# Nevada Attorney General Adam Paul Laxalt's Testimony Regarding the States' Lawsuit Challenging the President's Unilateral Action on Immigration

House Committee on the Judiciary

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Mr. Chairman, Ranking Member Conyers, and Members of the Committee: My name is Adam Paul Laxalt, and I am the Attorney General of Nevada. On behalf of the people of Nevada, I thank you for the opportunity to testify about the States' lawsuit challenging President Obama's unilateral executive action granting "deferred action" to over 4 million people.

I'd like to address three things this morning: First, I want to clarify what this lawsuit is about. Second, I will discuss how the President's executive action impacts Nevada. And third, I will address the federal district court's ruling last week.

**The States' Lawsuit**

On November 20, 2014, after repeatedly acknowledging his duty to faithfully enforce the immigration laws passed by Congress, and after emphasizing that he lacked authority to unilaterally change those laws, President Obama directed his Secretary of Homeland Security to change the law. To quote the President himself, he said, "I just took an action to *change* the law." (Nov. 25, 2014).

While immigration is the substantive issue underlying the President's executive action, this lawsuit is not ultimately about immigration. Rather, it is about the President's attempt to change the law through unconstitutional executive action.

Like most of us, I am a descendant of immigrants. My ancestors came here in search of a better life. My grandfather, Paul Laxalt, was the son of an immigrant sheepherder. He rose to become the Governor of Nevada and a United States Senator. In our nation's history, similar stories have been repeated over and over. They are what we have come to know as the American dream.

However, it has never been true that in order to sympathize with the plight of immigrants, or to believe in the American dream, one must reject our constitutional system. To borrow a phrase our President is fond of using: that is a false choice. In significant part, it is our commitment to the rule of law and to our Constitution that has drawn people to our shores across the generations.

Before taking unilateral action, the President said the following:

> I am president, I am not king. I can't do these things just by myself. . . . [T]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. … [W]e can't ignore the law. . . . [T]he fact of the matter is there are laws on the books that I have to enforce. (Sept. 28 and Oct. 25, 2014).

We agree. In accord with these earlier statements by the President, a coalition of states brought suit in federal court to enjoin the President's unilateral action. Since the lawsuit was originally filed, the number of states challenging the President's action has grown to a majority of the 50 states.

To better understand the lawsuit, it is best to start with what the President's November 20 executive action actually does. The executive action, made by the Secretary of Homeland Security at the direction of President Obama, purports to grant "deferred action" status to over four million individuals. Deferred action prevents removal of individuals who are currently in the country illegally. Deferred action grants these individuals legal presence and work authorization, and allows them to obtain a variety of state and federal benefits.

The States' suit argues that the President's executive action violates the law at least three different ways.

First, the Constitution requires that the President "take care that the Laws be faithfully executed." During the Korean War, President Truman, relying on the exigencies of war, unilaterally seized the Nation's steel mills. President Truman justified his unilateral action because Congress had refused to pass a statute authorizing his action. The Supreme Court held that Truman's actions were unconstitutional. Here, as Judge Hanen – the federal judge presiding over the States' case – has observed, "no statute gives the [Department of Homeland Security] the discretion it is trying to exercise" here. (Op. at 96). Quite the contrary, the administration's action "not only ignores the dictates of Congress, but actively acts to thwart them." (Op. at 99). For the same reason that Truman's unilateral action in the *Steel Seizure Cases* was held unconstitutional by the Supreme Court, so too is the administration's unilateral action unconstitutional.

Second, federal statutory law – namely, the Administrative Procedure Act – requires that when an agency issues a substantive rule, it must be consistent with Congress's clear statutory language. Under unambiguous federal law, the Department of Homeland Security (here I quote Judge Hanen again) "is tasked with the duty of removing illegal aliens. Congress has provided that it 'shall' do this. … The word 'shall' is not permissive or suggestive. Rather, it prevents the DHS from doing something that is clearly contrary to Congress's intent." (Op. at 98-98). The President's plan that millions of illegally present individuals be granted legal presence, work authorization, and eligibility for state and federal benefits runs contrary to federal law, thwarts statutory language, and violates the Administrative Procedure Act.

Third, when a federal agency changes the rules such as the President has ordered to be done here, the Administrative Procedure Act also requires that due process be followed – that is, the agency must give fair notice of the rule change and allow public comment before implementing the change. Everyone agrees that no such procedure was followed here.

On Constitutional grounds, on statutory grounds, and on due process grounds this executive action contradicts our laws.

## **Why Nevada Joined**

Just a little over a month ago, I made the decision to have Nevada join the States' lawsuit and I did so for two primary reasons.

First, by joining this suit and stopping the Administration from taking illegal unilateral action this important issue will return to where it belongs – this Congress. Joining this lawsuit rightly acknowledges that sweeping immigration policy must be decided by the legislative branch and not by executive fiat. It must be done in a manner that is consistent with the Constitution, which means through legislation enacted by Congress.

Second, like the other attorneys general who had already joined the suit, and like all members of Congress, I swore an oath to defend and uphold the Constitution of the United States. In other words, this suit is not about politics. As the federal judge noted in his decision last week, it is not even about the "wisdom, or lack thereof, underlying the [President's] decision." (Op. at 4). Rather, it is about defending the separation of powers and the rule of law.

As Nevada's chief law enforcement officer, Nevada law requires that I initiate or join litigation whenever necessary "to protect and secure the interest of the State." In addition to the important constitutional interests just mentioned, the States have demonstrated, and Judge Hanen agreed in his opinion, that the President's unilateral action will impose millions of dollars in direct increased costs on the States.

My duties as a constitutional officer of the State of Nevada and my duties to protect the interests of Nevada compelled me to join the States' lawsuit.

**The Federal Court's Ruling**

Last week, the federal district court ruled in favor the States, holding that the States' case is likely to succeed on the merits. The court thus preliminarily enjoined the President's unilateral immigration plan. The court issued a rigorous 123 page opinion that addresses and ultimately dismantles the arguments in favor of the unilateral executive action.

First, the President has argued that the States don't have standing to challenge his action, because they are not injured. The court rejected that argument, pointing out that the States have shown they will need to spend millions of dollars merely processing and issuing new drivers licenses to the new class of "deferred action" applicants created by the President's unilateral plan. (Op. at 35). As the court explained, "the states cannot protect themselves from the costs inflicted by the [Federal] Government when 4.3 million individuals are granted legal presence with the resulting ability to compel state action." (Op. at 28-29). That alone – ignoring all of the other ways States may be injured – is sufficient to grant standing to the States.

Second, the President's main defense of the lawfulness of his unilateral action is that his plan is merely the executive branch exercising unreviewable prosecutorial discretion. Here, Judge Hanen went out of his way to give the executive branch its due, emphasizing that the Department of Homeland Security has broad discretion in its decisions on how to marshal resources, utilize manpower, and concentrate its efforts. (Op. at 70). But as the Judge held, the President's deferred action plan is not that: The plan "does not represent mere inadequacy; it is complete abdication. … [It] not only ignores the dictates of Congress, but

actively acts to thwart them." (Op. at 99). Whatever else it can be called, the President's plan goes well beyond mere nonenforcement:

> Instead of merely refusing to enforce the [Immigration & Naturalization Act's] removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel. … Exercising prosecutorial discretion and/or refusing to enforce a statute does not also entail bestowing benefits. Non-enforcement is just that-not enforcing the law. Nonenforcement does not entail refusing to remove these individuals as required by the law and then providing three years of immunity from that law, legal presence status, plus any benefits that may accompany legal presence under current regulations. (Op. at 85-87).

Third, and related to the President's claim of prosecutorial discretion, the President has also argued that the unilateral order is merely an unreviewable policy statement as opposed to a substantive rule change. Here, Judge Hanen said that "actions speak louder than words." (Op. at 110). As the Judge explained:

> The DAPA program clearly represents a substantive change in immigration policy. It is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only "legal presence" in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled. It does more than "supplement" the statute; if anything, it contradicts the INA. It is, in effect, a new law. DAPA turns its beneficiaries' illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice …. the President, himself, described it as a change. (Op. at 111).

First, the President said that he lacked the authority to unilaterally change the immigration laws. Then the President said, "I just took an action to change the law." The federal government's lawyers now say that this isn't really a change to the law, it is just "policy guidance." Obviously, all three of these positions cannot all be true. The States would submit that the President was correct the first time. Neither he nor his Secretary of Homeland Security has the power to unilaterally change the law.

I want to finish by reiterating something I already said. This suit is not about scoring political points on a policy disagreement between Democrats and Republicans. Ultimately, this lawsuit is about stopping an unconstitutional exercise of executive power and returning this important issue to Congress, where it Constitutionally belongs.

This lawsuit should transcend policy differences and partisanship. It seeks to prevent legislation from being usurped by executive fiat. Protecting such distinctions goes to the core of the separation of legislative and executive powers and to the root of our Constitutional system. Nevada joined this lawsuit because upholding our Constitutional process is more significant than any policy objective that any political party may be pushing at a particular time.

Thank you again, Mr. Chairman, for allowing me to testify before the Committee about this important case.