Winstead, Maryscott

From: Hodge, Daniel <daniel.hodge@texasattorneygeneral.gov>
Sent: Tuesday, November 25, 2014 4:30 PM
To: mike.nizich@alaska.gov; Seth.hammett@governor.alabama.gov; ssmith@az.gov; Adam.hollingsworth@eog.myflorida.com; criley@georgia.gov; Matt.Hinch@iowa.gov; david.hensley@gov.idaho.gov; jatterholt@gov.in.gov; landon.fulmer@ks.gov; KJP1982 @icloud.com; john.mcgough@maine.gov; muchmored@michigan.gov; LSmith@governor.state.ms.us; Stith, Thomas A; rrausche@nd.gov; larry.bare@nebraska.gov; Kevin.O'Dowd@gov.state.nj.us; keith.gardner@state.nm.us; gigardner@gov.nv.gov; beth.hansen@governor.ohio.gov; denise.northrup@gov.ok.gov; lgromis@aol.com; tedpitts@gov.sc.gov; dustin.johnson@state.sd.us; mark.cate@tn.gov; Kathy Walt (kathy.walt@governor.state.tx.us); eric.schutt@wisconsin.gov; kari.gray@wyo.gov; cedarcitynative@gmail.com
Cc: Oldham, Andy
Subject: Legal Challenge to President's Executive Orders
Attachments: 2014 11 25 White Paper.pdf

Importance: High

Chiefs of Staff--

I am Texas Governor-Elect Greg Abbott's Chief of Staff and am contacting you to follow-up on comments my boss made during the Governors-Only meeting last week. As some of you may have heard, the State of Texas is preparing a legal challenge to the President's recent executive orders on immigration. During last week's meeting, Governor-Elect Abbott promised that we would circulate a white paper outlining the legal theories supporting the State's legal challenge to the other Governors. A copy of that white paper is attached to this email.

Our hope is that other states will join the State of Texas' legal action so that we will have a broad coalition to challenge the President's action--just as we did when 26 states banded together to challenge ObamaCare. Because Gov-Elect Abbott currently serves as Attorney General of Texas, we have also contacted many of your Attorneys General to inquire about their interest in joining Texas' legal challenge. Those offices have also been provided a copy of the attached white paper.

However, because some Governors indicated last week that their Attorneys General may not elect to join our legal challenge, Gov-Elect Abbott asked that I share this white paper with your office so that Governors whose AGs decline to join the case may do so on behalf of their states. Deputy Solicitor General Andy Oldham is lead counsel for this matter and the drafter of the attached white paper. To the extent any of your General Counsels have questions about the white paper or would like to discuss this matter in greater depth, please feel free to have them get in touch with Andy via either of the following:

Phone: 512 936-1862
Email: andy.oldham@texasattorneygeneral.gov

Of course, if you or your staff have any questions or would like to discuss this matter with me directly, please do not hesitate to contact me; my contact information is provided below.

Given the short turnaround, we'll be checking email over the holiday weekend and are happy to visit with anyone who wants to discuss this before next week. At this time, our plan is to file something next week. With that in mind, **if your state would like to join this legal challenge, please let us know by close of business on Tuesday, December 2**.

Thank you for your consideration. I look forward to working with each of you once the transition is complete and Gov-Elect Abbott takes office in late January. Until then, thanks for your time and Happy Thanksgiving.

DH

Daniel Hodge
First Assistant Attorney General & Chief of Staff
Texas Attorney General's Office
P.O. Box 12548--MC 001
Austin, Texas 78711-25489
(512) 936-1285--Direct

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

MEMORANDUM

To: Governors and Attorneys General

From: Attorney General Greg Abbott

Date: November 25, 2014

Re: Legal Analysis Supporting a Lawsuit Against Unlawful Presidential Action on Immigration

This memorandum provides a brief summary of the legal claims Texas intends to pursue in response to the President's recent unilateral actions on immigration. Greater detail will be provided in the lawsuit filed in federal court against the officials responsible for implementing the President's order. As leaders of our States, we need not all agree on immigration policy in order to agree that the President's unprecedented, unilateral actions undermine the rule of law and should be reviewed by the courts. The focus of the proposed litigation is not immigration. Rather, it is the scope of executive authority. The unchecked expansion of executive authority wielded by President Obama threatens the constitutional balance of power. If unchallenged, the President's actions threaten to forever change the Nation's constitutional foundation. We would welcome your State's participation in this effort as a co-plaintiff with Texas.

INTRODUCTION

On November 20, 2014, the President of the United States unilaterally suspended the Nation's immigration laws as applied to approximately 5 million people. He did so by invoking the concept of "deferred action" and applying it in two new ways. First, he expanded his Deferred Action for Childhood Arrivals ("DACA") program to apply to individuals who came to the U.S. before 2010 and their sixteenth birthday. And second, the President expanded the concept of "deferred action" to apply to adults who have been in the country for at least 5 years and who are parents of U.S. citizens or lawful permanent residents.

The President's actions give rise to at least two legal claims by the States. First, the President's actions violate his obligations under the Constitution's Take Care Clause. And second, they violate the Administrative Procedure Act ("APA").

The Supreme Court long has held that the President is not "above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974). The States should join forces and file suit to protect the rule of law, the separation of powers, and the principles of federalism.

STANDING

Texas has legal standing for two reasons. First, like any entity, the State has standing to sue the federal government for legal injuries to its own proprietary interests. *See, e.g.*, *Maryland v. Wirtz*, 392 U.S. 183 (1968). Texas has incurred healthcare, education, law enforcement, and other expenses on account of the President's 2012 DACA order. The President's 2013 deferred action program is even more ambitious, and according to early indications, it will lead to similar costs. That is more than sufficient to show constitutional standing. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Your State may have standing based on similar harms. But even if your State cannot demonstrate harms like Texas's, you can nonetheless join this suit because the Constitution requires only one plaintiff to prove standing. *See, e.g.*, *Florida ex rel. Atty. Gen. v. HHS*, 648 F.3d 1235, 1243 (11th Cir. 2011) ("The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim — as is the case here — we need not address whether the remaining plaintiffs have standing."), *rev'd in part on other grounds*, *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012); *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review.").

Second, a State also has standing to sue the federal government *parens patriae*, on behalf of citizens who are affected by the President's immigration plan. *See, e.g.*, *Massachusetts*, 549 U.S. at 519. *Parens patriae* standing arises where the State "surrenders certain sovereign prerogatives," which "are now lodged in the Federal Government" — such as the prerogative to pass its own immigration laws or to defend its own border. *Id.*; *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) ("One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."). And because a State can sue *parens patriae*, the Supreme Court has held that a State "is entitled to special solicitude in our standing analysis." *Massachusetts*, 549 U.S. at 520.

TAKE CARE CLAUSE

On the merits, the President's unilateral action violates his constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 5. That clause is specifically intended to limit the President's power — not to expand it. And the clause ensures that the President will faithfully execute Congress's laws — not rewrite them under the guise of executive "discretion."

The Take Care Clause has its roots in the dispute between King James II and Parliament in the late 17th Century. At the time, English monarchs claimed the power to "suspend" laws of Parliament (abrogating the law completely) or to "dispense" with such laws (nullifying the law in certain applications). King James's use of these powers infuriated Parliament, and he was overthrown in the Glorious Revolution of 1688. The subsequent monarchs, William and Mary, agreed to the English Bill of Rights, which stripped the monarchy of all authority to suspend or dispense with laws. *See* English Bill of Rights of 1689, art. 1 ("[T]he pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.").

The Glorious Revolution had a profound influence on America's Constitutional Convention. *See* JACK RAKOVE, ORIGINAL MEANINGS 20 (1996). For instance, the Framers unanimously rejected a proposal to grant the President the power to dispense with laws. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103-104 (Max Farrand ed., 1966). The framers understood the Take Care Clause to expressly repudiate the President's ability to suspend or dispense with Acts of Congress. *See* 2 JAMES WILSON, LECTURES ON LAW PART 2, *in* COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007) (explaining that the President has "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established").

And Supreme Court precedent makes clear that the Take Care Clause is judicially enforceable against presidential attempts to dispense with laws. For example, in *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), the Court affirmed a writ ordering a cabinet official to settle claims with mail contractors as required by an act of Congress. The cabinet official argued that he could ignore the law, but the Court disagreed:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution and entirely inadmissible.

Id. at 613; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."); *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945) ("[E]xplicit statutory requirements . . . must be observed and are beyond the dispensing power of Treasury officials.").

The President cannot use prosecutorial discretion to usurp Congress's lawmaking role. The framers gave Congress — not the President — the power "[t]o establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4; *see also* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (establishing a uniform rule of naturalization); THE FEDERALIST NO. 32, at 199 (Alexander Hamilton) (C. Rossiter ed., 1961). Thus, regardless of the President's discretion to decline enforcement in other areas, non-enforcement in the immigration context raises sensitive separation of powers concerns. Because Congress has exercised its authority under Article I, Section 8, the President cannot displace that prerogative by exempting 5 million people from immigration laws established by Congress. That violates Congress's exclusive authority to make "uniform Rule[s]" in this area.

Judicial enforcement of the Take Care Clause is not a relic of the past. During my tenure as Attorney General, I successfully obtained a Supreme Court ruling applying the Take Care Clause to the President. *See Medellin v. Texas*, 552 U.S. 491, 525 (2008) (President has "an array" of discretionary obligations to enforce international law, "but unilaterally converting a non-self-executing treaty into a self-executing one is not among them."); *id.* at 532 (The Take Care Clause "allows the President to execute the laws, not make them.").

The President is wrong to contend that "prosecutorial discretion" justifies his unilateral actions. Even the Obama Administration's own lawyers concede that the President's deferred action program is unprecedented in scale and scope. *See* Memorandum Opinion for the Secretary of Homeland Security, from Karl R. Thompson, Principal Deputy Assistant Attorney General, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* 30 (Nov. 19, 2014). Moreover, "prosecutorial discretion" connotes a decision not to prosecute. It does not connote a decision to openly tolerate unlawful behavior, much less does it permit a presidential edict to provide affirmative benefits — such as work permits — to reward unlawful behavior. President Obama's executive order goes far beyond "prosecutorial discretion" and invades the legislative province in violation of the Constitution.

THE ADMINISTRATIVE PROCEDURE ACT

Shortly after the President's announcement, his Secretary of the Department of Homeland Security ("DHS") issued a memorandum that purports to provide "guidance" to federal immigration authorities regarding non-enforcement of federal immigration law. A long line of precedent under Section 704 of the APA, 5 U.S.C. § 704, allows judicial review of administrative "guidance" documents when they create substantive duties or rights, and when they purport to speak with the effect

of binding law — that is, when they are "legislative rules." *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (agency action is judicially reviewable where "rights or obligations have been determined" or "legal consequences will flow" from it).

For example, in *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), EPA announced a "multi-factor, case-by-case analysis" that its staff would apply to determine the adequacy of States' air-quality monitoring standards. *Id.* at 1022. The court found irrelevant that EPA's "guidance" purported to turn on a "case-by-case analysis." *Id.* at 1022-23. The court also found irrelevant the fact that EPA included the following disclaimer at the end of its document: "'The policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.'" *Id.* (quoting guidance document). The disclaimer did nothing to insulate the "guidance" from judicial review because legal consequences nonetheless flowed from it:

> Insofar as the "policies" mentioned in the disclaimer consist of requiring State permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit, "rights" may not be created but "obligations" certainly are — obligations on the part of the State regulators and those they regulate. At any rate, the entire Guidance, from beginning to end — except the [disclaimer] paragraph — reads like a ukase. It commands, it requires, it orders, it dictates. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line.

Id.

DHS's deferred action "guidance" likewise reads like a dictate. It creates legal rights for 5 million individuals — including the legal right to live and to apply for work in the U.S. And while DHS has disclaimed any intention to create legal rights for the beneficiaries of the President's plan, precedent teaches that such disclaimers are meaningless. *See Appalachian Power*, 208 F.3d at 1023; *accord CBS v. United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.").

Because the President's action amounts to a legislative rule, attempting to implement it by executive order — rather than through agency rulemaking — violates the APA. We will seek an order requiring the administration to comply with the APA by crafting a rule that comports with the federal immigration statutes and by subjecting that rule to notice and comment. It is unlikely that the

administration could accomplish its goals through the APA's procedures, which is likely why the administration chose to use executive orders.

* * *

In short, the President's unilateral action should be reviewed by the courts and struck down because it violates the Take Care Clause and the APA. Whatever we think of the policy questions involved, requiring compliance with the Constitution is far more important than any single political issue. As leaders of our States, we are uniquely positioned to resist an overreaching presidential administration by taking action to restore the separation of powers required by our Constitution. Please consider whether joining in this legal action is the appropriate course for your State.