President Obama’s Immigration Plan: Rewriting the Law

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As a supporter of comprehensive immigration reform and director of Roger Williams Law School’s Immigration Clinic, I know the high stakes in the current debate about President Obama’s executive action. I also know the higher stakes, previously acknowledged by the President, in adherence to our constitutional order; see my recent paper supporting the President’s Deferred Action for Childhood Arrivals (DACA) program. The President’s action and OLC’s unconvincing legal defense injure our constitutional framework. They also distract from the difficult, frustrating, but necessary political work entailed in achieving lasting reform.

As with any separation of powers issue, we start with Justice Jackson’s division of presidential actions into three categories, based on the degree of collaboration between the President and Congress. The President receives greatest deference for acts consistent with Congress’s will, some deference for acts that occur when Congress is silent, and little or no deference for acts that clash with legislative intent.

The executive action announced on November 20 belongs in Jackson’s third category. Congress has carefully crafted an immigration framework that deters foreign nationals who enter the US illegally from using post-entry US citizen children to gain lawful status. In contrast, the central feature of the President’s unilateral action is its provision of work authorization and a reprieve from removal to this group. That policy may be a sensible means to address the situation of the estimated 11 million undocumented people in the US. But the unilateral grant of these immigration benefits defies Congress’s will.

Here’s the statutory framework that OLC fails to address convincingly. The Immigration and Nationality Act (INA) requires US citizens to be 21 before sponsoring parents. That provision is included in the INA precisely to discourage what foes of immigration reform crudely call “anchor babies”---kids born here (and therefore US citizens) who could legalize undocumented parents. The “anchor baby” trope is a canard, since the INA makes this strategy all but impossible. Undocumented individuals who entered without inspection (a category that includes most undocumented people from Mexico) would have to evade immigration authorities until their child turns 21; they would also have to return to their home country for 10 years, because the INA bars legalization for 10 years for folks who have been unlawfully present in the US for a year or more. That statutory gauntlet sends a clear signal to foreign nationals: Entering the US without inspection and having kids is not a ticket to lawful residence or any of the benefits that lawful residence provides, such as work authorization.

The OLC memo misses this clear legislative signal. At its heart, it’s not an interpretation of the INA, as Marty Lederman contends, but an end-run around statutory limits. Effective legal guidance would have acknowledged Congress’s painstaking efforts to deter undocumented folks from leveraging post-entry US citizen children. Instead, OLC breezily justifies the award of precious benefits like work authorization by touting undocumented parents’ “prospective entitlement to lawful immigration status.” Given congressional restrictions on this group, that’s like saying Chicago Cubs fans have a “prospective entitlement” to baseball’s world championship, even though the Cubs last won a World Series in 1908. This mischaracterization of legislative intent transforms the President’s announcement from an exercise in statutory interpretation to a clear example of presidential overreaching.

Justice Jackson’s second category of presidential action based on legislative silence does not salvage the legality of the President’s decree. The OLC memo asserts that the presidential decree’s sweeping program of deferred action resembles the longtime practice of presidential claims settlement acknowledged by the Supreme Court in Dames & Moore v. Regan (upholding the settlement of claims against Iran that paved the way for release of Iran’s US diplomatic hostages in 1981). The Court was right in Dames & Moore that presidential claims settlement, which dates to the presidency of John Adams, had been acquiesced in by Congress. However, the same cannot be said for the sweeping deferred action announced by the President.

Past deferred action programs, in contrast with President Obama’s announcement, were ancillary to legislation. For example, Bush 41’s “Family Fairness” program benefited relatives of people legalized under Congress’s 1986 immigration reform. President Bush’s program went beyond the 1986 legislation, as Mark Noferi notes in a valuable piece that supports President Obama. However, as Noferi recounts, Congress subsequently ratified President Bush’s initiative. That seems unlikely to occur this time around. Deferred action has also assisted individuals who applied for a lawful status under other legislation, including the Violence Against Women Act. None of the previous deferred action programs aided individuals that Congress had expressly prevented from obtaining immigration benefits.

The legal problems with the presidential decree are matched by its political flaws. The decree undermines the cause of real reform because it lets Congress off the hook. Congress’s failure to enact reform is a national disgrace. The task for committed advocates for reform is creating a political landscape that will make reform a reality. That endeavor will include work in Congress, the executive branch, and state legislatures where gerrymandering has impeded congressional momentum for reform efforts. House Republicans, who have blocked reform, now can rail against presidential overreach instead of facing the consequences of their obstinacy. Impeachment would be an uncalled-for overreaction, as Peter Schuck explains here. Nevertheless, providing immigration reform opponents with additional talking points is an unintended consequence of President Obama’s decision that will make genuine, lasting reform far more difficult to achieve.
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