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A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade

This Essay disputes the legal claims set forth in a recent lawsuit that seeks to invalidate a policy of the Department of Homeland Security. The policy gives protection against deportation to unauthorized immigrants who came to the country as children, and the Department defends it as an exercise of prosecutorial discretion. The plaintiffs claim that no such discretion exists, because the Immigration and Nationality Act, as amended in 1996, requires that virtually all aliens who entered without inspection be detained and placed in removal proceedings whenever encountered by immigration agents. Closely examining the statutory language and drawing on the author's own extensive involvement as General Counsel of the Immigration and Naturalization Service in the 1996 consideration of legislative amendments and administrative implementation, this Essay makes the case that the plaintiffs' argument misunderstands both Congress's intent and consistent agency practice before and after those amendments.

On August 23, 2012, ten Immigration and Customs Enforcement (ICE) officers sued in federal court to block the Obama Administration's program to grant deferred action to longtime U.S. residents who came here illegally as children.¹ Under that program, eligible persons will be shielded from deportation for two years (potentially renewable) and will generally receive work authorization. The covered individuals are sometimes called "DREAMers,"

1. Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Aug. 23, 2012). The plaintiffs filed an amended complaint on Oct. 10, 2012, primarily to add the State of Mississippi, through its governor, Phil Bryant, as an additional plaintiff. Amended Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Oct. 10, 2012), <http://big.assets.huffingtonpost.com/ICElawsuit.pdf>. The substantive arguments remained unchanged.

because most would have been given lawful immigration status by the DREAM Act, a bipartisan bill that at times has garnered majority support in both houses of Congress, but has never been enacted.² The officers claim that the program, officially known as Deferred Action for Childhood Arrivals (DACA), violates immigration statutes and transgresses our constitutional separation of powers. The Department of Homeland Security justifies DACA as a systematic and thoughtful way of exercising prosecutorial discretion. Under the program, the Department exercises its discretion by forgoing enforcement, after careful screening, against young unauthorized immigrants not considered culpable for their unauthorized entry or presence.³

Lead counsel for the officers in this case, *Crane v. Napolitano*, is Kris Kobach, who was a prime mover behind the recent wave of state and local legislation designed to crack down on illegal migration.⁴ Kobach is also the elected Secretary of State of Kansas, although he is representing the plaintiffs here in his private capacity and, one assumes, his spare time. Evidently, since

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2. The initial Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in 2001, S. 1291, 107th Cong. (2001), and reintroduced, with variations, in succeeding congresses. The House passed a version of the DREAM Act in the 2010 lame-duck session, but the bill failed in the Senate when a cloture motion received only 55 votes (with 41 opposed). David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>.

The criteria for deferred action under the Obama Administration's policy, however, diverge slightly from the DREAM Act. More significantly, the benefits of the executive action are more ephemeral than the full legal status that legislation could provide. Describing the policy in a *Time* essay, President Obama specifically noted that difference and called on Congress to enact the DREAM Act during its 2012 session. Barack Obama, *Exclusive: A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, <http://ideas.time.com/2012/06/17/a-nation-of-laws-and-a-nation-of-immigrants>.

3. See Memorandum from Janet Napolitano, U.S. Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/si-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. For a thorough review of the history of deferred action in the immigration field, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246-65 (2010). To be eligible for DACA, applicants must have taken up residence in the United States before their sixteenth birthday, and on or before June 15, 2007—five years before the program was announced—and must not have reached their thirty-first birthday as of June 15, 2012. Other requirements, particularly with regard to schooling and criminal record, also apply. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/childhoodarrivals> (last updated Sept. 14, 2012).
4. See John Hanna, *Kan. Lawyer Is Architect of Many Immigration Laws*, SAN DIEGO UNION-TRIB., May 10, 2010, <http://www.utsandiego.com/news/2010/may/10/kan-lawyer-is-architect-of-many-immigration-laws>.

the Supreme Court squelched most of those crackdown provisions in its June ruling in *Arizona v. United States*,⁵ he feels the itch to find a new stage on which to complain about federal immigration policy.

Policy objections to the new program are fair game, of course, but as a lawsuit this is a very strange beast, and its full and disturbing implications have not been widely noted. In essence, the plaintiff officers say they are empowered to make their own choices about which immigration violators to arrest, no matter what their bosses may say about enforcement priorities. Their position represents both unwise policy and deeply flawed legal analysis.

The suit relies primarily on a superficially attractive and syllogistically neat statutory theory that Kobach first trumpeted in TV appearances and op-eds shortly after DACA was announced in June.⁶ Under Kobach's theory, virtually every time an ICE agent encounters unauthorized aliens, he or she has a duty under federal law – with which no supervisor can interfere – to place the aliens into formal removal proceedings. The same argument has also been picked up by congressional opponents of DACA.⁷ But the argument's central reasoning is legally erroneous. The theory takes out of context a provision Congress enacted in 1996, marries it with a misunderstanding of two provisions that have been in place for decades, and ignores the actual practice under those provisions.

I present this Essay primarily as a work of statutory interpretation. But it also draws on close personal knowledge of the legislative project that led to major statutory amendments in 1996,⁸ including the legal provisions on which Kobach relies. From summer 1995 to early 1998, I was on leave from my law-faculty position, where my main specialty has been immigration law, to serve as General Counsel of the Immigration and Naturalization Service. In that capacity, I was involved in hundreds of discussions within the executive branch and on Capitol Hill regarding the immigration-reform legislation – initially as it was being shaped and later as it was being implemented. The *Crane* lawsuit

5. 132 S. Ct. 2492 (2012).

6. See Kris W. Kobach, *The 'DREAM' Order Isn't Legal*, N.Y. POST, June 21, 2012, http://www.nypost.com/p/news/opinion/opedcolumnists/the_dream_order_isn_legal_4WAYaqJueaEK6MSoonMJCO. The complaint also presents other legal theories, but I focus here on this statutory argument, which is the centerpiece of Kobach's public attack on DACA and of the lawsuit, as presented in the complaint's first cause of action.

7. See, e.g., Letter from Congressman Lou Barletta to House Judiciary Comm. and Homeland Sec. Comm. (June 26, 2012), http://www.fairus.org/DocServer/Rep_Barletta_Investigation_Letter_6-26-12.pdf.

8. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. IV, 110 Stat. 1214, 1258-81 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The changes on which the lawsuit relies were enacted in the Illegal Immigration Reform and Immigrant Responsibility Act.

refashions history and distorts what Congress and the executive branch intended in 1996. This Essay gives a richer account of why Congress adopted the key provisions than may be apparent from the traditional legislative history of committee reports and floor colloquies.

Part I addresses the core statutory argument that the officers' lawsuit presents. Part II goes on to reflect on the wider implications for sound and accountable law enforcement if the plaintiffs were to prevail.

I. THE STATUTORY ARGUMENT

A. *The Syllogism*

Here is the legal syllogism, as spelled out in the complaint. The argument relies on three provisions of section 235 of the Immigration and Nationality Act (INA),⁹ a section that governs inspections of people who have not been admitted to the United States. The first of those provisions, section 235(a)(1), was wholly new in 1996, and the other two are slightly revised versions of earlier provisions that have been in the INA since it was enacted in 1952. Specifically, the complaint contends:

[Section 235(a)(1) of the INA] 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 [section 235(a)(3)], which requires that all applicants for admission “shall be inspected by immigration officers.” This in turn triggers [section 235(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 [removal] proceeding [in immigration court].”¹⁰

The complaint then concludes that “federal law clearly requires Plaintiffs to place [aliens covered by these provisions] into removal proceedings.”¹¹ Kobach's op-ed is even more sweeping, asserting that Congress “inserted [these] interlocking provisions into the law that *require deportation* when

9. 8 U.S.C. § 1225 (2006). The complaint cites only the United States Code. In the text of this Essay, however, I refer to the relevant statutory provisions by their section numbers in the INA. In citations, I cite the United States Code as well as, where relevant, the INA.

10. Amended Complaint, *supra* note 1, ¶ 68.

11. *Id.* ¶ 69.

Executive Branch officials become aware of illegal aliens.”¹² He goes on: “[T]he ‘prosecutorial discretion’ that Obama claims he is ordering ICE agents to exercise no longer exists, because Congress eliminated it in 1996.”¹³ In other words, in Kobach’s view, Congress left no room for prosecutorial discretion, at least not before an unadmitted person has been charged, detained, and haled into immigration court.

B. Legal Flaws

1. Entrants Without Inspection vs. Overstays

Kobach’s statutory argument presents several serious problems. First, he acts as though it applies to all “illegal aliens.” (This is particularly true of the op-ed, but any nuances qualifying the legal argument in the complaint are at best subtly buried.) By its very terms, however, section 235(a)(1) applies only to “an alien present in the United States who has not been admitted” – that is, someone who entered clandestinely away from the port of entry where inspection and admission take place.¹⁴ These entrants without inspection (EWIs, in immigration-speak) probably constitute the stereotypical “illegal alien” in the public mind, but by commonly accepted estimates they make up only fifty to sixty-seven percent of the unlawfully present population.¹⁵ The rest entered through normal nonimmigrant channels (primarily on a student, tourist, or business visa), were admitted after inspection at the border, and then overstayed or otherwise violated the conditions of their temporary admission. Therefore, up to fifty percent of the unauthorized immigrants encountered by ICE agents would fall outside Kobach’s sweeping claim about the repeal of prosecutorial discretion, and there is no reason to think that different percentages would apply to DACA applicants.

2. How Congress Changed the Treatment of EWIs in 1996

But let us set aside this rather significant qualification on Kobach’s claim (perhaps it was only a made-for-media shorthand) that prosecutorial discretion no longer exists, and henceforth focus only on EWIs. Even as applied to them,

12. Kobach, *supra* note 6.

13. *Id.*

14. 8 U.S.C. § 1225(a)(1).

15. *Modes of Entry for the Unauthorized Migrant Population*, PEW HISP. CENTER 3 (May 22, 2006), <http://pewhispanic.org/files/factsheets/19.pdf>.

the argument, for all its lockstep “triggering,” is unsound. The complaint implicitly argues that there can be no reason for Congress to have specified, in INA section 235(a)(1), that every alien found in the country without having been admitted shall be deemed to be an applicant for admission, other than to trigger the other paragraphs and thus mandate that EWIs be inspected and then detained for removal proceedings. This argument deeply misunderstands a fundamental architectural change that Congress was making in 1996 to the structure of immigration law, and the role that section 235(a)(1) plays in that change. Moreover, the ultimate explanation of that paragraph of the law actually leads in the opposite direction from where Kobach wants the court to go, because it reflects a congressional wish to expand, not contract, the options open to the immigration-enforcement agency as it chooses when and whether to file charges.

To fully understand Congress’s handiwork, we must plunge deeply into the history of some immigration technicalities. Before 1996, and tracing back for at least a hundred years, immigration enforcement was marked by a key dividing line between exclusion and deportation—between blocking unqualified persons from entry and removing them after they had entered.¹⁶ The laws contained separate statutory sections setting forth grounds for exclusion and a somewhat shorter and more focused list of grounds for deportation. The statute also provided different procedures for exclusion and deportation, most importantly regarding the burden of proof. To avoid exclusion, the alien applicant for admission bore the burden of proof. In deportation proceedings, however, the burden fell on the government to show that one of the deportation grounds applied. Although the procedural and substantive differences were never great in practical effect and had narrowed over time, the overall provisions remained somewhat more favorable for deportable aliens than for excludable aliens.

Crucially, whether a person would be in exclusion or in deportation turned on whether he or she had *entered* U.S. territory. Thus applicants who did what they were supposed to—presented their documents at a port of entry—would be in the less favorable position of an excludable alien if their admissibility were questioned. But someone who sneaked across the border and thereby accomplished an entry would be subject to the more advantageous deportation

16. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

grounds and deportation procedures.¹⁷ This ironic privileging of EWIs had drawn adverse comment in several court cases and in academic commentary.¹⁸

Changing that framework to end the more favorable treatment of EWIs drew wide support within Congress and the executive branch as immigration reform legislation moved forward in 1995 and 1996.¹⁹ As enacted, the new legislation made several changes toward this end. Primarily, it amended the prefatory language in the section setting forth deportation grounds (which, after 1996, have generally been called “deportability grounds”). The repealed language stated that deportation grounds apply to aliens “in the United States.”²⁰ The new language declared the grounds applicable to aliens “in and admitted to the United States.”²¹ Further, the preexisting *deportation* ground for entering without inspection was repealed.²² Instead, EWIs would be covered by a brand new *inadmissibility* ground (the new terminology after 1996, which replaced “exclusion ground”), which renders inadmissible persons “present in the United States without being admitted or paroled.”²³ Finally, Congress changed a key paragraph of the definitions section of the INA,²⁴ so that, instead of defining “entry,” the statute would define “admission” or “admitted.”²⁵ In short, the key factor in determining which substantive provisions apply and which procedures govern is now admission, not entry. Because they were never “admitted,” EWIs are now, once charged, treated

17. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION: PROCESS AND POLICY* 474-510 (3d ed. 1995).

18. See *id.* at 402.

19. See, e.g., *Immigration in the National Interest Act of 1995: Hearing on H.R. 1915 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 24 (1995) (statement of T. Alexander Aleinikoff, Executive Associate Comm’r for Programs, United States Immigration and Naturalization Service); see also *Matter of Quilantan*, 25 I. & N. Dec. 285, 291 (B.I.A. 2010) (stating that the 1996 amendments were intended “to eliminate that aspect of the ‘entry doctrine’ that permitted aliens who had entered without inspection to have greater procedural and substantive rights in deportation proceedings than those who had presented themselves for inspection at a port of entry and had been placed in exclusion proceedings”). In this footnote, and as well as on page 174 and in footnote 52, I depart from standard citation style for the names of administrative adjudications and instead follow the terminology used by the Board of Immigration Appeals (BIA) and by many immigration scholars and practitioners.

20. 8 U.S.C. § 1251(a) (1994) (codifying the former section 241(a) of the INA).

21. 8 U.S.C. § 1227(a) (2006) (codifying section 237(a) of the INA).

22. 8 U.S.C. § 1251(a)(1)(B) (1994) (codifying the former section 241(a)(1)(B) of the INA).

23. 8 U.S.C. § 1182(a)(6)(A)(i) (2006) (codifying section 212(a)(6)(A)(i) of the INA).

24. 8 U.S.C. § 1101(a)(13) (2006) (codifying section 101(a)(13) of the INA).

25. Compare 8 U.S.C. § 1101(a)(13) (1994), with 8 U.S.C. § 1101(a)(13) (2006).

essentially the same as persons identified as inadmissible (formerly “excludable”) at a port of entry.²⁶

3. Badalamenti *and the Statutory Designation of EWIs as Applicants for Admission*

The statutory changes just described were the primary engines of the effort to end any favorable treatment of EWIs, and they might well have been enough to secure the basic architectural change that the political branches wanted: making EWIs inadmissible rather than deportable. But there was one more complication that the immigration agencies feared might hamper efficient enforcement against EWIs once that change took effect, and that complication was the real reason that Congress enacted section 235(a)(1). The complication derived from a 1988 decision by the Board of Immigration Appeals (BIA), *Matter of Badalamenti*,²⁷ which had very limited significance when handed down, but which might have had much wider application after the 1996 amendments.

Exclusion grounds, the BIA noted in *Badalamenti*, apply to “applicants for admission.”²⁸ In the pre-1996 world, this linkage rarely presented any issue at all. The litigated cases²⁹ almost always involved someone ruled excludable at a port of entry. By the very nature of the process of arrival and port inspection, a person challenging exclusion was clearly seeking admission. The picture becomes a bit more complex, however, because exclusion grounds could also be applied to some persons outside the port-of-entry context: parolees. In immigration law, a parolee is a person who has received official permission to come into U.S. territory for a stated period (which might sometimes extend for years, or even decades). From the beginning, parole as a legal concept did not amount to admission, and a parolee was deemed not to have accomplished an

26. There are still a few respects in which the statute and its implementing regulations differentiate between “arriving aliens” who present themselves at the port of entry for inspection and other removable aliens—a category that includes EWIs. *See, e.g.*, 8 U.S.C. §§ 1182(a)(9)(A), 1225(b)(1)(A)(i), (iii) (2006) (codifying sections 212(a)(9)(A), 235(b)(1)(A)(i), and 235(b)(1)(A)(iii) of the INA); 8 C.F.R. §§ 1.2, 235.3(c), 1003.19(h)(2)(i)(B) (2012). But because EWIs are now subject to the INA inadmissibility grounds and most of the inadmissibility procedures, the differences are limited compared to the disparities under pre-1996 law, and they are not material to the issues presented in the *Crane* litigation.

27. 19 I. & N. Dec. 623 (B.I.A. 1988).

28. *Id.* at 626.

29. The exclusion grounds were—and now the inadmissibility grounds are—also regularly applied by U.S. consular officers deciding whether to issue a visa, but such decisions are generally not subject to administrative or judicial review.

entry.³⁰ Under a legal fiction, a parolee remained constructively at the border and would be treated as an applicant for admission once again (thus subject to the exclusion grounds and procedures) whenever the parole ended. This also rarely presented an issue, however, because parolees generally wanted to stay. When parole termination was litigated, the controversy almost always centered on the propriety of the termination or the substantive interpretation of an exclusion ground.

Vito Badalamenti's case was different. An Italian citizen, he had been extradited to the United States from Spain in 1984 as one of nineteen defendants charged in a massive indictment meant to break up the so-called Pizza Connection drug-smuggling ring run by his father, Gaetano Badalamenti. In order to stand trial, he had been paroled into the United States. This move had been a standard practice for decades: parole is necessary if extradited defendants are to proceed beyond the port of entry to the jail and then the courthouse, because they would almost always be barred from admission owing to the evidence of their criminal activity. After a seventeen-month Pizza Connection trial, seventeen defendants were convicted, but Vito Badalamenti was acquitted. The local INS office told him he had a week to make arrangements to leave the United States at his own expense. When he missed the deadline, he was taken into INS custody and charged under the applicable exclusion grounds.³¹

Badalamenti did not dispute the possible substantive relevance of the stated grounds. He argued instead that he was not an applicant for admission and thus not subject to any exclusion grounds at all. Clearly he had not desired to come to the United States, and he would be happy to leave now, but he had been unable to secure travel plans in the time allowed.³² (He did not want to return to Italy, his country of nationality, because he probably faced prosecution there, and initial arrangements with Paraguay fell through.)³³

30. For a general account of the concept of parole and its application, see ALEINIKOFF ET AL., *supra* note 17, at 379-84. Parole is provided for in section 212(d)(5) of the INA. 8 U.S.C. § 1182(d)(5) (2006).

31. 19 I. & N. Dec. at 624-25; Ralph Blumenthal, *Acquitted in 'Pizza Connection' Trial, Man Remains in Prison*, N.Y. TIMES, July 28, 1988, <http://www.nytimes.com/1988/07/28/nyregion/acquitted-in-pizza-connection-trial-man-remains-in-prison.html>; Arnold H. Lubasch, *17 Found Guilty in 'Pizza' Trial of a Drug Ring*, N.Y. TIMES, Mar. 3, 1987, <http://www.nytimes.com/1987/03/03/nyregion/17-found-guilty-in-pizza-trial-of-a-drug-ring.html>.

32. 19 I. & N. Dec. at 625.

33. *Id.*; Blumenthal, *supra* note 31; *see also* Badalamenti v. Moyer, No. 87-c-8503, 1988 WL 9125, at *1 (N.D. Ill. Feb. 4, 1988) (describing—in the course of rejecting Badalamenti's habeas corpus petition, filed before the BIA ruling in the case—Badalamenti's allegations about the

The BIA agreed with his basic argument. It stated that, “once the purpose of parole has been served and parole has been terminated, the alien must be given a reasonable opportunity to depart unless there is evidence that he is an applicant for admission.”³⁴ At some point, the BIA stated, a parolee who fails to depart will become subject to exclusion and to treatment as an applicant for admission, but first he must be given a “fair and reasonable opportunity to depart.”³⁵ The case was remanded to the immigration judge for a hearing on whether Badalamenti had had such an opportunity, including what efforts he had made to secure departure and whether the government had impeded his efforts.³⁶ If the opportunity to depart fell short of these standards, the judge should terminate the exclusion proceedings as premature.

As the immigration-reform legislation was under consideration in 1995, INS and the Department of Justice grew concerned that *Badalamenti* might apply to EWIs upon their apprehension. That is, now that EWIs could be removed only under an inadmissibility ground, they might claim upon apprehension that they really did not want to apply for admission and that they would happily depart on their own if given a week or two to do so. Under *Badalamenti*, INS feared that the BIA might allow application of the inadmissibility provisions only to a person for whom INS could present direct “evidence that he is an applicant for admission”³⁷—at least until the person had a reasonable opportunity to depart on his own. In the meantime, lacking authority to charge, much less detain, the person, officers faced the prospect that many EWIs could easily abscond. Congressional staffers who were crafting the new system understood the concern and wanted to make certain to avoid this outcome.³⁸

Italian government’s interest in prosecuting him and the circumstances of his thwarted flight to Paraguay).

34. 19 I. & N. Dec. at 626.

35. *Id.* at 627.

36. *Id.*

37. *Id.* at 626.

38. I emphasize that the concern arose from an abundance of caution, rather than from any slam-dunk argument that an EWI had to be treated like an acquitted extraditee (for whom the claim of no desire to apply for admission is far more plausible). Nonetheless, early drafts of the legislation did not squarely foreclose the *Badalamenti* argument, and one could easily envision a defense lawyer pressing it in the future. Further, the concept of “seeking admission” does still appear in some locations in the post-1996 law (e.g., section 235(b)(2)(A), one of the provisions Kobach highlights). INS and the Department of Justice prudently wanted Congress to take direct steps to eliminate any misunderstanding and foreclose one litigation issue. Perhaps because this additional safeguard provision was added at the staff level early in the drafting process and without real controversy, the

Congress reacted by stating in section 235(a)(1) that any “alien present in the United States who has not been admitted” shall be deemed, as a matter of law, to be an applicant for admission.³⁹ Accordingly, once the reformed system took effect, INS could immediately charge an EWI, whatever his declared subjective intent, without first giving him a couple of weeks to leave. The congressional purpose was to *broaden* the discretion of the enforcement agency to choose when to charge an EWI. This new provision gave INS the *option* to charge EWIs with inadmissibility upon discovery when it otherwise might not have been able to file immediate charges at all because of *Badalamenti*. To my knowledge, no one at the time even came close to suggesting that this provision *required* the agency to file charges whenever it encountered an EWI. Kris Kobach has it backward.

4. *The Other Provisions of Section 235 of the Immigration and Nationality Act*

Even if section 235(a)(1) were read as Kobach argues, it still precludes prosecutorial discretion only if the remaining two paragraphs themselves leave no room for discretion. Those two provisions call, first, for inspection of applicants for admission and, second, for detention leading up to removal proceedings in cases of doubt about admissibility. But versions of these two provisions have been in the immigration laws at least since the current Immigration and Nationality Act was adopted in 1952,⁴⁰ and the longstanding practice of immigration agencies, at the ports of entry where these provisions classically applied, reveals substantial exercises of discretion, without an inexorable march into detention and then immigration court.

First, consider the well-established practice of withdrawal of an application for admission. For many years before 1996, and continuing thereafter, immigration inspectors have annually allowed tens of thousands of applicants for admission in the ports of entry to withdraw their applications, without charging or detaining them or placing them in removal proceedings. Withdrawal permission commonly reflects a judgment by the officer that the

reasons for adding what is now section 235(a)(1) have not been expressly stated, so far as I am aware, in the formal legislative history. (I took up my INS position in August 1995 after this change had already been made to the leading draft bills. But I had many conversations about section 235(a)(1) and its derivation from *Badalamenti* in succeeding months, while working with executive-branch and congressional staff on further necessary refinements in the provisions that would operationalize the shift of EWIs from deportable to inadmissible.)

39. 8 U.S.C. § 1225(a)(1) (2006).

40. Before 1996, the relevant provisions were the first two sentences of section 235(a) of the INA, which became the current section 235(a)(3), and the first sentence of section 235(b), which became the current section 235(b)(2)(A). See 8 U.S.C. § 1225(a), (b) (1994).

individual presented a document with a merely technical flaw or otherwise had made an honest mistake.⁴¹ Withdrawal allows the person to go home right away, fix the problem (perhaps by getting a new visa), and return without the automatic disqualifications that attach if a judge issues a formal removal order.⁴² This practice unmistakably amounts to prosecutorial discretion, routinely exercised for persons who came before an immigration officer for examination and were not “clearly and beyond a doubt entitled” to land.

If Kobach’s argument about the current, only slightly changed language, is correct, then from 1952 to 1996 the withdrawal practice was illegal. Under the Kobach interpretation, all that an examining officer could do upon finding a flaw in the application for admission would be to detain, charge, and bind the person over to immigration court. Congress never thought this withdrawal practice illegitimate or deemed it a violation of the “shall” commands in the governing statute. Indeed, in 1996 Congress gave explicit statutory blessing to this practice of permitting withdrawals, in the discretion of the officer, instead of detaining for removal.⁴³

Perhaps more closely relevant to assessing the legality of DACA are several varieties of immigration parole. Parole, like withdrawal, originated as a purely administrative innovation. It permits a person’s physical presence in the United States even when she could not legally be granted formal admission. The practice was well established by the time parole gained explicit statutory sanction in the original 1952 Immigration and Nationality Act. Consistent with

41. See Stanley Mailman & Stephen Yale-Loehr, *Withdrawing the Application for Admission*, N.Y. L.J., June 23, 1997, at 1, <http://www.ssbb.com/index.php/publications/entry/22> (describing the background of the withdrawal practice). Once a person presents himself or herself for admission at a port of entry, withdrawal is not at the individual’s discretion; it requires the officer’s approval. But approval is far from rare. When Congress began consideration of the 1996 amendments to the INA, withdrawals, which at that time had no explicit statutory basis, but were instead an “administrative invention” justified under the general INS authority to administer the immigration laws, were running above 900,000 per year. *Id.* (reporting 961,444 withdrawals in 1994, “a typical year,” as compared to 17,419 exclusion cases decided that year by immigration judges). In 2005, the most recent year for which withdrawal statistics have been officially reported, the Department of Homeland Security counted 316,898 withdrawals. Mary Dougherty, Denise Wilson & Amy Wu, *Annual Report—Immigration Enforcement Actions: 2005*, DEP’T OF HOMELAND SECURITY 4 (Nov. 2006), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

42. See 8 U.S.C. § 1182(a)(9)(A)(i) (2006) (codifying section 212(a)(9)(A)(i) of the INA) (generally rendering inadmissible for five years a person who had been ordered removed in a proceeding initiated upon her or his arrival).

43. 8 U.S.C. § 1225(a)(4) (2006) (codifying section 235(a)(4) of the INA).

the earlier treatment, Congress expressly provided that parole “shall not be regarded as an admission of the alien.”⁴⁴

Because that same 1952 Act contained the predecessor provisions to the current section 235(a)(3) and (b)(2)(A), Kobach’s interpretation of those two paragraphs must indicate that parole could take place only after the potential parolee—almost by definition a person “not clearly and beyond a doubt entitled” to admission—had been detained and placed in proceedings in immigration court. To be sure, a respectable percentage of paroles do conform to the Kobach model, because parole is often used to release from immigration custody an ostensibly inadmissible applicant for admission, pending completion of his removal proceedings. Under this type of parole, the person is released from actual physical custody, often after posting bond, based on a judgment that he is neither dangerous nor a flight risk.⁴⁵

But parole has also been used in hundreds of thousands of cases each year to allow arriving aliens at the port of entry to establish physical presence in the United States, without detention and without the initiation of immigration-court proceedings, even though these persons appear to be inadmissible. Humanitarian parole, granted so that an inadmissible person may receive urgent medical care, for instance, or may be united with a dying relative, furnishes one important example.⁴⁶ A far more common situation involves advance parole—approved by U.S. Citizenship and Immigration Services

44. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (2006)).

45. See 8 C.F.R. §§ 235.3(c), 236.1(c)(8), (11), 1003.19(h) (2012) (governing release from custody pending an immigration-court hearing); *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (describing the history of parole and its use to avoid “needless confinement”).

46. In recent years, U.S. Citizenship and Immigration Services (USCIS) has granted roughly three hundred to four hundred humanitarian paroles annually. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 08-208, IMMIGRATION BENEFITS: INTERNAL CONTROLS FOR ADJUDICATING HUMANITARIAN PAROLE CASES ARE GENERALLY EFFECTIVE, BUT SOME CAN BE STRENGTHENED 11 (2008), <http://www.gao.gov/new.items/do8282.pdf>. Immigration inspectors at the port of entry may also grant humanitarian and special public-interest parole without advance USCIS processing. U.S. CUSTOMS & BORDER PROT., INSPECTOR’S FIELD MANUAL, § 16.1(c), <http://www.visaserveblog.com/tp-090109080449/post-120221102209/U.S.CustomsandBorderProtection%28CBP%29Inspector%27sFieldManual.pdf> (last visited Dec. 6, 2012) (redacted version).

Another significant example can be found in the regulations governing “parole for deferred inspection,” a practice under which an alien is allowed to travel freely to his U.S. destination, where he will be further inspected by Department of Homeland Security officers. This practice is used primarily in circumstances where the officer at the port of entry “has reason to believe that the alien can overcome a finding of inadmissibility” by, *inter alia*, posting a bond or presenting additional evidence. 8 C.F.R. § 235.2(b) (2012).

(USCIS) upon the application of an alien currently in the United States (and ordinarily awaiting the processing of a benefit) but otherwise unable to reenter in the same status or on the initial nonimmigrant visa if he or she undertakes temporary travel. In fiscal year 2011, USCIS granted more than 245,000 freestanding applications for advance parole and more than 500,000 more applications as part of the adjustment of status process.⁴⁷ People who receive these types of parole, with few exceptions, are permitted to proceed at liberty onto U.S. territory, after minimal additional processing at the port of entry. Agency practice before 1996 in the ports of entry thus included a history of thousands of paroles allowed without detention, charge, or appearance in immigration court, and that pattern continued smoothly after the 1996 amendments.⁴⁸ I am aware of no evidence that Congress either intended a change or has objected to the continuing use of parole in this manner.⁴⁹

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47. DATA ANALYSIS & REPORTING BRANCH, U.S. CITIZENSHIP & IMMIGRATION SERVS., SERVICE-WIDE RECEIPTS AND APPROVALS FOR ALL FORM TYPES, FISCAL YEAR 2011, http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/allformtypes_performance_data_fy11.pdf. Advance parole is primarily granted to persons in the United States awaiting adjustment of status who need to travel before they receive their green card through the adjustment process. By 2007, applications for advance parole had become so common on the part of adjustment applicants that USCIS decided to require all adjustment applicants to complete the advance parole application and pay one consolidated fee that covers both adjustment processing and advance parole processing (plus interim employment authorization). See Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 27 Fed. Reg. 29,851, 29,861-62 (May 3, 2007) (codified at 8 C.F.R. pt. 103) (final rule); see also Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 4888, 4894 (Jan. 26, 2007) (proposed rule). Of course, only a fraction of adjustment applicants actually travel during the relevant period and return to the port of entry using advance parole.
48. Advance approval of parole does not guarantee actual parole at the port of entry. See U.S. CUSTOMS & BORDER PROT., *supra* note 46, § 16.1(b). If the inspecting officer detects a problem with the case, he may instead place the person into removal proceedings or permit withdrawal of the application for admission, accompanied by prompt return to the country the person left.
49. Some court decisions, most of them relying on *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), have read section 235(b)(2)(A) of the INA as giving the immigration officer “no choice but to place the alien in removal proceedings.” *Id.* at 27; see, e.g., *Bona v. Gonzales*, 425 F.3d 663, 669-70 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 117 (3d Cir. 2005). But in these cases, which involved aliens at the ports of entry, not EWIs, the courts were focusing not on inspection and charging procedures, but on the validity of a separate regulation that precluded certain arriving aliens in removal proceedings from applying for adjustment of status. This rigid reading of section 235(b)(2)(A) of the INA by the courts was one small part of a complicated statutory interpretation that led the courts to conclude that the regulation was invalid. These pronouncements on section 235(b)(2)(A) are probably dicta because the holdings rest on the regulation’s inconsistency with the underlying statute

If Kobach’s statutory argument in *Crane v. Napolitano* prevails, it must follow that these convenient and salutary uses of parole at the ports of entry are illegal. The deleterious effects (and utter impracticality) of such a change can be illustrated by focusing on one particular use of parole explicitly recognized in the *Inspector’s Field Manual*: for an “[e]mergency worker responding to a natural disaster.”⁵⁰ In earlier years, parole came to be used for such persons because, in disaster situations, time is too short for full visa processing in nonimmigrant categories that include work authorization. Under Kobach’s theory, a European search-and-rescue team or a squad of Canadian electric-power technicians would be allowed to proceed to their duty stations in the aftermath of an earthquake or hurricane only after the insult of detention and the filing of formal immigration charges. That is surely not what Congress intended.

5. *Prosecutorial Discretion and the Word “Shall”*

Finally, the entire statutory argument in *Crane v. Napolitano* depends on reading the word “shall” as a categorical mandate wherever it appears, negating any exercise of judgment—at least at any level above the frontline officer. But

governing adjustment of status, section 245 of the INA. 8 U.S.C. § 1255 (2006). (*Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011), did involve EWI petitioners, and it also contains dictum addressing application of section 235(b)(2)(A) of the INA to EWIs, but the court ultimately affirmed a BIA ruling that the petitioners were ineligible for adjustment of status.) In any event, these courts’ statements on the mandatory nature of section 235(b)(2)(A) were not based on a fully informed exploration of the actual administrative practice under that section and its predecessors. In particular, the court in *Zheng* was clearly incorrect when it stated that “[p]arole is a form of relief from immigration *detention*[;] it is not a form of relief from *removal proceedings*.” 422 F.3d at 117. As described in the text above, hundreds of thousands of parolees have been allowed to come into the United States without being placed into proceedings. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 521 (7th ed. 2012) (stating that parole “can thus be used for a wide variety of purposes, either before or after an administrative finding of inadmissibility”).

In contrast, the Supreme Court gave a more nuanced and careful signal about the meaning of section 235(b)(2)(A) when it began its 2005 opinion in *Clark v. Martinez* with these words:

An alien arriving in the United States must be inspected by an immigration official and, unless he is found ‘clearly and beyond a doubt entitled to be admitted,’ *must generally* undergo removal proceedings to determine admissibility. Meanwhile the alien *may* be detained, subject to the Secretary’s discretionary authority to parole him into the country.

543 U.S. 371, 373 (2005) (emphasis added) (citations omitted).

50. U.S. CUSTOMS & BORDER PROT., *supra* note 46, § 16.1(c)(2)(A).

enforcement statutes, notably in the criminal field, commonly employ that word, and yet discretion survives. For example, a typical petty-larceny statute reads: “Whoever steals . . . the property of another . . . *shall* be guilty of larceny, and . . . if the value of the property stolen . . . does not exceed two hundred and fifty dollars, *shall* be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars.”⁵¹ No one considers that such a law absolutely requires police to investigate or prosecutors to charge every time they have even minimal evidence of such a theft. To be sure, officers are unlikely to ignore someone shoplifting groceries right in front of them. But, even in such a case, the officer or district attorney could properly drop the case before charges are filed—based on a judgment that the criminal docket is already overloaded with more serious cases, for example, or that the defendant acted to feed a famished child. The statute’s ostensibly directive language would not render such a decision *ultra vires*. In this vein, the BIA ruled recently that “shall,” in a different paragraph of section 235, “does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term ‘shall’ to mean ‘may’ when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring.”⁵²

In that decision, the BIA relied on classic prosecutorial-discretion decisions by the Supreme Court in the criminal-justice field, including *United States v. Armstrong*.⁵³ In *Armstrong*, the Court rejected the defendant’s selective-prosecution argument with these words: “A selective-prosecution claim asks a court to exercise judicial power over a ‘special province’ of the Executive[, which traces to] . . . the President’s . . . constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”⁵⁴ *Armstrong* relied in part on *Heckler v. Chaney*, a landmark decision that generally precludes judicial review under the Administrative Procedure Act of “agency decisions to refuse enforcement.”⁵⁵ *Heckler* summarized the reasons for the “general unsuitability” of judicial review in this context:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation

51. MASS. GEN. LAWS ANN., ch. 266, § 30(1) (West 2008) (emphasis added).

52. Matter of E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 522 (B.I.A. 2011). The provision at issue was section 235(b)(1)(A)(i) of the INA.

53. 517 U.S. 456 (1996).

54. *Id.* at 464 (citing U.S. CONST. art. II, § 3).

55. 470 U.S. 821, 831 (1985).

has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.⁵⁶

It is the agency, not each individual enforcement officer, that has the responsibility to make these decisions about resource allocation and overall policy.

The normal selective-prosecution claim, of course, is filed by the accused, alleging that she was improperly singled out. But the ICE officers' suit also amounts to a selective-prosecution suit, although it comes from the opposite angle. The officers assert that their supervisors require them to be selective, when the statute's "shalls" do not permit selectivity. But as long as the same constitutionally based discretion that the executive branch possesses in the criminal realm also applies to immigration enforcement—as the BIA and the Supreme Court have indicated⁵⁷—then discretion continues, and it belongs not personally to line officers, but to the President and his delegates who head the relevant agency.

II. A BROADER PERSPECTIVE

Now that we have taken a deep dive into the technicalities, let us regain some altitude and think about the kind of enforcement regime we would have if Kobach's argument prevails. Supervisors could not tell front-line officers how to focus their enforcement efforts, ostensibly because Congress has said directly to the line officer: you must pick up every EWI you ever encounter and place them all in proceedings. An officer assigned to an interagency task force charged with investigating and then prosecuting or deporting major foreign

56. *Id.* at 831-32.

57. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999); *E-R-M- & L-R-M-*, 25 I. & N. Dec. at 522. *American-Arab Anti-Discrimination Committee* applied *Armstrong* in the immigration field, rejecting judicial review of a selective-enforcement challenge to deportation charges. As in the other settings, however, the Court said it was not necessarily foreclosing the possibility of review in a case presenting evidence of "outrageous" discrimination. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491.

drug dealers would have to break off from pursuit of the organization's leaders if he came across EWIs in the course of his investigation. An officer assigned to a fugitive-operations team—which concentrates on locating and removing persons who ignored a final order of removal issued after a full hearing—would have to divert her attention and use whatever time might be required to arrest and charge all EWIs encountered at the site where she expected to find the fugitive. It is even possible that an officer ordered to interview foreigners booked into a local jail after arrests for common crime could escape discipline for failing to show up if he could demonstrate that he spent the whole morning instead arresting and charging EWIs he happened to encounter on his way to the jail.

Equally important, Kobach's relentless mandate to arrest EWIs would apply even when detention space is full, even when local immigration-court dockets are overwhelmed. Any effort by supervisors and managers to prioritize based on judgments about the relative threat posed by various individuals, by reference to humanitarian concerns, or even just to accommodate the real world of limited enforcement resources, would be illegitimate.

This portrait of the anarchic enforcement regime that might result if the suit is successful is not fanciful. In fact, the complaint reveals that one of the plaintiffs has apparently already tried to act in this fashion. According to a section of the complaint titled "Harm" (evidently included to help establish that the officer plaintiffs have standing), plaintiff James Doebler was told that he had to stop issuing charging documents "to certain illegal aliens" who were not within the guidelines. His supervisors then moved to impose a three-day suspension when he still went ahead and arrested someone who was a low priority.⁵⁸

In any other law enforcement environment, this discipline would be unremarkable. Picture a mayor and police chief directing officers to join a new concerted operation to arrest drug dealers. But one of the officers decides instead to spend his day arresting unlicensed sidewalk hucksters whom he sees along the streets. A police officer who insists on arresting just the people he chooses, defying the chain of command that runs up to electorally accountable officials, is rightly regarded as a rogue agent—a troubling thing in a democracy. The officer is entitled to disagree with the policy, but not to defy it. Those who do not like the policy can work to elect a different mayor. In the meantime, enforcement officers have to follow orders.

No sensible law enforcement agency operates the way Kobach advocates. If Congress meant in 1996 to remove all enforcement discretion, particularly in view of the President's constitutionally based authority over enforcement, one

58. Amended Complaint, *supra* note 1, ¶ 50.

would expect a far more explicit statement than the complicated three-step triggering on which Kobach relies. Moreover, one would have to wonder why Congress would pick out EWIs, most of whom are diligent hard workers, and elevate them above criminals or national security threats for an absolute requirement to file charges. (The Administration, it should be noted, has firmly anchored DACA in ongoing policy changes meant to focus most immigration-enforcement resources on criminals, recent border crossers, and serious violators of the immigration laws.)⁵⁹ Nothing in the legislative history supports Kobach's counterintuitive reading. Indeed, twenty-eight members of Congress wrote to the Attorney General in 1999, indicating that prosecutorial discretion survived the 1996 legislation and urging that it be used more systematically to reduce hardship and promote fairness. The signers included several Republicans normally seen as hard-liners on immigration, including Representative Lamar Smith of Texas, the current Chairman of the House Judiciary Committee, and Representative F. James Sensenbrenner, Jr., of Wisconsin, the previous Republican chair of that committee.⁶⁰

Kobach's relentless push for blanket and indiscriminate enforcement, here and in the state legislation he helped draft and defend, contributes mightily to the bitter polarization on this issue – although he shares that blame with a few advocates on the other side whose maximalist opposition to enforcement initiatives gives little practical respect to immigration restrictions enacted in law. Those of us who hope someday to see a viable regime that restores credibility to our immigration laws lament stances such as Kobach's. Enforcement without a sense of proportion – or even of sensible administration

59. See Obama, *supra* note 2; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>. For a further discussion of the link between declining removals of low-priority cases and increased removals of criminals, see David A. Martin, *A Lawful Step for the Immigration System*, WASH. POST, June 24, 2012, http://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/24/gJQAgtOoV_story.html, which notes that overall ICE removals have remained at approximately 400,000 per year under Obama even as noncriminal removals decreased.

60. Letter from 28 Members of Cong. to Att'y Gen. Janet Reno & Doris Meissner, Comm'r, Immigration & Naturalization Serv. (Nov. 4, 1999), *reprinted in* 76 INTERPRETER RELEASES 1720 app. 1 (1999).

in the real world of limited resources—will fail at restoring the rule of law in this fractious and troubled realm.

In *Arizona v. United States*, the Supreme Court emphasized the federal government’s “broad discretion” in immigration enforcement, a discretion that is grounded in the President’s constitutional powers and also “embraces immediate human concerns.”⁶¹ The *Crane* challenge to DACA is technically deficient for the many reasons canvassed here. But it deserves rejection primarily because of its blindness to this larger principle, so recently reaffirmed.

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61. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). These early sections of the majority opinion seem to have been designed to counter the intemperate separate opinion of Justice Scalia, *id.* at 2511, 2520-22 (Scalia, J., concurring in part and dissenting in part), who went out of his way to thunder against the June 15 DACA policy, then only two weeks old (and obviously not discussed in the record before the Court). See David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 45-46 (2012), http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf.