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US IMMIGRATION & NATIONALITY LAW

JUSTICE, JUSTICE SHALL THOU PURSUE: WHY THE LAWSUIT AGAINST THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTIONS IS A WASTE OF TIME AND MONEY

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By Gary Endelman and Cyrus D. Mehta

For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me

Matthew 25:35

A lawsuit was expected as soon as President Obama dramatically announced that his immigration executive actions could impact more than 5 million people. It is already here. On December 3, 2014, Texas took the lead with 18 other states in a lawsuitagainst the United States asserting that the President's unilateral Immigration Accountability Executive Actions are unconstitutional. The coalition of states in addition to Texas include Alabama, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, Montana, Nebraska, North Carolina, South Carolina, South Dakota, Texas, Utah, West Virginia and Wisconsin.

The complaint essentially alleges that the DHS directive violates the President's constitutional duty to "take Care that the Laws be faithfully executed" under Article II, §3, Cl. 5 of the United States Constitution. Another basis for the complaint is that under the Administrative Procedure Act, 5 U.S.C. § 553, the President's executive action is akin to a rule, which needs to be promulgated through notice-and-comment rulemaking. The complaint also cites APA, 5 U.S.C. § 706, which gives a federal court power to set aside an agency action that is, among other things, arbitrary or capricious, contrary to constitutional right or in excess of statutory authority. But it reads more like a white-hot tabloid, and instead of providing a forceful legal basis, loudly proclaims in bombastic fashion

several prior utterances of President Obama claiming that he could never bypass Congress. Here are two out of many examples:

> *"I am president, I am not king. I can't do these things just by myself…here's a limit to the discretion that I can show because I am obliged to execute the law…I can't just make the laws up by myself."*
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> *"f in fact I could solve all these problems without passing laws in Congress, then I would do so. But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal. "*

The President still went ahead and changed the law himself despite his many previous assertions that he could not, according to the complaint, as if that can be a legal basis to challenge the actions. Interestingly, the President consistent with these prior utterances of his still insists even after November 20, 2014 that only Congress can change the law and bring on meaningful reform. The centerpiece of the President's executive actions is to broaden deferred action, which has always been deployed by the Executive Branch. The November 20, 2014 announcement defers the deportation of people who were in unlawful status as of the date of the announcement, and who were also the parents of US citizen or permanent resident children, provided they were in the United States before January 1, 2010. The previous Deferred Action for Childhood Arrivals (DACA) program has been expanded to include those who came to the United States when they were below 16 years prior to January 1, 2010 instead of January 15, 2007. The previous age limit of 31 that was imposed in the June 15, 2012 announcement has been lifted. Eligible people who are a non-priority for enforcement purposes can apply for deferred action, and obtain employment and travel authorization.

The lawsuit is a waste of time and taxpayers money. The authors have argued in A Time for Honest Truth: A Passionate Defense of President Obama's Executive Actions that the President clearly has the legal authority to exercise discretion with respect to prioritizing on whom to enforce the law against, especially when Congress has not provided sufficient funding to deport 12 million undocumented

people all at once. Even the conservative establishment refers to those who desire to deport 12 million as the "boxcar" crowd. The truth is that deferred action is neither recent nor revolutionary. Widows of US citizens have been granted this benefit. Battered immigrants have sought and obtained refuge there. Never has the size of a vulnerable population been a valid reason to say no. Even if the law suit alleges that the President does not have authority, now is a good time to remind critics about Justice Jackson's famous concurrent opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), which held that the President may act within a "twilight zone" in which he may have concurrent authority with Congress. 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 executive branch under the recent immigration actions 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. Although President Truman did not have authorization to seize the mill to prosecute the Korean War, Justice Jackson laid a three-pronged test to determine whether the President violated the Separation of Powers clause. First, where the President has express or implied authorization by Congress, his authority would be at its maximum. Second, where the President acts in the absence of congressional authority or a denial of authority, the President may still act constitutionally within a "twilight zone" in which he may have concurrent authority with Congress, or in which its distribution is uncertain. Under the second prong, Congressional inertia may enable, if not invite, measures of independent presidential authority. Finally, under the third prong, where the President acts in a way that is incompatible with an express or implied will of Congress, the President's power is at its lowest and is vulnerable to being unconstitutional.

Through the Immigration Accountability Executive Actions, the President is likely acting under either prong one or two of Justice Jackson's tripartite test. INA Section 103(a)(1) charges the DHS Secretary with the administration and enforcement of the INA. This implies that the DHS can decide when to and when not to remove an alien.." INA § 212(d)(5), which Congress also enacted,

authorizes the Executive to grant interim benefits for "urgent humanitarian reasons" or "significant public benefits." Parole can also be used to allow promising entrepreneurs to come to the United States and establish startups, although this and many other actions to help businesses have not been attacked in the law suit. Moreover, INA § 274A(h)(3)(B) provides authority to the Executive to grant employment authorization. Even if such authority is implied and not express, Congress has not overtly prohibited its exertion but displayed a passive acquiescence that reinforces its constitutional legitimacy. Operating in Justice Jackson's "twilight zone," such constructive ambiguity creates the opportunity for reform through executive initiative. In terms of employment authorization issuance, Congress has rarely spoken on this except via INA § 274A(h)(3)(B), so that many instances of employment authorization issuance are purely an act of executive discretion justified by that one statutory provision. Furthermore, INA § 103(3) confers powers on the Secretary of Homeland Security to "establish such regulations, prescribe such forms or bonds, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

We reproduce the very penetrating and insightful comments of our esteemed colleague Jose R. Perez, who is a partner at Foster:

> *It's my hope that Federal Judge Andy Hanen in Brownsville, TX, will do the right thing and dismiss this lawsuit based on:*
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> · *#1: Lack of subject matter jurisdiction since the alleged cause of action is a 'political question' or a dogfight between the executive & legislative branches as there is no case or controversy for an Article III Court to decide;*
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> · *#2: The plaintiffs lack 'standing' since the states have NOT suffered a palpable injury suffered and the 'alleged injury' is baseless and at best highly speculative since no undocumented alien has benefited from the executive actions of November 20, 2014; and*
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> · *#3: Once implemented, the executive actions do NOT circumvent Congress or usurp our Constitution since President Obama has the executive authority under Article II of the U.S. Constitution and the statutory authority under the INA to grant*

> *deferred action based on law enforcement priorities as an act of prosecutorial discretion. This is an presidents have done so.*

We wish to double down on these sage comments concerning lack of state standing to bring this lawsuit for they are its Achilles heel. This is not a case where a federal agency like the Environmental Protection Agency has declined a request by an affected state actor to regulate the emission of toxic greenhouse gas emissions whose presence in our air and water present a clear and present danger of environmental catastrophe.. For this reason, the holding by the Supreme Court that the State of Massachusetts did have requisite Article III standing to sue the EPA is fundamentally inapposite both in logic and law. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). Undocumented immigrants who work long hours at low pay doing the hard and dirty jobs on which we all depend but are loath to perform are not the cause or harbinger of global warming. Whatever grievances Texas and her sister states have , the proper forum for their expression and resolution in our system of governance is the Congress not the courts. *See Lajan v. Defenders of Wildlife,* 504 U.S. 555, 576 (1992)..

Courts are loath to review any non-enforcement decisions taken by federal authorities. *See,e.g., Lincoln v. Vigil,* 508 U.S. 182, 191-92 (1993). *Arizona v. United States*, 132 S.Ct. 2492, 2499 (2012), articulated the true reason why: " 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..." The decision by President to order ICE to focus its enforcement activities on designated priorities is a policy judgment which the courts have neither the time nor inclination to second guess:

> *This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. See United States v. Batchelder, 442 U. S. 114, 123-124 (1979); United States v. Nixon, 418 U. S. 683, 693 (1974); Vaca v. Sipes, 386 U. S. 171, 182 (1967); Confiscation Cases, 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of*

> *agency decisions to refuse enforcement.*

Heckler v. Chaney, 470 U.S. 821, 8311 (1985)

The Constitution neither allows nor encourages any of the state litigants in this extra-constitutional litigation to micromanage the enforcement or implementation of current immigration law or regulation. That is up to the President and those federal agencies to whom he delegates his authority: "An agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 842-845 (1984). Under the oft-quoted *Chevron doctrine*, federal 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 intrude only when the agency's interpretation is manifestly irrational or clearly erroneous. Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 US 967 (2005),while affirming *Chevron*, held that, if there is an ambiguous statute requiring agency deference under *Chevron*, the agency's understanding will also trump a judicial exegesis of the same statute. There is simply no case or controversy here for the federal courts to settle. None of these Plaintiffs identify or present such a " personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr,* 369 U.S. 186, 204 (1962). Where is their standing then one wonders? In all of the hyperbolic protestations that suffuse this complaint, where rhetoric often masquerades as reality, one looks in vain for any allegation or evidence that any of the state complainants can " show that it has suffered a concrete and particularized injury that is fairly traceable to thte defendant and that a favorable decision will likely redress that injury." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992).

Still, one should not be too sanguine about Judge Hanen doing the right thing who will hear this case in the United District Court for the Southern district of Texas, Division. In *US v. Nava-Martinez*, a case that involved a human trafficker who sought to smuggle an El Salvadorian girl into the United States, Judge Hanen chastised the DHS for completing the crime by delivering the minor to the custody of the parent, even though the DHS was obliged to unify the child under the 1997 *Flores v. Reno*, CV-85-4544-RJK, settlement agreement. Judge Hanen

equated this policy to "taking illegal drugs or weapons that it had seized from smugglers and delivering them to the criminals who initially solicited their illegal importation/exportation." *Id*. at 10. The plaintiffs have cleverly cited *Nava-Martinez*in their complaint as an example of DHS laxity encouraging illegal migrants, and also disingenuously conflated the surge of unaccompanied minors this summer with the President's previous DACA program, even though it has been well documented that these children may have come to the US for other legitimate reasons, such as fleeing horrific gang persecution in countries such as Honduras, el Salvador and Guatemala. . A December 5, 2014 NY Times article confirms this:

> *At the National Immigrant Justice Center in Chicago, lawyers interviewed 3,956 migrant children this year. Lisa Koop, associate director of legal services there, said the number of children who had heard of the 2012 program was "in the single digits."*
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> *"It is clear that DACA was not a driving force behind the migration," Ms. Koop said. "What we heard time and again was that violence in Central America and the need for safe haven was what prompted these children to undertake the journey north."*

Even if Judge Hanen does not rule the way we think he should, it is hoped that the Fifth Circuit will swiftly reverse him. Indeed, the Fifth Circuit has recently recognized the supremacy of federal immigration law over state law as well as federal discretion in enforcing immigration law. In *Villas at Parkside Partners v. Farmers Branch*, 726 F.3d 524 (5th Cir. 2013), the Fifth Circuit struck down a local housing ordinance on preemption grounds because it conflicted with federal law regarding the ability of aliens not lawfully present in the United States to remain in the US. The Fifth Circuit also noted that the federal government could exercise discretion:

> *Whereas the Supreme Court has made clear that there are "significant complexities involved in . . . the determination whether a person is removable," and the decision is "entrusted to the discretion of the Federal Government," Arizona, 132 S. Ct.*

> *at 2506; see also Plyler, 457 U.S. at 236 (Blackmun, J., concurring) ("he structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."), the Ordinance allows state courts to assess the legality of a non-citizen's presence absent a "preclusive" federal determination, opening the door to conflicting state and federal rulings on the question.*

The creation of law by federal agencies in the implementation of executive initiative has become the norm rather than the exception in our system of governance , if for no other reason than that the sheer multiplicity of issues, as well as their dense complexity, defy traditional compromise or consensus which are the very hallmarks of Congressional deliberation. Despite the assertion in Article I of the Constitution that " All legislative Powers herein granted shall be vested in a Congress of the United States," it is far from novel to acknowledge as we must that independent federal regulatory agencies also exercise legislative powers. As Justice White noted in his dissent in *INS v Chadha,*462 U.S. 919, 947 (1983) (White,J., dissenting) after reviewing prior cases upholding broad delegations of legislative power:

> *These cases establish that by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without passage of new legislation. For some time, the sheer amount of law- the substantive rules that regulate private conduct and direct the operation of government- made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process. There is no question that agency rulemaking is lawmaking in any functional or realistic sense of the term.*

Immigration has historically been linked to foreign policy. Indeed, a core reason for the plenary federal power over immigration is precisely because it implicates real and genuine foreign policy concerns. This is another reason why the Executive enjoys wide, though not unchecked, discretion to effect changes in immigration procedures through *sua sponte* regulation. Indeed, it is perhaps only a modest exaggeration to maintain that the INA could not be administered in any

other way. The President's executive action does not displace Congress as the primary architect of federal immigration policy but rather is in aid of the legislative function and, as such, is in harmony with the constitutional injunction to diversify authority. The President is not divorced from lawmaking; that is the very reason why the Framers provided an executive veto power. If the President had no role in lawmaking, why give such a weapon to limit congressional prerogative? Once we accept the fact that the Executive is a junior partner in lawmaking, then the President's executive actions become a strong but unremarkable expression of this well-settled constitutional concept. To suggest that the President is powerless to act simply because only Congress can modify the INA is to isolate one co-equal branch of our national government from another beyond what the Constitution suggests or requires. This is not what the Framers had in mind:

> *Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of government...The mean who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.*

Buckley v. Valeo, 424 U.S. 1, 121 (1976)

Not only is it appropriate for the President to direct the formulation of immigration policy on technical issues of surpassing importance, this is the way it must be; this is what the Constitution expects. The decision by President Obama to do now what he had been reluctant or unwilling to do earlier suggests not a reversal of position or a grab for imperial power but a willingness to change, to grow, to embrace solutions that meet the exigencies of an ever-changing challenge stubbornly resistant to what has been tried before and failed. We are reminded of what President Lincoln wrote to Albert G. Hodges on April 4, 1864 : "I claim not to have controlled events, but confess plainly that events have controlled me." In perhaps the most famous judicial exposition of the need for

pragmatic presidential initiative, we end our advocacy in confident reliance upon the still cogent observations of Chief Justice John Marshall in *McCulloch v. Maryland:*

> *To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur*

17 U. S. 316 (1819)

The President's proposals do nothing to inhibit or prevent Congress from enacting amendments to the INA. He has not attempted to supplant Congress when it comes to the exercise of the legislative function over which in alone enjoys plenary power. President Obama has acted solely in furtherance of what the Congress has already done to give America the immigration policy that it needs and deserves, one that is more effective and adaptable to the exigencies of the moment so that both the nation and the immigrants who have sacrificed all to write the next great chapter in the American story can benefit in full measure.

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