

Written Statement

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“Keeping Families Together: The President’s Executive Action On Immigration And The Need To Pass Comprehensive Reform”

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Chairman Leahy, Ranking Member Grassley, and members of the Judiciary Committee, I am Chris Schroeder, a professor of law at Duke Law School. From 2010-2012, I served as Assistant Attorney General for the Office of Legal Policy at the United States Department of Justice. Earlier, I served as deputy assistant attorney general and acting Assistant Attorney General for the Office of Legal Counsel, from 1994-97. In 1992-93, I was chief counsel to the Senate Judiciary Committee. I teach and write in the area of presidential authority and the separation of powers.

I thank you for the invitation to testify here today on the legality of the policies announced on November 20 by Jeh Johnson, Secretary of the Department of Homeland Security. These policies provide the possibility of deferred action and work authorization for an undocumented alien who is otherwise a low priority for removal because he or she poses no threat to national security, public safety or border security, is not otherwise an enforcement priority; has resided here continuously since January 1, 2010; has a child who is a U.S. citizen or legal permanent resident; is physically present both when DHS announces its program and when he or she applies and who presents “no other factors that, in the exercise of discretion make[] the grant of deferred action inappropriate.” Memorandum for Leon Rodriguez, Director U.S. Citizenship and Immigration Services, et al. from Jeh Charles

Johnson, Secretary Department of Homeland Security, November 20, 2014, p. 4 (“Johnson Memorandum”).

These policies achieve substantial humanitarian gains for the individuals encompassed by them and for the communities in which they live. As the Johnson memorandum states, “[t]he reality is that most individuals [included in these policies] are hard-working people who have become integrated members of American society. ... [They] are extremely unlikely to be deported given this Department’s limited resources – which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation’s security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization ... and be counted.” *Id.* at p. 3.

At the same time, many people strongly oppose the policies and claim that the Department of Homeland Security has no lawful authority to implement them.

Although comprehensive immigration reform has been debated throughout the country for years, and various reform proposals have been before the Congress, to date no measure has been enacted and the Congress continues to have the issue before it. The President, furthermore, has throughout expressed interest in working with the Congress to craft acceptable legislation. While it is impossible to predict the content of any legislation that might eventually pass, it is entirely conceivable that such a bill would contain provisions affecting the very individuals covered by these DHS policies, perhaps in ways compatible with the DHS policies, but perhaps not. With Congress considering, but unable to adopt, pertinent legislation, some critics of the DHS policies have described them as an “executive power grab,” an end run around the Congress, a violation of the separation of powers, or a breach of the president’s Constitutional duty to “take care that the laws be faithfully executed.”

In addressing the question of the legality of the Johnson policies, we now have the great advantage of being able to read the legal analysis of the Department of Justice’s Office of Legal Counsel, which released a thirty-three page memorandum setting forth that analysis, on the same day that DHS re-

leased the Johnson Memorandum. Memorandum Opinion for the Secretary of the Department 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 the Removal of Others from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, November 19, 2014. ("OLC Opinion") The legal memorandum is careful and thorough. It takes some time to absorb all its details, and I do not intend to weigh down this hearing with a recitation of those details. Instead, I want to call attention to several of its central points.

The first thing to notice is how the Office of Legal Counsel approaches the question of legality. It does so by analyzing "the sources and limits of DHS's enforcement discretion under the immigration laws." *Id.* at 2-3. In other words, under OLC's analysis, the legality of the announced policies depends entirely on whether the existing immigration laws have been implemented in a lawful manner. The fact that the Congress is considering new immigration laws does not, as a legal matter, affect the content and meaning of the laws already on the books. This is a point to which I will return.

Furthermore, the OLC Opinion makes no assertion of any unilateral executive authority to establish these programs. The plain and simple legal question is: do the existing immigration laws grant sufficient authority to permit DHS to take these actions? The approach of the OLC analysis is thus entirely consistent with a foundational principle of the separation of powers, namely that it is Congress who enacts the laws and it is the executive branch who implements them.

The question then becomes: How should we evaluate whether an agency has acted within its statutory authorities, thereby remaining within the realm of implementation? Two important separation of powers decisions by the Supreme Court provide some guidance on how to separate lawful implementation of existing laws by administrative agencies from unlawful attempts to intrude on Congress's domain and to rewrite the laws. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), effectively translated the idea that "the Congress enacts the laws and the executive implements them" in the modern administrative state by identifying two key questions: First, does the statute address "the precise question at issue?" If so, the agency must follow it. Second, where the statute does not ad-

dress the question “at the level of specificity” to answer the question, has the agency chosen a course of action that is a “reasonable accommodation” of the interests involved and a “permissible construction” of the statute? *Id.* at 843, 865. If so, the action is legal and is a permissible exercise of discretion that has been granted by the Congress. For this second question, the agency’s action receives a fair amount of deference.

Chevron stands for the proposition that whenever the statute itself does not require, allow or prohibit a particular approach -- in other words, does not directly speak to the issue one way or the other -- this means that the Congress has effectively delegated the responsibility for making that choice to the agency, so long as the action taken is a reasonable way to proceed in light of what the statute otherwise does say. What is more, for purposes of deciding whether administrative discretion has been delegated to the agency, the reasons for Congress’s delegation are not relevant. As the Court put it:

“Perhaps [the Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.” *Id.* at 865

There can be no doubt that the exercise of delegated authority by an administrative agency can resemble lawmaking. Indeed, from the perspective of people regulated by some statute, it does not much matter whether a fine or sanction is imposed as the result of a requirement that can be found in the words of the statute or as the result of a requirement that has been promulgated by the agency. Nonetheless, from a legal perspective there is a difference. INS v. Chadha, 462 U.S. 919 (1983) is another important separation of powers decision, and it speaks directly to the difference. First, Chadha acknowledges the similarities between statutory law and agency law, saying:

“To be sure, some administrative agency action—rule making, for example—may resemble “lawmaking.” See [5 U.S.C. § 551\(4\)](#), which de-

finer an agency's "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...." *Id.* at 953 n. 13 (emphasis in original)

At the same time, the Chadha decision also makes clear that as long as the agency's "administrative activity [does not] reach beyond the limits of the statute that created it," the agency is indeed implementing the statute, and not usurping the Congress's legislative power. *Id.* In such a case -- even when the statute does not provide an answer to the precise question facing the agency -- the statute provides the limits beyond which the agency may not go and remains the legal basis for the agency's action.

The OLC Opinion approaches the question of legality from within this fundamental framework. Accordingly, the opinion must engage in a thorough analysis of what the existing immigration laws say insofar as they bear on the policies that were proposed by DHS and announced in the Johnson Memorandum. This is precisely what the opinion does. Here are the essentials of its conclusions.

First, the kind of discretion involved in the deferred action policies is enforcement discretion, something that the Congress has typically permitted agencies to exercise with wide latitude. A case can be made, in fact, that some degree of enforcement discretion is necessary under our separation of powers system, in the interests of ensuring that liberty-depriving actions by the state are undertaken with the independent participation of each branch of government, whereby the Congress enacts the laws, the executive branch decides to prosecute the laws, and the judiciary decides the case. I do not read the OLC Opinion to be relying on any unilateral executive authority in this case, however. Instead, by focusing on "the sources and limits of DHS's enforcement discretion under the immigration laws," it rests its conclusions on the existing immigration laws, which, as the Supreme Court has recently recognized, include as "a principal feature of the removal system" a grant of "broad discretion to immigration officials," which includes "as an initial matter, [deciding] whether it makes sense to pursue removal at all." Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

One element of the existing statutory structure expressly charges the Department of Homeland Security with responsibility for "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of

2002, Pub. L. No. 107-205, § 402(5) (codified at 6 U.S.C. § 202(5)). Yet another feature of the statutory structure is that over the years the Congress – aware of the use of deferred action by INS (later DHS) in both individual and larger group contexts – has several times enacted legislation making certain classes of aliens eligible for deferred action. “These enactments,” OLC concludes, “strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy rather than embarking on a frolic of its own.” OLC Opinion at 23 (internal quotations omitted).

A consequence of these features of the immigration laws is that specific deferred action decisions do not have to be expressly authorized by those laws in order to be lawful. As the Congressional Research Service recently summarized the matter, “immigration officials would not necessarily be precluded from granting deferred action ... just because federal immigration statutes do not expressly authorize such actions.” CRS, “Prosecutorial Discretion in Immigration Enforcement: Legal Issues,” CRS Rep. 7-5700 (December 27, 2013), p.6.

Of course, it is within the Congress’s purview to authorize, acknowledge or permit a particular type of discretion like deferred action as a general matter while prohibiting a particular instance or application of that discretion. Thus, a second and necessary step in assessing the legality of the deferred action policies in the Johnson Memorandum is to conclude that existing immigration laws do not in fact prevent the implementation of these particular deferred action policies. One reason the some of the critics of these policies may be describing them in terms of grand constitutional violations is that they have been unable to find anything in the existing statutes that instructs the Department of Homeland Security to avoid making deferred action available to a significant number of people at the same time, whether as a general matter or as regards the particular group of individuals covered by these policies.

The OLC Opinion, however, does not simply take the absence of an express statutory prohibition to be sufficient to supply a legal basis for the deferred action policies. Instead, it takes a third step by analyzing whether these policies are “consonant with, rather than contrary to, the congressional poli-

cy underlying the statutes the agency is charged with administering.” OLC Opinion, p. 6

In exploring this issue, the OLC Opinion focuses on the same humanitarian concerns expressed in the Johnson Memorandum and emphasized elsewhere by the administration, namely

“the particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States.” Id. at 26

The Opinion then demonstrates that family unity has been one of the policy considerations animating our immigration laws, finding that “[n]umerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States.” Id.

Notice that the Opinion does not claim that this is the only concern reflected in our laws, as this is obviously not the case. Not only that, such other concerns can be in tension with the concern to keep families united. The amount of public debate over the propriety of the deferred actions decisions amply demonstrates that there is disagreement within the country about how to resolve the tension among the multiple policies reflected in our immigration laws as they apply to the individuals covered by the policies announced in the Johnson Memorandum. There certainly are a number of ways that would be valid under the law to address these tensions other than via the announced deferred action policies, including maintaining the status quo enforcement posture toward these individuals (which, admittedly is producing few removal actions against such individuals). Recall, however, what the legal standard is for judging the legality of a delegated authority: the decision simply needs to be a “reasonable accommodation” of the competing interests involved. The Chevron decision, furthermore, elaborates on this point in the following way:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judg-

ments. ... When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. Chevron at 865-866.

Accordingly, while some may have preferred to embark on a different course here, or simply to stay the course, it ultimately falls to the current administration to pursue a course that conforms with its understanding of wise policy – so long as it stays within the limits of the authorities enacted by the Congress. In my opinion, the OLC Opinion supports the conclusion that the Johnson Memorandum meets that standard.

To this point, I have discussed the general framework established by our system of separated powers for the legal evaluation of exercises of administrative discretion, followed by a discussion of the legality of the deferred action proposals as exercises of that discretion under the existing immigration laws. I will conclude by returning to the topic I flagged toward the beginning of these remarks. In the current debate much has been made of the fact that the administration has on its own initiative promulgated a rather significant change in enforcement policy at a time when (a) proponents of enacting some mechanism for the affected individuals to acquire legal status in the United States have been unable to do so, (b) opposition to these executive actions is significant. By acting under these circumstances, the President has been accused of usurping Congress's exclusive constitutional authority to enact the laws and of improperly running around the Congress.

There are two separate replies to these charges. First, as a legal matter, events currently occurring in the Congress concerning immigration law reform are not relevant to the issue of what discretionary authorities are embodied in the existing immigration laws. As Chadha establishes, Congress can make changes in the laws on the books only by enacting another law. Until it does so, the administration quite rightly must reference existing law in assessing its discretionary options. Congress has been unsuccessful in passing new law that would benefit the individuals covered by DHS's announced policies, and it also has been unsuccessful in enacting legislation restricting DHS's current discretionary authorities. As the Supreme Court has noted, "unsuccessful attempts at legislation are not the best of guides to

legislative intent," one way or the other. Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 382 n.11 (1969)

Of course, the system of separation of powers is more than a set of legal rules. It is also an understanding of how our government ought to operate. People may be intending these critical remarks to reflect their judgment that the approach that would be most consistent with our form of government, our system of shared but separated power, would be for the executive branch to maintain the status quo pending legislative action, and not as an assertion of illegal conduct by the executive branch. As such, that judgment is directed to the political and policy arenas, not to the question of legality. It also ought to be counterbalanced by the real human and social costs that the announced policies seek to ameliorate. While people may reach different conclusions here as a policy matter, these conclusions speak to a different question than the legal one addressed here.

The second response to the accusation that the executive is doing what only the Congress can rightly do is to say that this is simply not the case. Deferred action is not amnesty, it does not confer legal status, it does not remove these individual's eligibility for deportation, it only defers it. The deferral can be revoked. Adjusting the immigration laws to provide legal status for these individuals is indeed something only the Congress can do. This is one of the major reasons that the President continues to call for such legislation. What is more, the discretionary actions DHS is taking are themselves subject to revision by the Congress. The Johnson Memorandum operates within the limits of existing immigration law, but the Congress can in all respects revise those laws as it sees fit; nothing in the deferred action policies runs around or tries to avoid that constitutional truth.

I thank the Committee for its time, and I look forward to responding to any questions that you may have.