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THEY STILL HAVE THEIR DREAM: LAWSUIT AGAINST DREAMERS WILL GO NOWHERE

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"The arc of the moral universe is long but it bends towards justice." Dr. Martin Luther King

As if the non-recognition by the governors of Arizona, Nebraska, Texas and Mississippi of Obama's Consideration of Deferred Action for Childhood Arrivals (DACA) program was not enough, a lawsuit filed by disgruntled ICE agents further reveals the misguided hate against a most vulnerable and sympathetic immigrant population in the US – young people who entered the US before they turned 16, and who are not in a lawful status through no fault of their own.

The lawsuit, *Crane v. Napolitano*, has been filed by 10 ICE agents in a federal court in Texas who are being represented by Kris Kobach – the architect of the anti-immigrant state laws of Arizona and Alabama. It is being bank rolled by NumbersUSA, an anti-immigrant organization, which has been called a hate group. Even the head of the AFL-CIO has slammed the plaintiffs as not representing legitimate union grievances (as 9 out of the 10 plaintiffs belong to the ICE Union) but as "working with some of the most anti-immigrant forces in the country, forces that have long sowed division and destruction."

The lawsuit alleges that the recent prosecutorial discretion policies enunciated in the Memo by ICE Director John Morton and DACA command ICE officers to violate federal law. In essence, ICE officers, according to plaintiffs, are required to remove non-citizens who are not here legally while DACA prohibits an officer from doing just that, which among other things, requires the individual to have entered the US under the age of 16; been continuously residing in the US from June 15, 2007 until June 15, 2012, and was present on June 15, 2012; is

currently in school, has graduated from high school or obtained a GED or has been honorably discharged from the Armed Forces or the Coast Guard; and is not above the age of 30. Also, the qualified individual should not have been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and does not otherwise pose a threat to national security or public safety.

The lawsuit invokes provisions from the 1996 Immigration Act. The complaint alleges as follows: "8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted…shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3) which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A) which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." The proceedings under 8 U.S.C. § 1229a are removal proceedings in the United States immigration courts."

Deferred action is neither recent nor radical. Widows of US citizens have been granted this benefit. Battered immigrants have also known its sheltering arms. Never has the size of a vulnerable population been a valid reason to say no. Knowing this, the extension of such relief to DACA applicants is less a leap into the unknown justified by some wild, lawless ideology than a sober reaffirmation of an existing tool for remediation in prior emergencies**.** Moreover, many EWIs are also eligible for adjustment of status under special provisions of the law, but they are not routinely detained under INA § 235(b)(2)(A). While they may be entitled to admission beyond a clear doubt, such a determination is not been made upon the mere filing of the adjustment application. Moreover, this argument is clearly not applicable to individuals who enter the US on a valid visa and overstay, which is the case with many DACA applicants.

Also, Kobach's lawsuit conveniently omits to mention INA § 103(a)(1), which charges the DHS Secretary with the administration and enforcement of the Act, which in turn implies that the DHS can decide when to and when not to remove an alien. He also fails to mention INA 274A(h)(3)(B), which excludes from the definition of "unauthorized alien" any alien "authorized to be so employed . . . by the Attorney General." After all, 8 CFR 274a.12(c)(14), which authorizes the

grant of employment authorization to one who has been granted deferred action, has been around for several decades. The only new thing about DACA is that the guidance memorandum set forth criteria for the grant of deferred action, and work authorization under 8 CFR 274a.12(c)(14).Congress too has recognized "deferred action" in § 202(c)(2)(B)(viii) of the REAL ID Act as a status, which can allow an alien to receive a driver's license. This stands in marked contrast to the stated refusal of the Republican gubernatorial quartet noted *supra* to allow issuance of state driver's licenses. Texas Governor Perry apparently does not realize that current Texas law already allows deferred action beneficiaries who have an employment authorization document to get a one-year Texas license.

There is a direct conflict between these Governors and the provisions of the Real ID act that, as of January 1, 2013, will sanction issuance of state driver's license to deferred action grantees, This has been brought out vividly in Nightmare in Arizona: Governor Brewer's Nonsensical And Mean-Spirited Executive Order Against Dreamers, and is a classic example of conflict pre-emption that is constitutionally impermissible under *Arizona v. United States*, 132 S. Ct. 2492, 183 L.Ed.2d 351 (2012). Whatever state executives may think, when confronted with the expressed intent of Congress in the Real ID Act, their opposition to deferred action having state driver's licenses must give way. State law cannot "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). We suggest that the enemies of Dream Act relief tread softly and with great care. Gary Endelman & Cynthia Lange, *The Perils of Preemption: Immigration and the Federalist Paradox*, 13 Bender's Immigr. Bull. 1217 (Oct. 1, 2008).

We refer our readers to the excellent Immigration Impact blog on why Kobach and the plaintiffs will likely lose. One compelling argument that the blog makes is that the court will dismiss for lack of jurisdiction since a federal case cannot be made out of a difference of opinion between government employees and their superiors. The blog's author Ben Winograd draws this apt analogy: "ICE agents hauling the head of the Department of Homeland Security (DHS) into court is like a law clerk suing a judge for writing a decision with which she disagrees—or Kobach's own subordinates in Kansas seeking an injunction requiring him to perform his actual job as Kansas Secretary of State. It's just not how the legal system works."

We propose further suggestions why the law suit may have no merit. We now revive the argument that we made in The Tyranny of Priority Dates that the courts will most likely give deference to the administration's interpretation of INA provisions in the event that it grants benefits, such as work authorization, through executive action. Indeed, in the recent past, another restrictionist group filed a similar law suit against an administrative measure, which failed. In *Programmers Guild v. Chertoff*, 08-cv-2666 (D.N.J. 2008), the Programmers Guild sued DHS challenging the regulation extending Optional Practical Training from 12 months to 29 months for STEM (Science, Technology, Engineering and Math) students. The plaintiffs in seeking a preliminary injunction argued that DHS had invented its own guest worker program without Congressional authorization. The court dismissed the suit for injunction on the ground that DHS was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). Under the oft quoted Chevron doctrine, courts will pay deference to the regulatory interpretation of the agency charged with executing the laws of the United States when there is ambiguity in the statute. The courts will step in only when the agency's interpretation is irrational or in error. Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), while affirming *Chevron*, held that if there is an ambiguous statute requiring agency deference under *Chevron,* the agency's interpretation will also trump a judicial decision interpreting the same statute. The court in dismissing the Programmers Guild lawsuit discussed the rulings in *Chevron* and *Brand X* to uphold the DHS's ability to extend the student F-1 OPT regulation. Programmers Guild appealed and the Third Circuit also dismissed the lawsuit based on the fact that the Plaintiffs did not have standing. *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239 (3rd Cir. 2009), *petition for cert. filed*, (U.S. Nov. 13, 2009) (No. 09-590). While the Third Circuit did not address *Chevron* or *Brand X* – there was no need to – it interestingly cited Lorillard v. Pons, 434 U.S. 575, 580 (1978), which held that Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts its statutes without change. Here, the F-1 practical training regulation was devoid of any reference to the displacement of domestic labor, and Congress chose not to enact any such reference, which is why the Programmers Guild lacked standing.

In the ICE agents' case against DACA, the same arguments can be forcefully made. In the event that the court finds jurisdiction, a similar argument can be

made that the DHS be given deference in interpreting INA § 103(a)(1), which would allow the DHS Secretary to set forth policies regarding the exercise of prosecutorial discretion as in the Morton Memo and under DACA. Surely, the "body of experience" and the "informed judgment" that DHS brings to the Dream Act provide its interpretations with " the power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As Justice Elena Kagan famously noted when she served as the Dean of the Harvard Law School, the increasingly vigorous resort to federal regulation as a tool for policy transformation by all Presidents since Ronald Reagan has made "the regulatory activities of the executive branch agencies more and more an extension of the President's own policy and political agenda." Elena Kagan, *Presidential Administration,* 114 Harv. L. Rev. 2245, 2246 (2001). Kobach and his clients might profitably peruse Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference,* 58 Admin. L. Rev. 429 (2006) if they really want to know why they are wrong. Writing for the *Brand X* majority, Justice Thomas noted that, in *Chevron* itself, the Supreme Court deferred to the reversal by the Reagan EPA in 1981 as to the meaning of "statutory source" in the 1977 Clean Air Act amendments. *Id. at 440, n. 66.* If Kobach does not know if the DHS has the power to act, or what the constitutional wellsprings of the DACA memoranda are, we suggest that the Supreme Court does. The very notion of *Chevron*-deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gap." *FDA v. Brown & Williamson Tobacco Corp.*, 529 US 120, 159 (2000). That is precisely what the DHS has done. Moreover, INA § 274A(h)(3)(B) provides authority to the Executive Branch to grant employment authorization to whomever it wants. Deferred action has also been around for decades, and Congress has been aware of this administrative benefit, which it recognized when enacting the Real ID Act. Until now, *Chevron*, and *Brand X* in particular, have been feared by the immigration bar and immigration advocates for its negative potential as a legitimization of government repression. Yet, it has a positive potential by enabling the Executive to expand individual rights and grant benefits *sua sponte*. We do not need to live in fear of *Brand X*. We can make it our own – at least in this law suit challenging DACA.

It is also worth mentioning that while the lawsuit may argue that there is no express Congressional authorization for the Obama Administration to implement such measures, the President may act within a "twilight zone" in

which he may have concurrent authority with Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Unlike *Youngstown Sheet and Tube Co. v. Sawyer*, where the Supreme Court held that the President could not seize a steel mill to resolve a labor dispute without Congressional authorization, the Administration under through the Morton Memo and DACA is well acting within Congressional authorization. In his famous concurring opinion, Justice Jackson reminded us that, however meritorious, separation of powers itself was not without limit: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* at 635. Nativist lawyers look in vain for explicit authority in the INA that supports DACA relief. They can stop searching:

Congress ...may not have expressly delegated authority to...fill a particular gap. Yet,it can still be apparent from the agency's generally conferred authority that Congress will expect the agency to speak with the force of law when it addresses ambiguity in the statute...even one about which Congress did not actually have an intent as to a particular result. United States v. Mead, 533 U.S. 218, 229(2001)

Finally, one cannot separate the vitriol against DREAMers in states like Arizona and the law suit challenging DACA. They emanate from the same xenophobia against immigrants without being able to see that the deserving beneficiaries of DACA are out of status for no fault of their own, and even if one pinpoints the blame on their parents, the reason for such a huge undocumented population is because of a broken immigration system that does not provide sufficient avenues to legalize oneself. This law suit challenging DACA, along with the opposition to DACA by the Arizona and other states, essentially challenges the federal government's authority to exercise prosecutorial discretion. We think this is a losing proposition. In the *Arizona v. USA* decision, the Supreme Court acknowledged the federal government's role in exercising prosecutorial discretion, where Justice Kennedy writing for the majority in that decision noted, "A principal feature of the removal system is the broad discretion exercised by immigration officials...Federal officials as an initial matter, must decide whether it makes sense to pursue removal at all." Kobach wants the Dreamers kicked out; neither he nor his ICE agents get to make that call; it is up to DHS to decide when, or whether, to initiate such an enforcement campaign.

Heckler v. Chaney, 470 U.S. 821, 835 (1985). The reason is not hard to figure out; inherent in the exercise of discretion is the bedrock truth that there is simply "no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410(1971). The good sense and fundamental decency of the American people, guided by the continuing truth of the Constitution, will have to make due. It has served us pretty well so far.