, to act as tyrants. On October 25, 2010, President Obama recognized his own limits:

> I am president, I am not king. I can't [legislate] just by myself. We have a system of government that requires the Congress to work with the Executive Branch to make it happen. . .The main thing we have to do to stop deportations is to change the laws. . . [T]he most important thing that we can do is to change the law because the way the system works – again, I just want to repeat, I'm president, I'm not king. . . But there's a limit to the discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself. So the most important thing that we can do is focus on changing the underlying laws.[5]

Whether framed as an executive order or as mere "executive action" in the form of so-called "prosecutorial discretion," President Obama's recent action on immigration violates the Constitution. It is moored neither in his authority granted by the Constitution nor in authority delegated by a lawful statute passed by Congress.[6] First, by contradicting Congress's express and implied intent, President Obama's actions violate the test articulated in *Youngstown Sheet & Tube Co. v. Sawyer*.[7] Second, by enacting a sweeping new program under the guise of "prosecutorial discretion," President Obama has violated controlling precedent and defied clear instructions from his own attorneys at the Office of Legal Counsel. I will address each contention in turn.

Constitutional Analysis

Justice Jackson articulated a three-tier framework to measure executive actions in *Youngstown Sheet & Tube Co. v. Sawyer*.[8] Courts have applied this framework when the President

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[4] *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.").

[5] *Transcript of President Barack Obama with Univision*, LA TIMES, Oct. 25, 2010, *available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html.

[6] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999).

[7] 343 U.S. at 635-37 (Jackson J., concurring).

[8] *Id.*

acts within an area generally considered to be under the constitutional authority of Congress. According to *Youngstown*, when the President acts pursuant to an authorization from Congress, his power is "at its maximum."[9] When Congress is silent on the matter, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[10] Finally, when the President takes action in conflict with Congress's expressed or implied intent, the President's power is at its "lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter."[11] While Justice Jackson's classification of executive action into this three-tier framework is "analytically useful," the Supreme Court has been mindful in applying this framework that "[the] great ordinances of the Constitution do not establish and divide fields of black and white" and it is therefore rare when executive action falls "neatly in one of three pigeonholes."[12]

While I firmly believe the recent executive action falls under the third tier—where the President's power is at its lowest ebb—even if it fell somewhere closer to the second tier (as the President seems to claim in asserting he had to act because Congress refused to pass legislation on immigration) the executive action still fails this constitutional test. The President's executive action disrupts the delicate balance of separation of powers, obliterating the Constitution's Presentment Clause,[13] which requires bicameral action on legislation followed by presentment to the president for his signature, and ignores the exclusive authority of Congress to set laws and policy on immigration matters.

Few enumerated powers are more fundamental to the sovereignty of the United States than the control of the ingress and egress of aliens. Over two hundred years ago, in 1795, Congress claimed exclusive authority over naturalization, which was affirmed by the Supreme Court in 1817 in *Chirac v. Lessee of Chirac*.[14] Beyond naturalization, the Supreme Court has recognized that Congress has plenary power over immigration,[15] and has said that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration.[16] Similarly, the Supreme Court has recognized that it is in Congress's exclusive authority to dictate the policy

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[9] *Id.* at 635-36.
[10] *Id.* at 637.
[11] *Id.*
[12] *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (internal quotation marks and citations omitted).
[13] U.S. CONST. art. I, § 7, cl. 2.
[14] 15 U.S. (1 Wheat.) 259, 269 (1817) (holding that "the power of naturalization is exclusively in congress" and not delegated to any other authority or to the individual states).
[15] *See, e.g.*, *Sale v. Haitian Council, Inc.*, 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); *INS v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question."); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'").
[16] *Reno v. Flores*, 507 U.S. 292, 305 (1993); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Hana v. Gonzales*, 503 F.3d 39, 43 (1st Cir. 2007).

pertaining to aliens' ability to enter and remain in the United States. As Justice Frankfurter aptly said:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the *formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[17]

While the Court has clearly articulated that Congress has exclusive authority to set immigration policy, the Supreme Court has expressed that the President has inherent authority over immigration-related matters that influence the nation's sovereignty and foreign affairs.[18] But the Supreme Court, in no ambiguous terms, has recognized Congress's "sole[] responsibility" for determining "[t]he condition of entry of every alien, the particular classes of aliens that shall be denied entry, the basis for determining such classification, [and] the right to terminate hospitality to aliens." [19] In this same vein, Congress also has exclusive authority to determine through legislation when hospitality should be extended to a broad class of aliens, such as through a categorical use of deferred action.

The recent executive action defies Congress's exclusive authority with the intention, as President Obama has admitted, of setting a new policy and creating new law. While Congress has authorized various forms of discretionary relief, including deferred action, for specific categories of aliens,[20] Congress has not authorized such relief for the class President Obama's action targets, to the parents of U.S. citizens and lawful permanent residents. Moreover, Congress's authorization of some forms of discretionary relief and deferred action for narrow categories in no way signifies that Congress acquiesced to the President setting his own broad new category, especially because the category created by the President is composed solely of illegal aliens who are, under the present law, removable.

Critically, Congress's refusal to enact the policy President Obama prefers is not "silence" or a "failure"; it represents our constitutional system working as intended. Our nation's immigration laws are quite extensive—they are simply not enacted in the manner President Obama prefers. Differing policy preferences do not provide license to, as President Obama said, "change the law."

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[17] *Galvan v. Press*, 347 U.S. 522, 531 (1954) (emphasis added) (internal citations omitted).
[18] *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).
[19] *Fiallo*, 430 U.S. at 796 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring)).
[20] Congress has exercised this authority by creating certain statutory mechanisms to extend, on a case-by-case basis, hospitable or discretionary relief, such as parole, INA § 212(d)(5); deferred action for eligible victims of violence, *id.* § 204(a)(1)(D)(i)(II), (IV); deferred action for eligible victims of trafficking, *id.* § 237(d)(2); and deferred action and advance parole for a spouse, parent or child of certain U.S. citizens who died as a result of honorable service, National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 1703(c), (d) (2003).

President Obama tries to rely on the history of the actions of past presidents, but an overwhelming majority of past executive actions on immigration granting broad deferred action were country-specific (thus implicating the President's authority under foreign affairs) or directly implemented existing law. Despite the President's claim that executive actions of this kind are rooted in history, only on rare occasions has a president defined a class of individuals for non-country specific relief from removal.[21] The President points to the "Family Fairness" program initiated by President Reagan and expanded by President H.W. Bush as grounds for why the current categorical deferred action program is constitutional. While there are differences in substance and scale between President Obama's action and President Reagan's and President H. W. Bush's actions, these prior actions were constitutionally suspect as well.[22] Past constitutionally suspect actions do not provide legal support for President Obama's present unconstitutional program. Indeed, neither past program was ever challenged or upheld by the Supreme Court and thus represents at most a mere political example—not a legal precedent—and is irrelevant to the constitutional analysis. Constitutional violations do not improve with age or time; thus President Obama's reliance on these historical executive actions is misplaced.

President Obama also misplaces his reliance on authority generally granted to the Secretary of Homeland Security in section 103(a)(3) of the INA.[23] Section 103(a)(3) specifically limits the delegated authority of the Secretary to those actions that are "necessary for carrying out [its] authority under the provisions of this chapter." The chapter in no way gives the Executive the authority to create an extensive, categorical deferred action program that grants affirmative legal benefits.[24] Nor would such a program be necessary to carry out the authority delegated to the Secretary. Similarly, while The Homeland Security Act does make the Secretary of DHS responsible for "[e]stablishing national immigration enforcement policies and priorities,"[25] there is a substantial difference between priorities for enforcement, which allow the agencies tasked with carrying out the law to focus their limited resources, and creating enforcement-free zones for a

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[21] *See* Ruth Ellen Wasem, CONG. RESEARCH SERV., RS7-5700, DISCRETIONARY IMMIGRATION RELIEF 7 (2014). According to Congressional Research Service's review, most "discretionary deferrals have been done on a country-specific bases, usually in response to war, civil unrest, or natural disaster." *Id.*

[22] The Immigration Reform and Control Act of 1986 allowed immigrants who had been living continuously in the U.S. since at least Jan. 1, 1982, to apply for temporary, and later permanent, residency. The law explicitly authorized the Attorney General to grant waivers of deportation "in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." In 1987, President Reagan defined "family unity" through regulation, and granted deferred voluntary departure, a remedy available under law, for minor children whose parents qualified for the amnesty under the new law. In 1990, President H.W. Bush expanded the interpretation of "family unity" to include all spouses and children, granting deferred voluntary departure for up to a year and renewable thereafter.

[23] 8 U.S.C. § 1103(a)(3) (2012).

[24] With one exception, the INA under section 274A(h)(3) does allow the Attorney General (now the Secretary of DHS) discretion to grant work authorization and to define unlawful immigrant for purpose of granting a work authorization.

[25] 6 U.S.C. § 202(5) (2012).

category of unlawful aliens, which is not consistent with or set by congressional action.

The removal of unlawful aliens carries enormous importance to the overall statutory scheme, and rather than just articulating priorities for removal and ignoring an unlawful alien who is not a high priority, the President's recent action grants legal benefits (such as lawful presence during the deferred action for purposes of 8 U.S.C. §§ 1182(a)(9)(B), (C)(i)(I))[26] on a categorical basis to current illegal aliens. It is true that as a general policy, Congress has created certain benefits for close family members of U.S. citizens and lawful permanent residents. It is an incorrect presumption, however, that these past legislative actions, enacted through Congress's constitutional authority, justifies executive action to create a new deferred action program that affirmatively grants legal benefits to a broad category of illegal aliens.[27] President Obama's executive action stretches the enabling sections to their absolute breaking point in an effort to enact the President's agenda over that of Congress.

The President's recent immigration action is neither moored to his constitutional authority, either express or implied, nor can it be moored to a delegation of statutory authority. On no less than twenty-two occasions did President Obama expressly state that he lacked the constitutional authority to take this executive action. President Obama has subverted the very law that he was charged with enforcing and, as he admitted only days ago, created new law.

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[26] Memorandum from Karl R. Thompson, Dep't of Justice, Office of Legal Counsel, for the Secretary of Homeland Security and the Counsel to the President on The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others 13 (Nov. 19, 2014) [hereinafter OLC memo] (stating that "aliens who receive deferred action will temporarily cease accruing 'unlawful presence' for purposes of 8 U.S.C. §§ 1182(a)(9)(B) and (a)(9)(C)(i)(I)"). The INA does provide the Secretary discretion to waive the bar under certain conditions for aliens who have been unlawfully present in the U.S. over 180 days. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (2012). However, to grant lawful presence during the time of deferred action for the purpose of section 1182(a)(9)(C), which applies to those unlawfully present for over a year or who had been previously removed, contravenes the spirit of the law. Unlike section 1182(a)(9)(B), the statute limits the authority of the Secretary to waive the accrual and bar. *See id.* § 1182(a)(9)(C)(iii) (authority to grant a waiver of admissibility only for individuals eligible under VAWA and for those individuals seeking lawful entry from outside the US with Secretary approval after 10 years from last departure).

[27] The President tries to justify the executive action, in part, because of the general policy of family reunification throughout U.S. immigration law. While the United States generally supports such a policy, there are numerous instances in which the law penalizes unlawful entry into the United States regardless of family ties to a citizen or lawful permanent resident. *See generally* 8 U.S.C. § 1255 (2012) (providing limits on discretion to adjust the status of aliens who entered the United States illegally to that of permanent residence even if they qualify for a green card by other means such as marrying a U.S. citizen); *id.* § 1182(a)(9)(B), (C) (providing that aliens who have been unlawfully present for certain periods of time are inadmissible to the United states, with limited waivers possible, even if they qualify for a green card by other means); *id.* § 1153(a) (setting forth the numerical limitations on many family-based green card categories).

Prosecutorial Discretion

Youngstown provides no constitutional refuge for President Obama and neither does "prosecutorial discretion." The President asserts that creating the deferred action program falls under his prosecutorial discretion; but claiming prosecutorial discretion does not mean that his action was constitutional, rather it simply begins a new analysis: Did the President abuse his discretion by creating a categorical deferred action program of this magnitude, which is not backed by any statutory authority? I conclude that despite the President's assertion, the creation of the categorical deferred action program exceeds the bounds of his discretion.

As the Executive, Article II, Section 3, of the Constitution declares that the President "shall take Care that the Laws be faithfully executed" (hereinafter "Take Care Clause").[28] From this obligation and the doctrine of separation of powers, [29] courts have recognized that the Executive Branch has broad prosecutorial or enforcement discretion,[30] even in immigration matters.[31] But this

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[28] U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

[29] *See, e.g.*, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." (internal citations omitted)). In addition to the Take Care Clause, Judge Kavanaugh has opined that prosecutorial discretion is also rooted in the Executive Power Clause, U.S. CONST. art. II, § 1, cl. 1, the Oath of Office Clause, *id.* § 2, cl. 8, the Pardon Clause, *id.* § 2, cl. 1, and the Bill of Attainder Clause, *id.* § 9, cl. 3. *In re Aiken County*, 725 F.3d 255, 262-63 (D.C. Cir. 2013).

[30] *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982))); *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . " (citing the *Confiscation Cases*, 74 U.S. (1 Wall.) 454 (1869))). There arguably is a basis under the President's pardon power, U.S. CONST. art. II, § 2, cl. 1, which gives the president authority, notwithstanding his duty to faithfully execute, to pardon an offense even before a trial or conviction. Commentators have referred to the pardon authority as grounds for why the President need not enforce every law to its fullest extent. Some argue that even in this authority "the President can neither authorize violations of the law (he cannot issue dispensations) nor can he nullify a law (he cannot suspend its operation)." Heritage Foundation, *The Guide to the Constitution*, *Take Care Clause*, http://www.heritage.org/constitution#!/articles/2/essays/98/take-care-clause (last visited Nov. 24, 2014).

[31] *See Arizona*, 132 S. Ct. at 2498 ("A principal feature of the removal system is the broad discretion entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission"). In the immigration context, for example, immigration offers have discretion

discretion while broad is not unfettered.[32]

The Supreme Court has recognized in fulfilling the obligation to faithfully execute the laws, the Executive Branch may not be able to practically enforce "*each* technical violation of the statute."[33] As this language implies, prosecutorial discretion ordinarily requires a case-by-case determination whether the individual should be subject to an enforcement action, rather than categorical exemptions.[34] Moreover, the Supreme Court has warned that the conscious and express adoption of a categorical exemption may reflect a "general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[35]

This is not a radical assertion. Indeed the Office of Legal Counsel ("OLC")—in a memorandum purporting to justify President Obama's action—declared that the Executive cannot "under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preference."[36] According to the OLC memo and Secretary of Homeland Security Johnson's November 20th directive, "[a]s an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion."[37] Relying heavily on the Supreme Court's decision in *Heckler v. Chaney*, the OLC advised that "any expansion of deferred action to new classes of aliens must be carefully

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whether to initiate removal proceedings, *see, e.g.*, *Hanggi v. Holder*, 563 F.3d 378, 383 (8th Cir. 2009); cancel a Notice of Appearance, *see, e.g.*, *Akhtar v. Gonzalez*, 450 F.3d 587, 591 (5th Cir. 2006); or extend voluntary departure to an alien otherwise subject to removal, s*ee, e.g.*, *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992).

[32] *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

[33] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (emphasis added).

[34] Lower courts following *Chaney* have indicated that a non-enforcement decision applied broadly and not made on an individualized basis raise suspicion of whether the Executive has abdicated his statutory duty. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994). As the Office of Legal Counsel advised, "a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." OLC memo, *supra* note 26 at 7.

[35] *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted). The Presidential action may violate the Constitution if he "expressly adopt[s] a generally policy which is in effect an abdication of its statutory duty" by implementing a blanket ban on enforcement of a duly enacted statute. *Adams v. Richardson*, 480 F.2d 1159*,* 1162 (D.C. Cir. 1973). A general policy of non-enforcement that forecloses individualized review on a case-by-case basis, as a general rule, could indicate that an agency has exceeded its prosecutorial or enforcement discretion. *See, e.g.*, *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994).

[36] OLC memo, *supra* note 26 at 6.

[37] Memorandum from Jeh Charles Johnson, Sec. Dep't Homeland Sec., to Leon Ridriguez, Dir. Of U.S. Citizenship and Immigrant Servs., et al., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents 2 (Nov. 20, 2014) [hereinafter DHS Deferred action memo].

scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences." [38] Furthermore, according to the OLC, "[t]he breadth of [class-based] programs . . . may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances."[39] Failure to comply with these general principles, the OLC warns, would "cross the line between executing the law and rewriting it."[40]

After laying out these limits on the Executive's prosecutorial discretion, the OLC stretches its reasoning to prove that the executive action will be implemented on a case-by-case basis. But as a constitutional law professor recently wrote, rather than clearly articulating how immigration officers might possibly exercise discretion on an individual basis, "[t]he last, best hope [for the] blanket non-enforcement policy is the *appearance* of an 'individualized assessment.'"[41] More importantly, "[i]t cannot be the rule of law that the President can create criteria that automatically apply to millions, then instruct[s] his agents to check off a few boxes that will always be checked, and call it an individualized assessment. The policy is designed to exempt everyone who correctly signs up. This is not an instance of executive discretion, but of clerical approval."[42]

Even a review of President Obama's statements since the release of the executive action reveals that he is defying OLC's legal advice and rewriting the laws to match his policy preference, not mandating true case-by-case review. President Obama did not promise more than 4 million illegal aliens discretionary, individual reviews. President Obama promised them a deal. In his own words from November 20th, which he has similarly stated in subsequent addresses: "So we're going to offer the following deal: If you've with been in America more than five years. If you have children who are American citizens or illegal residents. If you register, pass a criminal background check and you're willing to pay your fair share of taxes, you'll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That's what this deal is."[43] Never has the President stated that at any time his administration retains the power to terminate the deferred action, even if the applicant satisfies the listed eligibility requirements. In fact, how can this be so when the administration states it will not remove illegal aliens for three years upon grant of deferred action and the aliens will be given work authorizations valid of three years.[44]

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[38] OLC memo, *supra* note 26 at 24.
[39] *Id.* at 22.
[40] *Id.* at 24.
[41] Eugene Volokh, *The constitutional limits of prosecutorial discretion*, WASHINGTON POST, (Nov. 22, 2014) (quoting Professor Josh Blackman), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/22/ the-constitutional-limits-of-prosecutorial-discretion.
[42] *Id*.
[43] *Transcript: Obama's Immigration Speech*, WASHINGTON POST, Nov. 20, 2014, http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/ 14ba8042-7117-11e4-893f-86bd390a3340_story.html.
[44] DHS Deferred action memo, *supra* note 37 at 2-3.

Put simply, if President Obama is enacting the "case-by-case" review mandated by the OLC memo, he is misleading the four million illegal aliens he encouraged to come out of the shadows. If he is defying the attorneys at the OLC and giving illegal aliens the "deal" he promised, then he is misleading the American public.

The policy directive from Secretary Johnson clearly stated "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."[45] But again, this is not the deal President Obama promised. He promised illegal aliens that they could come out of the shadows for a deal and that if they met certain requirements, the deal applied to them.

So, why the dichotomy? It is likely that the OLC memo is a mere legal smoke screen. Does the administration truly have plans—or allocated the considerable necessary resources—to do case-by-case reviews of millions of illegal aliens? If the program is not stopped, hindsight will likely demonstrate that immigration officers lacked ultimate discretion to deny deferred action if the applicant met the list of eligibility requirements.[46] Thus, making the new deferred action program for roughly four million illegal immigrants nothing more than a conveyer belt of rubberstamping, or more aptly put, a categorical exemption, hidden under the guise of enforcement discretion. As discussed above, Congress has exclusive power to legislate categorical exemptions for removal for which the President may grant in his discretion. Yet through executive action, the President has created a remedy for a category of aliens that Congress has not statutorily allowed and the President lacks authority to create.

The Supreme Court has expressly recognized that in determining whether to initiate enforcement actions the President may consider a number of factors, including a lack of resources, something the President has expressed underlies, at least in part, the basis for his recent executive action.[47] There is no doubt that the President lacks the resources to remove all presently illegal

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[45] *Id.* at 5.

[46] In justifying President Obama's executive action that created DACA, the OLC memo "warned that 'granting deferred action *automatically* to all applicants who satisfied the threshold eligibility criteria' would be problematic." But as Professor Josh Blackman articulated, "[d]espite paying lip service to discretion, according to a Brookings report, only 1% of applicants were denied deferrals. I could not find any explanation for why, under the capacious standards set by DHS, the denial rate was even this high. A 1% denial rate seems awfully close to 'automatic' relief." Professor Blackman then opines that under the new deferred action program, DHS has provided absolutely "*no* guidance" by which an officer may exercise discretion and reject an application. Thus, "[t]hese factors are equally capacious as those under DACA, and are likely to yield a similar denial rate." Eugene Volokh, *The constitutional limits of prosecutorial discretion*, WASHINGTON POST, (Nov. 22, 2014) (quoting Professor Josh Blackman), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/22/the-constitutional-limits-of-prosecutorial-discretion.

[47] *Chaney*, 470 U.S. at 831 ("[W]hether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action best fit

aliens in the United States. But there are obvious reasons to question the validity of whether "lack of resources" can be asserted, even in part, as a reason to create a deferred action program of this magnitude.[48] Though the OLC memo attempts to justify the potential costs for a program of this magnitude, there is little confidence in its statement that the program "might help DHS address its severe resources limitation" when it is apparent that millions of new reviews will tax already-limited resources.[49]

Indeed, a much smaller program like DACA has proven difficult to implement. Stephen Legomsky, chief counsel for USCIS in the first days of DACA, said that the President's order was a "heavy lift" for the agency because it meant "training the adjudicators, hiring them, and finding physical space for them."[50] A leaked draft of an internal DHS policy document entitled *Administrative Alternatives to Comprehensive Immigration Reform*, prepared for the Director of U.S. Citizenship and Immigration Services (USCIS), reveals that the administration contemplated years ago how it could use deferred action widely to achieve "immigration reform absent legislative action" and recognized that granting deferred action to "an unrestricted number of unlawfully present individuals" would be "expensive."[51] Not only did this leaked memo demonstrate the costs of the program, it also exposed the true nature of President Obama's action. Notably, top officials at

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the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all.").

[48] Lack of resources was only one reason provided for the deferred action program, along with a humanitarian interest in promoting family unity (discussed internally above), and common sense. *See* DHS Deferred action memo, *supra* note 37 at 1, 3; *see* OLC Memo, *supra* note 26 at 26. If lack of resources was a proper defense to the President's breach of his duty of enforcement, the executive action would not apply to an individual who is already in removal proceedings or subject to a final order of removal, where substantial resources have already been expended and would need to be expended again should the program truly be temporary as the President has asserted. *See* DHS Deferred action memo, *supra* note 37 at 5.

[49] *See* OLC Memo, *supra* note 26 at 26.

[50] Interview on NPR, *After Obama's Action, Immigration Agency Awaits 'A Real Challenge'* (Nov. 24, 2014), http://www.npr.org/2014/11/24/366352953/after-obamas-action-immigration-agency-awaits-a-real-challenge.

[51] Draft Memorandum from Denise A. Vanison, Policy & Strategy, U.S. Citizenship & Immigration Servs. et al., to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs., on Administrative Alternatives to Comprehensive Immigration Reform 2, 10 [hereinafter Draft Memorandum], *available at* http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf (last visited Nov. 24, 2014). The memo is marked draft, and according to one of the drafter's, Roxana Bacon, at the time USCIS chief counsel, the views expressed in the draft were "not new ideas." She confirmed sending the draft memo to the agency's director in April 2010. *See* Andrew Becker, *Obama End-Run Amnesty Claim Is 'Nuts,' Immigration Official Says*, HUFFINGTON POST, Aug. 10, 2010, http://www.huffingtonpost.com/andrew-becker/obama-end-run-amnesty-cla_b_676442.html. The memo specifically states that deferred action, when "widely available to hundreds of thousands . . . [is] a non-legislative version of 'amnesty'" and suggests that the President make the action available to "particular groups such as individuals who would be eligible for relief under the DREAM Act." *See* Draft Memorandum at 11.

USCIS referred to categorical deferred action offered to "hundreds of thousands" as a "non-legislative version of 'amnesty'" and notes that "[p]eriods of time in deferred action . . . may be extended indefinitely."[52] Through these revelations, it is apparent that the administration knew and intended to rewrite the immigration laws to its liking without Congress and further show that the President is hiding behind the guise of enforcement discretion.

In conclusion, the intent to rewrite immigration law, by the President's own admission, demonstrates that this executive action was not created out of prosecutorial discretion. The deferred action program, for all intents and purposes, will apply categorically to such a large section of illegal aliens that the President has effectively made what is illegal, as proscribed by statute, now legal. Neither a lack of appropriated funds to remove the estimated 11.5 million illegal aliens, nor a disagreement with congressional policy, are grounds to subvert federal law and create new law.[53] Through the recent executive action the President has created a general policy "so extreme as to amount to an abdication of [his] statutory [and constitutional] responsibilities."[54] President Obama's actions are unconstitutional, violating the separation of powers and exceeding even his considerable prosecutorial discretion. Congress's refusal to enact the President's preferred policies does not provide a lawful pretext for violating our nation's vital restraints on executive authority.

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[52] Draft Memorandum at 11.

[53] *Cf. In re Aiken Cnty.*, 725 F.3d at 259 ("But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections."). In *In re Aiken County*, the court expressly rejected the assertion that a lack of congressionally appropriated funds to complete the full project was grounds for the agency, and thus the President, not executing its obligations under the Take Care Clause. *Id.* ("Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a project.").

[54] *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted).