

Is the DAPA Amnesty Legal Under the US Constitution?

The U.S. Constitution clearly states at the beginning of Article I that all legislative power is vested in Congress. The President is assigned the responsibility of carrying out the laws passed by Congress, and is given the opportunity to recommend (but not to make) changes in the laws.

Does the Deferred Action for Parents of Americans (DAPA) program of President Obama, granting potential “deferred action” status to more than four million illegal aliens, fall within these constitutional boundaries or did the President’s policy change the law, in violation of the Constitution’s separation of powers? The Office of Legal Counsel (OLC) of the Department of Justice has given its opinion that the President has the necessary authority (see their November 19 Memorandum). Jeh Johnson, Secretary of the Department of Homeland Security, relied heavily on the OLC opinion in his November 20 memo directing DHS agencies to carry out the new policies, incorporating some of its wording verbatim. However the weakness of the OLC’s reasoning makes it appear that their approach was not to provide an objective evaluation, but rather to construct a defense of what the President already intended to do.

OLC admits that while “prosecutorial discretion” is a well-recognized attribute of the president and his subordinates, it does not grant unlimited discretion to the executive branch. It cannot be used to “attempt to effectively rewrite the laws to match its policy preferences.” It also cannot follow a course “so extreme as to amount to an abdication of its statutory responsibilities.”

OLC denies that the deferred action policy goes so far as to reach this forbidden ground, but it relies heavily on the doubtful argument that Congress has implicitly granted broad authority to the president in this area. Considering that Congress has never passed a law establishing deferred action, such a claim should be based on clear and unquestioned precedent, but this is exactly where the OLC memo falls short.

The OLC cites four recent pre-Obama examples of deferred action for “particular classes of aliens”. However, these were cases in which deportation was to be postponed because existing circumstances made it possible or even likely that those affected would soon receive the status of legal residents. Students who temporarily had no valid student visas when Hurricane Katrina caused their schools to shut down, abused wives and children seeking a transition to permanent legal status, widows and widowers of citizens (Congress was about to pass legislation granting them a path to citizenship), and visa applicants under the Victims of Trafficking and Violence Protection Act were very different categories from those proposed by President Obama. They merely needed a delay while they obtained their legal status. Furthermore, few of the people in these categories had originally entered the U.S. illegally.

The OLC also mentions the 1990 Family Fairness program of President George H. W. Bush, which provided deferred action for spouses and children of those who had been granted amnesty by the 1986 law. What the OLC does not mention is that this program was a temporary measure while legislation was in the works to make their legal residence permanent (legislation which was passed that same year). It is also worth noting, because it reflects on the credibility of the OLC, that the memorandum cites the thoroughly discredited claim that the Family Fairness program covered 1.5 million people, while the true number is less than 150,000.

The OLC also points to a few cases where Congress has allowed the executive branch some leeway in deferring action on people who are subject to deportation, but none of these

precedents is remotely similar to the new deferred action program, and none involve people who illegally entered the United States. Two post-September 11 laws allowing citizenship for family members of US citizens who died in the terrorist attacks or in later combat did provide for deferred action, but once again this was intended as a temporary delay while they made the transition to citizenship.

OLC even concedes that deferred action is supposed to be a “temporary” suspension of deportation, which was the case in all these examples. Had they been unable to obtain legal status, they would have been subject to deportation. For example, a Katrina-affected student who chose not to return to school would have been sent home. However, Obama’s deferred action, while limited to three years at a time, may be extended and is not to be followed by either legalization or deportation. It is intended to be at least indefinite, and the arguments used in its favor are only consistent with the intention of a permanent change in status.

Another key point is whether the new deferred action program is one that grants deferral to a whole class of people, or merely provides for DHS to make a case-by-case decision on the applicants. OLC is very clear in saying that only a case-by-case approach can be valid. It defends the new program, saying “The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief.” Unfortunately, the OLC’s evaluation takes at face value the claim that each application will receive a thorough review. The Obama administration has estimated that as many as 4.1 million people may apply for deferred action, a far greater number than DHS has ever had to deal with, and a number which is likely to swamp the Department’s ability to check out each one. Adding the necessary resources to carry out an effective case-by-case review would require an appropriation by Congress, and without such an appropriation, the review process is likely to be a worthless farce. Asking for an appropriation would also expose the fact that this program does not have the support of Congress, and is in fact a rewriting of the law by the President in the face of Congressional refusal. Furthermore, it is clear from the statements of President Obama that the purpose of the program is to be fully inclusive. Looking for reasons to reject an application would run counter to that intention.

Previous examples of deferred action have been for small numbers of people who entered the US legally and needed a delay of deportation while waiting for a restoration of legal status. DAPA is a much larger program, intended for people who entered the US illegally (or who stayed when their visas expired), and who are not in the process of becoming legal residents. Instead, its purpose is to give what amounts to permanent semi-legal status to millions of law-breakers.