

**DACA/DAPA and the Relational Conception:
An Assessment of Inter-Branch Conflict Over Constitutional Authority in Immigration**

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Abstract

In the history of the American republic, no branch of government has increased its powers more than the Executive Branch and no area of policy, arguably, has caused as much intense inter-branch conflict in recent years as immigration. Since the last major bipartisan immigration reform in 1986, Presidents have time and again exercised their executive powers to make immigration policy. Most of these exercises of power have been in the form of executive orders and actions granting reprieve from deportation to groups of undocumented immigrants. With the rise of illegal immigration in the 90s and steady decline in recent years, the U.S. currently faces an undocumented population of roughly 11 million. Which branch of government has the power to enact policy regarding these immigrants is heavily disputed. The current legal battle for constitutional authority in immigration is *Texas v. United States*, where 26 states have sued President Obama for abuse of executive power in creating an extension of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), programs which would grant reprieve from deportation to up to 4.3 million undocumented immigrants and issue them work authorization documents. To assess whether President Obama has the constitutional authority to promulgate these programs, this paper applies political scientist Mariah Zeisberg's *relational conception* model to analyze the inter-branch conflict on immigration between the Legislative Branch, traditionally charged with creating immigration policy, and the Executive Branch, traditionally charged with enforcing it.

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I. Introduction

In 2012, President Barack Obama created the Deferred Action for Childhood Arrivals (DACA) program, by which “young adults brought to the U.S. illegally as children [became eligible to] apply for temporary deportation relief.”¹ Today, roughly 600,000 of the 1.2 million eligible have received relief and work permits.² In November of 2014, Obama announced further major executive actions: the expansion of DACA and creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), intended to provide reprieve from deportation to the parents of U.S. Citizens and Lawful Permanent Residents.³ This series of executive actions is unprecedented in the history of presidential executive actions primarily because of its collective potential to affect up to five million undocumented immigrants.

Unlike DACA that has since prevailed in legal challenges, most notably in *Arizona Dream Act Coalition v. Brewer* (2014) filed in the U.S. Court of Appeals for the Ninth Circuit in which the court ruled unconstitutional Arizona’s policy denying driver’s licenses to DACA recipients, these new executive actions currently face major legal obstacles. In February 2015, 26 states brought suit challenging the president’s use of executive power in the Federal District Court for the Southern District of Texas in *Texas v. United States*. The court blocked the actions on procedural grounds through a preliminary injunction, that is, an indefinite halt to the implementation proceedings of the two programs which were set to commence in early 2015.⁴

¹ Drew Desilver, *Executive actions on immigration have long history* (Washington D.C.: Pew Research Center, November 21, 2014), accessed October 2015, <http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/>.

² Zenen Jaimes Perez, *How DACA Has Impacted the Lives of Undocumented Young People* (Washington, D.C.: Center for American Progress, November 19, 2014), accessed February 2016, <https://www.americanprogress.org/issues/immigration/report/2014/11/19/101868/how-daca-has-improved-the-lives-of-undocumented-young-people/>.

³ Ibid.

⁴ Judge Hanen, who delivered the Opinion, ruled that the federal government, in creating the DAPA and expanded DACA programs, was in violation of the the Administrative Procedure Act (APA) for failure to fulfill the “notice and comment requirement.” The Act requires a notice and comment period

Subsequently, the U.S. Department of Justice asked the court for an emergency stay (i.e. stop the injunction from being in effect) to allow the programs to proceed to implementation. However, the stay was denied in a 2-1 decision on May 26, 2015.⁵ On November 9, 2015, the District Court ruling was upheld in a 2-1 decision made by the U.S. Fifth Circuit Court of Appeals. On November 20, 2015, exactly a year after the programs were announced, the Department of Justice filed a petition to the Supreme Court for a *writ of certiorari*.⁶ On January 19, 2016 the petition was granted. The court is scheduled to hear arguments on April 18, 2016 and make a ruling in June of 2016.

With the clock ticking in President Obama's last quarter in office, the debate surrounding his executive actions' constitutionality remains a hot-button issue. While the president claims he acted well within his discretionary power to enforce existing immigration law amid congressional stalemate on comprehensive immigration reform, his critics conversely argue he abused and overstepped his executive powers, calling his actions essentially lawmaking. Which argument is constitutionally sound? This research paper will answer this question by analyzing the inter-branch conflict over constitutional authority in immigration. Since the Legislative Branch has irresponsibly failed to meet its institutional obligations to reform the nation's outdated immigration laws, this paper will argue that the Executive Branch, in responsibly exercising its institutional strengths and enforcing existing immigration law with the resources it has at its disposal, has generated the constitutional authority to promulgate and implement DACA/DAPA.

as part of the rulemaking procedure "under which a proposed rule is published in the Federal Register and is open to comment by the general public." For more information see:

<http://www.foreffectivegov.org/node/2578>

⁵ *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5th Cir. May 26, 2015).

⁶ "Writ of certiorari" is "a type of writ by which an appellate court decides to review a case at its discretion" as defined by the Legal Information Institute, Cornell Law School. Petition for a *writ of certiorari* (Nov. 20, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/11/us-v-texas-petition.pdf> https://www.law.cornell.edu/wex/writ_of_certiorari.

The research paper is structured as follows: Part II will provide an overview of executive powers, differentiating the types of powers at the president's disposal and their constitutional origins. Then, the section will discuss constitutional theories of executive power, including the renowned presidential powers framework developed by Justice Robert H. Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* (1952) and the "Unitary Executive Theory," which came to fruition during the Reagan Administration. Part III will run through a history of major executive actions on immigration since the last bipartisan immigration reform in 1986. Part IV will analyze the constitutionality of President Obama's 2014 executive actions on immigration. Next, the section will outline key elements of the ongoing constitutionality debate and an overview of the judicial challenges to DACA/DAPA including the current lawsuit, *Texas v. United States*. The constitutional analysis will begin with an analysis of the actions under the *Youngstown* framework and discuss the framework's limitations in assessing executive power in modern government and particularly in immigration. Then, the actions will be analyzed under political scientist Mariah Zeisberg's relational conception model, created to assess constitutional war authority. Part V will conclude the paper with a discussion of the broader implications of inter-branch conflict over constitutional authority in immigration and discuss the practical benefits of DACA/DAPA to America's citizens.

II. Overview of Executive Powers

A. What are the President's Executive Powers?

The president, as the head of the Executive Branch, is an important figure of U.S. government with powers that impact virtually all domains of public policy. Renowned for his influential conception of presidential power, political scientist Richard Neustadt contended that presidential power and persuasion are synonymous, that is, "if a president is to enjoy a measure

of success, he must master the art of persuasion.”⁷ According to Neustadt, the ability to persuade defines political (and presidential) power in that it requires the convincing of other political actors by bargaining and negotiating in order to do things that a president cannot accomplish on his or her own. Formal powers, on the other hand, are a “painful last resort, a forced response to the exhaustion of other remedies.”⁸ However, this conception has been challenged by both the increase in size and importance of the Executive Branch and the rise of unilateral presidential actions, which political scientist William G. Howell calls “the virtual antithesis of bargaining and persuading.”⁹

1. The U.S. Constitution

To understand fully the broader puzzle that are unilateral presidential actions is to understand fully the president’s formal executive powers and their constitutional origins, referred as the “fundamental and irreducible core of presidential power” by political scientist Richard Pious.¹⁰ Article II of the Constitution contains an explicit list of presidential powers which include the power to appoint and nominate officers, the power to grant reprieves and pardons against offenses, and as Commander in Chief of the United States Armed Forces, the power to make treaties. However, the Constitution is also ambiguous—perhaps intentional, perhaps not—when it comes to the powers and responsibilities of the president, an issue that has been debated by political scientists and presidents alike for decades. Political scientist Dr. Ryan J. Barilleaux calls this phenomena “the presidential conundrum,” the idea that the Constitution itself

⁷ William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 8.

⁸ *Ibid.*, 9.

⁹ *Ibid.*, 15.

¹⁰ Christopher S. Kelley, *Executing the Constitution: Putting the President Back into the Constitution* (Albany: State University of New York Press, 2006), 4.

encourages presidents to test the limits of the Constitution.¹¹ He argues that, to resolve this conundrum, presidents engage in *venture constitutionalism* by taking risks that push the boundaries of constitutional authority. In fact, presidents, in their effort to either push their policy objectives and/or circumvent a hostile Congress, have used this ambiguity as justification for claiming broader powers. But what are the boundaries? The Vesting Clause and the Take Care Clause provide some guidance.

a) The Vesting Clause

Arguably “the most plausible constitutional warrant for broad executive powers” is the Vesting Clause.¹² The Vesting Clause states: “the executive power shall be vested in a President of the United States of America.”¹³ The Vesting clause is controversial because it is not clear what “the executive power” refers to: does it refer to the powers explicitly outlined in Article II, or does it confer some broader, not explicitly stated powers? According to political scientist Graham Dodds it may be the latter. Whilst comparing the language of the Executive Vesting Clause in Article II and the Legislative Vesting Cause in Article I, Dodds notes one particular and crucial difference: the words “herein granted.” Article I of the Constitution outlines the powers and responsibilities of the the Legislative Branch (i.e. Congress). Much like Article II, Article I also includes a Vesting Clause of its own which states: “all legislative power herein granted shall be vested in a Congress.”¹⁴ The “herein granted,” interpreted to mean the powers and responsibilities outlined in Article I, is missing in the Executive Branch’s Vesting Clause. The

¹¹ Ryan J. Barilleaux, “Venture Constitutionalism and the Enlargement of the Presidency,” in *Executing the Constitution: Putting the President Back into the Constitution*, ed. Christopher S. Kelley (Albany: State University of New York Press, 2006), 38.

¹² Graham G. Dodds, *Take up Your Pen: Unilateral Presidential Directives in American Politics* (Philadelphia: University of Pennsylvania Press, 2013), 32.

¹³ U.S. Const. art. III, § 2, § 3.

¹⁴ U.S. Const. art. I, § 1.

mere absence of these two words has led certain political scientists to believe that “there is an unspecified ‘residuum’ of executive power from which the president can draw from consisting of all powers that are arguably executive in nature and that are neither specifically granted nor specifically prohibited in the Constitution.”¹⁵ That is to say, in short, the president has broader executive powers at his disposal.

b) The Take Care Clause

The Take Care Clause states that the president “shall take care that the laws be faithfully executed.”¹⁶ Dodds states that in one view, the clause instructs the president to administer statutes carefully and on the other, the clause invokes a broader scope of action similar to the “necessary and proper” clause of Article I. Political scientist Richard Pious agrees. Pious argues that presidents, like Congress, “may take actions [that are] ‘necessary and proper’ to put their executive powers into effect, having all the means at their disposal that the Constitution does not forbid, and they combine their constitutional powers with statutes Congress passed to expand their administrative powers, even asserting their own reading of implicit provisions of statutory law.”¹⁷ In addition, presidents may stretch the meaning of the Constitution under certain circumstances through prerogative governance, whereby presidents use prerogative power when they believe they must act to resolve major public problems. Howell recounts that John Locke, English philosopher of the Enlightenment, first spoke about prerogative powers, stating that “certain public officials ought to enjoy ‘the power to act according to discretion, for the public good, without the prescription of the law and sometimes even against it.’”¹⁸ It is these prerogative

¹⁵ Dodds, *Take up Your Pen*, 31.

¹⁶ U.S. Const. art. III, § 2, § 3.

¹⁷ Richard M. Pious, “Public Law and the ‘Executive’ Constitution,” in *Executing the Constitution: Putting the President Back into the Constitution*, ed. Christopher S. Kelley (Albany: State University of New York, 2006), 14.

¹⁸ Howell, *Power without Persuasion*, 16.

powers that presidents such as FDR used as justification for acting unilaterally when neither the Legislature nor the Constitution had mandated appropriate powers. Claims of prerogative powers, however, obviously are in deep tension with maintaining the rule of law.

2. Unilateral Presidential Directives

The ambiguity of the Vesting Clause and Take Care Clause of Article II of the Constitution offer some rationale for considerable executive power. But what kinds exactly? In his book, *Take up Your Pen: Unilateral Presidential Directives in American Politics*, Dodds names these powers “unilateral presidential directives,” UPDs. UPDs, which presidents have long relied on to enact their preferences across a wide range of policy areas, are documents that the president issues to direct the activities of the Executive Branch.¹⁹ Dodds states that UPDs “serve to prompt congressional action, to preclude it, or to circumvent a recalcitrant Congress.”²⁰ Furthermore, UPDs are not anomalies. In fact, there are over two dozen different types. Presidents predominantly issue executive orders, proclamations and memoranda, most frequently in times of crises. In fact, as political scientist William G. Howell states, “throughout the history of the Republic, the public, Congress, and the courts have looked to the president to guide the nation through foreign and domestic crises.”²¹

In immigration, presidents often have issued executive orders and executive actions, terms that by definition “are not interchangeable” although in practice, they often are.²² Executive orders, unlike executive actions, have a legal definition and are published in the *Federal Register*. By definition, “executive orders and proclamations are directives or actions by the President,

¹⁹ Dodds, *Take up Your Pen*, 4.

²⁰ *Ibid.*, 4.

²¹ Howell, *Power without Persuasion*, 4.

²² John Contrubis, *Executive Orders and Proclamations* (Washington, D.C.: Congressional Research Service, March 9, 1999), accessed March 2016.

[that] when they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law...[and] in the narrower sense are generally directed to, and govern actions by, Government officials and agencies, [while they] usually affect private individuals only indirectly.”²³ Stated differently, “executive orders are directives issued by the president to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they henceforth be responsible for the implementation of law.”²⁴ Executive orders and other UPDs are as wide or narrow as the Legislative Branch, the Judicial Branch, and the Constitution permit.

a) Authority and Limits

The use of these directives are both justified and limited by the Legislative Branch, the lawmaking institution of the U.S. government, the Constitution and the Courts. First, Congress may delegate power to the president to take a certain action—which happens frequently—just as it can limit the president from acting on any given issue, that is, if Congress passes a law, the president cannot override it by a UPD. Although it has the authority to override UPDs either by passing laws or amending existing laws to explicitly strike down the UPD, Congress seldom does. In fact, Congress can limit or eliminate certain UPDs taken by the president or may vote to withhold the funds that would be necessary to implement a UPD, which Dodds remarks is “tantamount to nullifying the directive.”²⁵ (Congress tried this very tactic in December of 2014 by almost defunding the Department of Homeland Security over President Obama’s 2014 executive actions on immigration.) Second, UPDs may also be justified by the Constitution (e.g.

²³ “Executive Orders and Proclamations: A Study on the Use of Presidential Powers,” Staff of House Comm. On Government Operations, 85th Congress, 1st Session (1957).

²⁴ Howell, *Power without Persuasion*, 17.

²⁵ Dodds, *Take up Your Pen*, 11.

Article II, § 2 gives the president the power to grant reprieves and pardons for offenses against the United States), though most are not. Howell asserts that the power of unilateral action is mentioned “nowhere.”²⁶ Instead, most UPDs are justified by expansive constitutional interpretations of Article II. Third, UPDs may be limited by the Judicial Branch, the U.S. Supreme Court and other courts, by being struck down as unconstitutional. In sum, John Contrubis writes that “the authority for executive actions and orders must be based upon: (1) the Constitution; (2) statutes or treaties; or (3) the President’s inherent authority to ensure that the laws are ‘faithfully executed.’”²⁷ But, as Howell notes, “the fact of the matter is that presidents have always made law without the explicit consent of Congress, sometimes by acting upon general powers delegated to them by different congresses, past and present, and other times by reading new executive authorities in the Constitution itself.”²⁸

What make UPDs particularly fascinating is the tension they have with two core constitutional doctrines: the separation of powers and checks and balances. Dodds notes, “insofar as UPDs enable the Executive to legislate unilaterally, they violate the separation of powers,” and “insofar as the two branches have often been unable or unwilling to resist or reverse them, [they] also call into question the efficacy of traditional checks and balances.”²⁹ Howell further notes that these UPDs are “unlike any other power formally granted to the president” for two reasons: 1) the president makes policy first and thereby places a “burden” on Congress and the courts to respond, either by passing a law or ruling against the president, or do nothing; and 2) the president acts

²⁶ Howell, *Power without Persuasion*, 14.

²⁷ Contrubis, *Executive Orders and Proclamations*, 12.

²⁸ Howell, *Power without Persuasion*, 13.

²⁹ Dodds, *Take up Your Pen*, 11.

alone, rather than depend on any other institution, particularly Congress, to enact his or her legislative agenda.³⁰

B. Major Constitutional Theories of Executive Power

It is indisputable among political scientists like Dr. Ryan J. Barilleaux that executive power, or narrowly defined, presidential power, is much broader today than it ever was in the history of the American republic. Although this power has “waxed and waned” at times, it has generally increased over the course of history, a phenomenon economist Rexford G. Tugwell, who worked as a policy advisor to President Franklin D. Roosevelt, called the “enlargement of the presidency.”³¹ With this increase in executive power, presidents have pushed and tested the limits of their constitutional authority and in doing so, have devised theories of executive power to defend their actions.

Acclaimed “the architect of both the theoretical and practical foundations of the modern presidency,” President Theodore Roosevelt was the first major pioneer of enhancing the power of the national government and the president through his stewardship theory.³² In short, the *stewardship theory* held that the president can do anything not explicitly forbidden by the Constitution or by laws passed by Congress. President William Howard Taft’s *constitutional theory*, sometimes called a “Whig” (or “strict constructionist” or “literalist”) theory of presidential power, stated that the president derived his powers strictly from powers enumerated

³⁰ Howell, *Power without Persuasion*, 15.

³¹ Barilleaux, “Venture Constitutionalism,” 37.

³² Randall L. Robinson, “The Stewardship Theory of the Presidency: Theodore Roosevelt’s Political Theory of the Republican Progressive Statesmanship and the Foundation of the Modern Presidency,” The Claremont Graduate School (1997).

in the Constitution or granted by Congress.³³ That is, Taft believed the powers of the president should be so limited as to preserve constitutional democracy, separation of powers, and to resist “radical majoritarianism.” By contrast, the Franklin D. Roosevelt Administration is arguably the first to employ and defend prerogative powers in the context of commanding political positions. In the *prerogative theory* of presidential power, President Franklin D. Roosevelt, building on Theodore Roosevelt’s views, decided “the presidential prerogative ‘to take care’ that the laws be faithfully executed meant that the laws should be executed based on his interpretation of their meaning.”³⁴ For FDR, this meant broader executive powers in emergency situations such as war. Pious states that “presidents claim that they, as agents of the American people, exercise these powers when the Constitution is silent [and] they claim on rare occasions a Lockean Prerogative—the responsibility in an emergency to act without prescription of the law, and sometimes against it.”³⁵ Presidents, in his view, interpret the oath to “preserve, protect, and defend the Constitution” as also allowing them, in certain circumstances, “dispensing Power” to dispense with the execution of the law.³⁶

The Supreme Court and the Reagan Administration have also devised different theories of presidential power. The first is a presidential power framework created by Justice Robert H. Jackson in *Youngstown Sheet & Tube Co. v. Sawyer* and the second is the “Unitary Executive Theory.”

³³ Michael J. Korzi, “Our Chief Magistrate and His Powers: A Reconsideration of William Howard Taft’s “Whig” Theory of Presidential Leadership,” *Presidential Studies Quarterly* Vol. 33, No. 2 (June 2003): 305-324, <http://www.jstor.org/stable/pdf/27552486.pdf?acceptTC=true>.

³⁴ Richard M. Pious, “The Historical Presidency: Franklin D. Roosevelt and the Destroyer Deal: Normalizing Prerogative Power,” *Presidential Studies Quarterly* 42, No. 1 (March 2012), <http://onlinelibrary.wiley.com/doi/10.1111/j.1741-5705.2012.03948.x/pdf>.

³⁵ Richard M. Pious, “Prerogative Power and Presidential Politics,” *The Oxford Handbook of the American Presidency* (May 2010): 459, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199238859.001.0001/oxfordhb-9780199238859-e-20?print=pdf>.

³⁶ *Ibid.*

1. *Youngstown Sheet & Tube Co. v. Sawyer* Presidential Power Framework

Youngstown Co. v. Sawyer (1952) is a landmark Supreme Court case that addressed the constitutional authority of presidential power. In April of 1952, President Harry Truman issued an executive order directing the Secretary of Commerce Charles W. Sawyer to seize and operate most steel mills “to avert a nationwide strike of steelworkers.”³⁷ In “seizing” the mills, the order also directed the presidents of the mills to operate them as operating managers for the U.S. in accordance with U.S. regulations and directions. However, the seizure did not sit well with steel owners. In response, steel companies affected by the executive order sued Secretary Sawyer to regain control of their mills, demanding declaratory judgment³⁸ and injunctive relief.³⁹

In the president’s defense, his lawyers argued, like FDR, that the authority to issue such an executive order stemmed from the Vesting Clause of the Constitution, that “the executive power shall be vested in a President of the United States of America,” and upon his constitutional prerogatives and duties as President and Commander in Chief of the U.S. Armed Forces.⁴⁰ Truman felt compelled to ensure that the steel demanded during the Korean War was properly supplied rather than halted by a strike. The judges did not agree. A District Court issued a preliminary injunction which a Court of Appeals of later stayed (i.e. lifted the injunction). *Youngstown Sheet & Tube Co.* appealed the case to the Supreme Court. When the case reached the Court, the legal question was whether or not the executive order was constitutional. In a 6-3

³⁷ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952).

³⁸ “Declaratory judgment is a binding judgment from a court defining the legal relationship between parties and their rights in the matter before the court.” See “Injunction” Legal Information Institute: https://www.law.cornell.edu/wex/declaratory_judgment (Also see Fed. R. Civ. P. 27)

³⁹ “Injunctive relief is a discretionary power in the court in which the court upon deciding the plaintiff’s rights are being violated, balances the irreparability of injuries and inadequacy of damages if an injunction were not granted against the damages that granting an injunction would cause.” See “Declaratory Judgment” Legal Information Institute: <https://www.law.cornell.edu/wex/injunction>

⁴⁰ U.S. Const. art. III, § 2, § 3.

decision, the Supreme Court invalidated the executive order to seize the steel mills, holding it was neither authorized by the Constitution nor by existing U.S. laws.

Justice Jackson in his concurring opinion argued that “presidential powers are not fixed but fluctuate, depending upon the disjunction or conjunction with those of Congress.”⁴¹ To illustrate this relationship between the Executive and Legislative branches, he created a now widely used presidential power framework which divided presidential power into three distinct categories. The first zone states that the president is at his height of powers when he “acts pursuant to express or implied authorization of Congress.”⁴² This means that the President acts with the consent of Congress under full statutory authority.

The second zone is where the president “acts in absence of either congressional grant or denial of authority.”⁴³ This zone describes the situation in which the president acts when Congress is silent on a particular matter, that is, executive action is “in [the] absence of either a congressional grant or denial of [executive] authority.”⁴⁴ It is in these situations where the President “must have some basis for independent constitutional power.”⁴⁵ Justice Jackson, however, notes that there also exists a “zone of twilight” where both the president and Congress have overlapping or indistinct powers and where a lack of congressional action may necessitate executive action.⁴⁶ Stated differently, Michael J. Turner, author of “Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin,” states that the “zone of twilight” is “defined by the absence of congressional action, positive or negative, and

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Michael J. Turner, “Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medellin,” *American University Law Review* 58, No. 3 (February 2009): 675.

⁴⁶ *Ibid.*, citing *Youngstown*, 637.

the presence of some constitutional basis for presidential power.”⁴⁷ Turner emphasizes that the “zone of twilight” is narrow, since analysis under this zone “should occur only after an analysis under categories one and three is inconclusive.”⁴⁸

In the third and final zone, the president reaches his lowest “ebb” of powers. This is when “the President takes measures incompatible with the expressed or implied will of Congress” but where he can “rely only upon his constitutional powers minus any constitutional powers of Congress over the matter.”⁴⁹ It is in this zone where *inherent powers* (i.e. “powers held by the President that are not specified in the Constitution, but which are needed to efficiently perform the duties of the office”⁵⁰) matter the most, though often they will not be enough. In fact, Justice Jackson rejected President Truman’s argument that his authority for seizing the mills was based on the inherent power asserted in the Constitution. Instead, Justice Jackson stated that seizing the mills fell into the third zone because the Constitution gives Congress the power “to raise and support Armies” and “to provide and maintain a Navy” and thus only “Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement.”⁵¹

2. The Unitary Executive Theory

The *Unitary Executive Theory*, designed to maximize presidential power and minimize constitutional restraints on such power, is a product of the reassertion of presidential power in the late 20th century. Political scientist Dr. Christopher S. Kelley writes that “the political environments of the 1970s, 80s, and 90s, made bargaining and persuading extraordinarily

⁴⁷ *Ibid.*, 676, citing *Youngstown*, 638.

⁴⁸ Turner, “Fade to Black,” 675.

⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952).

⁵⁰ See “Inherent Powers” at Legal Dictionary: <http://legaldictionary.net/inherent-powers/>.

⁵¹ *Ibid.*

difficult for the President.”⁵² Beginning roughly with the Reagan Administration, in particular, he argues, the Executive Branch was staffed with individuals committed to strengthening presidential power nonetheless.⁵³

The Unitary Executive Theory came to fruition during the Reagan Administration in response to the political atmosphere of the 60s and 70s, which generated an increasing perception of an imperial presidency. The public perceived that the president abused and superseded his executive powers, especially in the Nixon years. In response, Reagan officials crafted the unitary executive theory as justification for their efforts to establish that a “highly centralized bureaucratic structure of government that would ensure that ultimate control of decision making in all executive branch agencies, including independent regulatory agencies, would rest in the hands of the president or his delegate.”⁵⁴ In its essence, the Unitary Executive Theory states that “any effort to limit executive power is unconstitutional--whether the effort involves the imposition of congressional or judicial oversight on executive actions or the creation of so-called independent agencies with limited autonomy.”⁵⁵ This theory is rooted in the Vesting Clause of Article II of the Constitution, which vest “the executive power” in the president.

Proponents of the theory suggest that the both the Vesting Clause and the Take Care Clause of Article II of the Constitution create a “hierarchical, unified executive department under the direct control of the President.”⁵⁶ That is, they contend that “the President has plenary or

⁵² Kelley, *Executing the Constitution*, 4.

⁵³ *Ibid.*, 2.

⁵⁴ Morton Rosenberg, “Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive,” 57 *George Washington Law Review* 627 (1989): 628-629, [URL](#).

⁵⁵ Karl Manheim and Allan Ides, “The Unitary Executive: Federal courts have almost always rebuffed assertions of unchecked power by the executive branch,” *Los Angeles Lawyer* (September 2006), 24, <http://www.lacba.org/files/lal/vol29no6/2305.pdf>.

⁵⁶ Steven G. Calabresi and Kevin H. Rhodes, “The Structural Constitution: Unitary Executive, Plural Judiciary,” 105 *Harvard Law Review* 1153 (1992).

unlimited power over the execution of administrative functions” such as the power to remove officers in the Executive Branch.⁵⁷ According to political scientist Richard Waterman, “the theory posits that, by creating a single president, the founders intended for the president to have complete and unfettered control over all aspects of the executive branch” and that any attempt by Congress to limit such control is unconstitutional and thus, need not be enforced.⁵⁸ In short, the theory represents expansive claims of inherent presidential power.

Conversely, opponents of the theory call it a myth that promotes an erroneous interpretation of the separation of powers and the very intentions of the Founding Fathers. A modern interpretation of the theory suggests “that the authority to enforce federal law and to implement federal policy rests exclusively in the executive branch and ultimately in the president.”⁵⁹ Morton Rosenberg, in “Congress’ Prerogative over Agencies and Agency Decision-makers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive,” discusses the constitutionally-based theory, arguing that it “is and always has been a myth concocted by the Reagan Administration to provide a semblance of legal respectability for an aggressive administrative strategy designed to accomplish what its failed legislative agenda could not.”⁶⁰ The theory “subverts our delicately balanced scheme of separated but shared powers.”⁶¹ He argues that Congress has always had the prerogative over administrative bureaucracy, not the president. This includes the power to create, abolish, and locate agencies and to define the

⁵⁷ Cass R. Sunstein and Lawrence Lessig, “The President and the Administration,” 94 *Columbia Law Review* 1 (1994).

⁵⁸ Richard W. Waterman, “The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory,” *Presidential Studies Quarterly* Vol. 39, No. 1 (March 2009): 5-9, <http://www.jstor.org/stable.23044871>.

⁵⁹ *Ibid.*, 27.

⁶⁰ Rosenberg, “Congress’s Prerogative over Agencies and Agency Decisionmakers,” 634.

⁶¹ *Ibid.*

powers, duties, tenure, compensation, and other incidents of the offices within them. Thus, there is a narrow limit on congressional authority over agencies.

III. History of Executive Actions on Immigration since IRCA

Executive actions and orders, as aforementioned, prominent UPDs in the realm of immigration, have a long history. For example, Democratic President John F. Kennedy issued an executive action directing the then Department of Health, Education, and Welfare to establish a formal program to assist Cuban refugees in 1961.⁶² Democratic President Jimmy Carter in 1980 issued an executive action admitting Cuban and Haitian refugees into the country, in what came to be known as the Mariel boatlift.⁶³ However, executive actions in this particular policy area have only relatively recently gained steam.

In the last 30 years, U.S. immigration policy has seen a growing trend in curbing illegal immigration through attrition, limiting public services and resources to undocumented individuals, and increasing sanctions on employers knowingly hiring and recruiting them.⁶⁴ In 1986, the Immigration Reform and Control Act (IRCA) imposed sanctions on employers who knowingly hired or recruited undocumented immigrants.⁶⁵ In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) took it a step further and established “the Basic Pilot Program,” a program that enabled employers and social services agencies to verify, by telephone or electronically, the employment eligibility of immigrants.⁶⁶ Though these laws

⁶² Desilver, *Executive actions on immigration have long history.*

⁶³ *Ibid.*

⁶⁴ Catalina Amuedo-Dorantes, Thitima Puttitanun and Ana P. Martinez-Donate, “How Do Tougher Immigration Measures Affect Unauthorized Immigrants?” *Demography* Vol. 50, No. 3 (June 2013):1067.

⁶⁵ *Major U.S. Immigration Laws, 1790-Present.* (Washington, D.C.: Migration Policy Institute, March, 2013), accessed November 2015, <http://www.migrationpolicy.org/research/timeline-1790>.

⁶⁶ Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (1996).

both enforced stricter measures to regulate illegal immigration and in the case of IRCA, simultaneously provided reprieve from deportation to millions of undocumented immigrants, presidents have additionally employed UPDs that, for the most part, have provided relief to undocumented immigrants not covered by legislation.⁶⁷

A. Ronald Reagan Administration (1986-1989)

In 1986, the Immigration Reform and Control Act was signed into law by Republican President Ronald Reagan. An advocate of amnesty, the “father of modern conservatism” stated in 1984: “I believe in the idea of amnesty for those who have put down roots and lived here, even though sometime back they may have entered illegally.”⁶⁸ With a mission to “crackdown” on illegal immigration, IRCA established tighter security measures at the U.S.-Mexican border and put into place strict penalties to employers who hired undocumented immigrants. But perhaps the most striking of the provisions was that the new law granted amnesty, that is “legalized status,” to undocumented immigrants who entered the country prior to 1982 and had continuously resided in the U.S. since January 1st of that year.⁶⁹ Specifically, IRCA legalized the status of two particular groups of undocumented immigrants. They were: 1) “aliens (i.e. undocumented immigrants) who had been unlawfully residing in the United States since before January 1, 1982 (pre-1982 immigrants),” legalized under § 245A of the Immigration and Nationality Act (INA), and 2)

⁶⁷ 8 U.S.C. § 1103(a)(1)

⁶⁸ “A Reagan Legacy: Amnesty for Illegal Immigrants,” *National Public Radio*, July 4, 2010, <http://www.npr.org/templates/story/story.php?storyId=128303672>.

⁶⁹ “Legalized status,” unlike “legalized residency” which grants undocumented immigrants legalized residency in the U.S. for a definite period of time, is an adjustment of immigration status under U.S. immigration law meaning undocumented immigrants’ statuses, under IRCA, were adjusted to Lawful Permanent Resident (LPR), which short of citizenship, grants indefinite legal status and work authorization including eligibility for public services. LPRs are eligible, after a certain duration of legal residency in the U.S., for naturalization.

“aliens employed in seasonal agricultural work for a minimum of 90 days in the year prior to May, 1986,” legalized under § 210A of the INA.⁷⁰ The tedious legalization process included application fees and demonstration of basic English language proficiency as well as general knowledge about U.S. history and government. Notwithstanding such requirements, IRCA was successful in legalizing 2.7 million of the roughly 3 million undocumented immigrants who applied.⁷¹

However, since most undocumented immigrants who benefitted from IRCA’s amnesty were young, male laborers from Mexico, a new dilemma was created: how to deal with the spouses and children of these newly-legalized immigrants who did not qualify for legalization.⁷² In response, in October of 1987, President Reagan issued an executive action that shielded from deportation minor children of parents legalized by IRCA. This “family fairness” policy, unlike IRCA, did not grant an adjustment of legal status to eligible minor children, but rather granted them legal residency.⁷³ A report released by Pew Research Center in 2014 states that this policy affected an estimated 100,000 families.⁷⁴

B. George H. W. Bush Administration (1989 – 1993)

President George H. W. Bush, following in his predecessor’s mission to keep families together, issued an executive action that further extended reprieve from deportation to undocumented immigrants who did not qualify for legalization under IRCA. In February of 1990,

⁷⁰ Nancy Rytina, “IRCA Legalization Effects: Lawful Permanent Residence and Naturalization through 2001,” Office of Policy and Planning, Statistics Division, U.S. Immigration and Naturalization Service, October 25, 2002, 2, <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>.

⁷¹ *Ibid.*, 3.

⁷² Timothy J. Henderson, *Beyond Borders: A History of Mexican Migration to the United States* (Malden, MA: Wiley-Blackwell, 2011).

⁷³ See Footnote 16.

⁷⁴ *Major U.S. Immigration Laws*, 3.

the president issued an executive action which stated that the “spouses and unmarried children of people who gained legal status under the 1986 law could apply for permission to remain in the country and receive work permits.”⁷⁵ This policy, which came to be known as the Family Fairness Program because it was intended to avoid separating families, affected less than an estimated 100,000 families.⁷⁶

Later that same year, Congress passed the Immigration Act of 1990 which also incorporated President H. W. Bush’s expanded policy. Among its provisions, the Act adjusted the worldwide immigration ceiling from 290,000 to 700,000 and the per-country cap from 20,000 to 25,620. The Act also granted Salvadoran refugees “Temporary Protected Status” (TPS).⁷⁷ In addition to this policy, President H. W. Bush issued executive actions shielding Central American refugees and exiles from deportation. However, illegal immigration continued to grow with Mexico remaining “the leading source of both legal and illegal immigrants under the new legislation.”⁷⁸ The number of deportable immigrants reached about 3.5 million by the end of 1990.⁷⁹

C. Bill Clinton Administration (1993-2001)

⁷⁵ Desilver, *Executive actions on immigration have long history*.

⁷⁶ Ibid.

⁷⁷ “Temporary Protected Status” according to the Department of Homeland Security, which issues these statuses, is a temporary benefit granted to certain foreign nationals living in the United States due to temporary conditions occurring in their country of origin which include: ongoing armed conflict (such as civil war), an environmental disaster (such as an earthquake or hurricane, or an epidemic, or other extraordinary and temporary conditions. Beneficiaries of this status are protected from removal proceedings from the U.S., can obtain an employment authorization document (EAD) and may be granted travel authorization. (For more information see: Website of the Department of Homeland Security: <http://www.uscis.gov/tps>)

⁷⁸ Henderson, *Beyond Borders*, 116.

⁷⁹ *Unauthorized Immigrants: Who they are and what the public thinks* (Washington, D.C.: Pew Research Center, January 15, 2015), <http://www.pewresearch.org/key-data-points/immigration/>.

Into the mid 1990s, one of the first executive actions on immigration issued by Democratic President Bill Clinton was the extension of former President H. W. Bush's executive action granting TPS status to Salvadoran refugees. In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act that legalized the status of migrants from Central American countries (i.e. Nicaragua, El Salvador, and Guatemala).⁸⁰ By the end of the year, President Clinton issued another executive action extending refugee status to thousands of Haitian migrants. Congress once again passed legislation which legalized the status of Haitian refugees in what came to be known as the Haitian Refugee Immigrant Fairness Act enacted in October of 1998. Some 20,000 to 40,000 Haitian refugees, according to the Pew Research Center, were shielded from deportation.⁸¹

In 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA, taking IRCA a step further in terms of enforcing immigration law in the sphere of employment, established "the Basic Pilot Program." The program enabled employers and social services agencies to verify, by telephone or electronically, the employment eligibility of prospective immigrant workers.⁸² Following the implementation of the program in five states, it was authorized for use in all 50 states in 2003 and renamed "E-Verify" in 2007.⁸³ Despite stricter immigration law enforcement, legal and illegal immigration continued to grow well into the 2000s, with unauthorized immigration skyrocketing from 5.7 million in 1995 to 8.6 million by 2000.⁸⁴

⁸⁰ Desilver, *Executive actions on immigration have long history.*

⁸¹ *Ibid.*

⁸² Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (1996).

⁸³ Benjamin J. Newman, et al., "Immigration Crackdown in the American Workplace: Explaining Variation in E-Verify Policy Adoption Across the U.S. States." *State Politics & Policy Quarterly* Vol. 12, No. 2 (June 2012): 160-182.

⁸⁴ *Unauthorized Immigrants: Who they are and what the public thinks* (Pew Research Center).

D. George W. Bush Administration (2001 – 2009)

Although Republican President George W. Bush issued no major executive actions on immigration during his two terms, it is nonetheless important to comment on the increasing anti-immigrant sentiment and heightened concern for national security which took center stage beginning in 2001. Following the terrorist attacks on the World Trade Center in New York City on September 11th, attitudes toward immigration took a right-wing turn. A study released by the Institute for the Study of Labor, entitled “The Effects of 9/11 on Attitudes Toward Immigration and the Moderating Role of Education,” suggests “there is strong evidence that anti-Muslim sentiments and xenophobic aggression increased considerably among the U.S. population in the aftermath of the 9/11 attacks.”⁸⁵ These sentiments were reflected in the legislative bills both passed and not passed during the post-9/11 period.

In 2005, the U.S. House of Representatives passed the Border, Protection, Antiterrorism, and Illegal Immigration Control Act, also called the Sensenbrenner bill (H.R. 4437). The Act “would have transformed illegal presence in the country from a misdemeanor to a felony, threatened anyone giving aid to an undocumented person with up to five years in prison, increased the penalty for employing an undocumented worker to \$7,500 for a first offense, and ‘expedited’ the removal of apprehended undocumented immigrants.”⁸⁶ Although the bill failed to pass in the Senate, the Sensenbrenner bill and others of a similar nature would continue to be proposed, never voted on (e.g. Comprehensive Immigration Reform Act of 2007⁸⁷) or passed in

⁸⁵ Simone Schüller, *The Effects of 9/11 on Attitudes Toward Immigration and the Moderating Role of Education* (Bonn, Germany: Institute for the Study of Labor, November 2012), <http://ftp.iza.org/dp7052.pdf>.

⁸⁶ Henderson, *Beyond Borders*, 148.

⁸⁷ Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (S. 1348) was a bill introduced in the Senate by Senator Harry Reid (D-NV) which would have provided legal status and a

one chamber, and defeated in the other. By the end of 2007, unauthorized immigration reached an unprecedented level at about 12.2 million.⁸⁸

E. Barack Obama Administration (2009 – Present)

1. The DREAM Act, DACA, and the Gang of Eight

A year into Democratic President Barack Obama's first term, the U.S. House of Representatives passed the Development, Relief, and Education for Alien Minors Act, or the DREAM Act (S. 3992, H.R. 6479), on December 8th, 2010. The DREAM Act was a bipartisan piece of legislation that aimed to provide undocumented young men and women brought to the U.S. as young children a pathway to citizenship if they graduated from U.S. high schools and attended college or performed military service. The Act would have provided legal residence to about 1.5 of the 11.3 million undocumented immigrants residing in the country at the time.⁸⁹ Since its passing in the Democratically-led House and subsequent defeat in the Senate, the DREAM Act has yet to be passed by both chambers of Congress.

In addressing the illegal immigration upsurge sans congressional action, on June 5th, 2012, President Barack Obama issued an executive action creating the Deferred Action for Childhood Arrivals (DACA) program, by which “young adults brought to the U.S. illegally as children could apply for temporary deportation relief,” receive legal residency and legal work authorization.⁹⁰ Then Department of Homeland Security Secretary Janet Napolitano issued a memorandum, entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who

path to citizenship to all undocumented immigrants residing illegally in the country. The bill never came to a vote in the House.

⁸⁸ *Unauthorized Immigrants: Who they are and what the public thinks*, (Pew Research Center).

⁸⁹ *Ibid.*

⁹⁰ Desilver, *Executive actions on immigration have long history*.

Came to the United States as Children,” which instructed her department heads to give deferred action status to undocumented immigrants who came to the U.S. before the age of sixteen; continuously resided in the country for at least five years prior to June 15, 2012, and were in the U.S. on June 15, 2012; were then attending school, or had graduated from high school, obtained a GED, or were honorably discharged from the military; had not been convicted of a felony, significant misdemeanor, multiple misdemeanors, or otherwise posed a threat to national security; and were not above the age of thirty.”⁹¹ Undocumented immigrants under the age of 31 as of June 15, 2012 and that had been in the U.S. before June 15, 2007 became eligible under the program to apply for deferment on renewable two-year cycles. Today, roughly 600,000 of the estimated 1.5 million eligible have received relief and work permits.⁹²

Since President Obama’s DACA program did not guarantee its beneficiaries a path to citizenship and nor did it address the remaining (roughly) 10 to 11 million undocumented immigrants also residing in the country, a bipartisan coalition of Senators, which came to be known as the “Gang of Eight”, came together in 2013 to create legislation to “fix” the immigration system. The bipartisan coalition, which was made up of Senators Chuck Schumer (D-NY.), Dick Durbin (D-IL), Michael Bennet (D-CO), Bob Menendez (D-NJ), John McCain (R-AZ), Lindsey Graham (R-SC), Jeff Flake (R-AZ), and Marco Rubio (R-FL), wrote the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), also called the Gang of Eight amnesty bill. Among its many provisions which included securing the U.S.-Mexico border, the bill would have created a pathway to citizenship to many undocumented

⁹¹ Janet Napolitano, DHS Memorandum to US CBP, USCIS, ICE, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁹² Perez, *How DACA Has Impacted the Lives of Undocumented Young People*.

immigrants who resided in the U.S. before December 31st of 2011.⁹³ Though the Act passed in the Senate by a 68-32 margin, and analysts believed it had the support of a majority of House Representatives, Republican Speaker John Boehner (R-OH) did not put it before a vote.

2. DACA Extension and DAPA

Calling it an “important step to fix our broken immigration system,” President Barack Obama then took immigration matters into his own hands and announced a series of executive actions, collectively called the Immigration Accountability Executive Action, on November 20, 2014.⁹⁴ Like his predecessors, Republican Presidents Ronald Reagan and George H.W. Bush, Obama too emphasized keeping families together and reprioritizing enforcement resources. He stated, “we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mother who’s working hard to provide for her kids.”⁹⁵

The Immigration Accountability Executive Action, increased law enforcement at the U.S.-Mexico border and promised to amplify efforts to attract and retain high-skilled labor. At the centerpiece of the executive actions was its expansion of the current DACA program and creation of the Deferred Action for Parents of Americans and Lawful Permanent Residents, otherwise known as, DAPA. The extension of DACA would allow more immigrants that came illegally to the U.S. as children to qualify for temporary relief from deportation and work permits. Specifically, DACA was extended in three ways: 1) the age cap was removed, allowing otherwise

⁹³ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., U.S. G.P.O. (2013).

⁹⁴ “FACT SHEET: Immigration Accountability Executive Action.” White House Office of the Press Secretary, November 20, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

⁹⁵ Barack Obama, “Remarks by the President in Address to the Nation on Immigration,” November 20, 2014, <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

eligible undocumented immigrants who were older than 31 years of age in June 2012 become eligible; 2) DACA renewal and work authorization was extended from two to three-years; and 3) the eligibility cut-off date by which a DACA applicant must have been in the U.S. was adjusted from June 15, 2007 to January 1, 2010.⁹⁶ The new DAPA program would grant reprieve from deportation to another faction of undocumented immigrants who “have, on [November 20, 2014], a son or daughter who is a U.S. citizen or Lawful Permanent Resident; have continuously resided in the United States since before January 1, 2010; [were] physically present in the United States on [November 20, 2014], *and* at the time of making a request for consideration of deferred action with USCIS; have no lawful status on [November 20, 2014]; are not an enforcement priority as reflected in the November 20, 2014 “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum;”⁹⁷ and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”⁹⁸

In February 2015, twenty-six states brought suit challenging the president’s use of executive power in the Federal District Court for the Southern District of Texas in *Texas v. United States*. The Court blocked DACA/DAPA on procedural grounds through a preliminary injunction, which was upheld by the Fifth Circuit Court of Appeals on November 9, 2015. Until the Supreme Court hears the case in April of 2016, the preliminary injunction will remain in effect.

⁹⁶ Jeh Johnson, Memorandum to USCIS, ICE, CBP , *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (November 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

⁹⁷ Enforcement priority include: “1. Threats to national security, border security, and public safety, 2. Misdemeanants (of three or more) and new immigration violators or 3. Other immigration violations.” See “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” [URL](#).

⁹⁸ Johnson, *Exercising Prosecutorial Discretion*.

IV. Constitutional Analysis of DACA/DAPA

A. Constitutionality Debate

President Obama's 2014 executive actions on immigration have been met with statutory and constitutional challenges. While the 5th Circuit Court of Appeals in *Texas v. United States* upheld the District Court's ruling striking down the executive actions, the questions surrounding their legality are yet to be resolved. The five main legal concerns are: 1) APA violations, 2) existing precedent, 3) The Take Care Clause of Article II, 4) prosecutorial discretion, and 5) the separation of powers doctrine.

1. APA Violations

In *Texas v. United States*, the U.S. District Court for the Southern District of Texas struck down the executive actions because of a violation of the Administrative Procedure Act (APA). Under the APA, administrative agencies in the federal government are required to publish a "general notice of proposed rule making" in the Federal Register and allow for "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."⁹⁹ Judge Hanen, who wrote the District Court opinion, found that the federal government violated the APA by failing to comply with the "notice-and-comment" rulemaking requirement upon promulgation of the programs.¹⁰⁰ The U.S. government continues to hold that the actions are unreviewable under the APA.

To clarify what is and is not reviewable under the APA, prior to becoming Supreme Court Justice, Elena Kagan, in an article written in the *Harvard Law Review* entitled "Presidential Administration," makes this important distinction. She cites *Franklin v. Massachusetts* (1992)

⁹⁹ The Administrative Procedure Act 5 U.S. Code § 553.

¹⁰⁰ *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5th Cir. May 26, 2015).

where the Supreme Court held that the President is not an ‘agency’ as defined by the APA and thus, his actions are not subject to APA regulations.¹⁰¹ A president’s actions are subject to judicial review, however, if the action(s) in question are delegated to an agency head but directed by the President. Only then has the President effectively “stepped into the shoes of an agency head and the review provisions usually applicable to that agency’s actions should govern.”¹⁰² The District Court employed this rationale.

2. Precedent

In defending the constitutionality of President Obama’s 2014 executive actions, the Obama Administration has consistently made the case that precedent is on its side. Often citing executive actions on immigration promulgated by President Reagan and H.W. Bush, the Administration has also claimed that it is not disregarding the law anymore than its predecessors. According to a report released by the American Immigration Council, since 1956, U.S. presidents have granted temporary immigration relief to undocumented immigrants a total of 39 times.¹⁰³ A SCOTUS blog written by Brienne Gorod, Chief Counsel at the Constitutional Accountability Center, states that “by setting [enforcement] priorities and providing guidance regarding how those priorities should be implemented, the Obama administration was simply doing what presidents of both parties have done for decades – exercising the substantial discretion Congress

¹⁰¹ The APA defines ‘agency’ as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) Congress; (B) the courts of the United States; (C) the government of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of § 552 of this title--(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory...” 5 U.S. Code § 551.

¹⁰² Elena Kagan, “Presidential Administration,” 114 *Harvard Law Review* 2245 (2000-2001): 2351, http://harvardlawreview.org/wp-content/uploads/pdfs/vol114_kagan.pdf.

¹⁰³ *Executive Grants of Temporary Immigration Relief, 1956 – Present* (Washington D.C.: American Immigration Council, October 2014), accessed October 2015, http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf.

has conferred on the executive branch to make determinations about how best to enforce the nation's immigration laws.”¹⁰⁴

Republican Senator and 2016 presidential candidate Ted Cruz (R-FL), among other critics, rejects the notion that the Obama Administration is not disregarding the law any more than previous presidential administrations. His *Harvard Journal of Law and Public Policy* article, published in January of 2015, accuses the Obama Administration of “unprecedented lawlessness” in a variety of policy areas including immigration. He argues that there is “no historical basis for this sweeping view of executive power.”¹⁰⁵ To support this claim, Cruz cites instances in which previous administrations acceptably disregarded federal laws due to either legitimate constitutional objections to a federal law or statutes (e.g. President George W. Bush's signing statements¹⁰⁶) or the president was faced with extenuating circumstances such as war (e.g. presidents that did not comply with the War Powers resolution, which forbids the president from continuing military operations beyond 60 days without express congressional approval). In his view, President Obama's executive actions were not promulgated in response to a legitimate constitutional objection and nor were they a product of extenuating circumstances. He thus has no prerogative nor constitutional right to categorically ignore statutes. Jessica Schulberg, in her *University of Arizona Law Review* article, “President Obama's DAPA Executive Action: Ephemeral or Enduring,” finds that the response, rather than the executive actions themselves, is unprecedented. She cites that historically, no executive actions (also granting reprieve from

¹⁰⁴ Brianne Gorod, “Symposium: Why it's time to unfreeze DAPA,” SCOTUSblog, February 9, 2016, <http://www.scotusblog.com/2016/02/symposium-why-its-time-to-unfreeze-dapa/>.

¹⁰⁵ Ted Cruz, “The Obama Administration's Unprecedented Lawlessness,” *Harvard Journal of Law and Public Policy* Vol. 38, No. 1 (2015), [URL](#).

¹⁰⁶ The practice of signing statements—essentially commentary on a new law—according to Mr. Cruz, is “used to register constitutional objection to infringements on executive authority protects the Constitution's core framework.” These were used frequently under the George W. Bush Administration to express constitutional objects and the Executive's intent to refuse enforcement.

deportation to certain undocumented immigrants) in the 80s and 90s were met with such a high level of scrutiny, intense claims of presidential overreach, threats of impeachment, lawsuits, or government shutdowns.¹⁰⁷

3. The Take Care Clause

Also a part of the current constitutionality debate of President Obama's 2014 executive actions is whether or not the president violated the Take Care Clause of Article II of the Constitution. To recall, the Take Care Clause states that the president of the United States "shall take care that the laws be faithfully executed."¹⁰⁸ The Obama Administration claims it has not violated this clause. A memorandum opinion released by the Office of Legal Counsel on the day the executive actions were announced argues that the Department of Homeland Security's discretion over enforcement is consistent with the President's constitutional "duty to take care that the laws be faithfully executed." The opinion states that "when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action."¹⁰⁹ The opinion cites *Heckler v. Chaney* (1985) where the Court recognized that "faithful" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing, but rather, it implores the agency to "balanc[e]...a number of factors [e.g. allocation of resources, compatibility with other existing overall agency policies] which are

¹⁰⁷ Jessica A. Schulberg, "President Obama's DAPA Executive Action: Ephemeral or Enduring," 57 *University of Arizona Law Review* 623 (2015), [URL](#).

¹⁰⁸ U.S. Const. art. III, § 2, § 3.

¹⁰⁹ Office of Legal Counsel, Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, *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* (November 19, 2014), 4, <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

peculiarly within its expertise.”¹¹⁰ This precedent, OLC argues, has thus granted the President, through the Department of Homeland Security, broad discretion in this area. Nonetheless, OLC is careful to note that such broad discretion does not go without limits, limits that it admits are not “clearly defined.”¹¹¹

Similarly, Senator Cruz argues that in taking care that the laws be faithfully executed, the president is obligated to enforce the laws enacted by Congress rather than “pick and choose” which laws to enforce based on personal or political preferences.¹¹² That is, the Take Care Clause is a requirement, not a prerogative. Like other scholars, Cruz cites *Youngstown Sheet & Tube Co. v. Sawyer* stating, “the President exceeds the Take Care Clause duty once he stops adhering to federal law.”¹¹³ In his view, by not enforcing immigration law on certain undocumented immigrants, the president is not enforcing the law all together. Cruz also argues that such disregard for domestic policy statutes essentially “usurps” congressional legislative power and “sets dangerous precedents” that allow future presidents to disregard the Take Care Clause. The plaintiffs (twenty-six states including Texas) in *Texas v. United States* certainly agree, claiming Obama’s executive actions are unconstitutional because they abdicate the role of the Executive. The actions, in their view, run afoul of the president’s duty to “take care that the laws be faithfully executed.”

4. Prosecutorial Discretion

Perhaps at the core of the constitutionality debate is whether or not President Obama’s 2014 executive actions fall under the executive power of prosecutorial discretion. *Black’s Law Dictionary* defines prosecutorial discretion in the immigration context as “[a] federal authority’s

¹¹⁰ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

¹¹¹ *The Department of Homeland Security’s Authority*, 5.

¹¹² Cruz, “The Obama Administration’s Unprecedented Lawlessness.”

¹¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

discretion not to immediately arrest or endeavor to remove an illegal immigrant because the immigrant does not meet the federal government's immigration-enforcement priorities.”¹¹⁴

In a memorandum issued to immigration agencies, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” DHS Secretary Jeh Johnson states that prosecutorial discretion, in the context of immigration, applies to a broad range of discretionary enforcement decisions, including: “whether to issue, serve, file, or cancel a Notice to Appear; whom to stop, question, and arrest; whom to detain, and arrest; whom to detain or release; whether to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case.”¹¹⁵ A Congressional Digest publication entitled, “Legality of Obama’s Immigration Initiatives: Executive Branch Authority Over Immigration Enforcement,” also states that prosecutorial discretion “is generally seen as affording the Executive wide latitude in determining when, against whom, how, and even whether to prosecute apparent violations of Federal law.”¹¹⁶ Since this discretionary power does not require express delegation from Congress, the Executive has claimed substantial discretionary authority in this area, particularly in immigration law. This form of discretion has been exercised by DHS and its predecessor, the Immigration and Naturalization Service (INS), for quite some time, instructing immigration officers to prioritize and deprioritize the enforcement of immigration laws against certain groups of undocumented immigrants.

¹¹⁴ See *Black’s Law Dictionary* 565 (10th ed. 2014).

¹¹⁵ Jeh Johnson, Memorandum to US ICE, CBP, USCIS, and Acting Assistant Secretary for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (November, 20, 2014), [URL](#).

¹¹⁶ “Legality of Obama’s Immigration Initiatives: Executive Branch Authority Over Immigration Enforcement,” *The Congressional Digest*, March 1, 2015, [URL](#).

In the context of President Obama's most recent actions on immigration, the Executive claims constitutional authority to promulgate extended DACA and DAPA by classifying them as under the scope of prosecutorial discretion with respect to undocumented immigrants who came to the U.S. as children and to certain parents of U.S. Citizens or Lawful Permanent Residents. In a memorandum issued to U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) a day after President Obama's announcement, DHS Secretary Jeh Johnson directed the agencies to prioritize the enforcement of immigration law to "threats to national security, public safety, and border security," meaning, prioritize the removal of undocumented immigrants engaged in criminal activity, that pose a threat to public safety, or that have recently entered the country, and thus, deprioritize undocumented immigrants not in those categories.¹¹⁷ (This is a similar enforcement discretionary policy to that of former DHS Secretary Janet Napolitano, entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, "issued following the creation of DACA in 2012.¹¹⁸)

The Office of Legal Counsel, in "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," defends deferred action as "an exercise rooted in DHS's authority to enforce the immigration laws."¹¹⁹ It identifies respects in which deferred action is different, and nevertheless permissible, from other types of widespread exercises of enforcement discretion. For example, that it is "a decision to openly tolerate an undocumented alien's continued presence in

¹¹⁷ Jeh Johnson, Memorandum to US ICE, CBP, USCIS, and Acting Assistant Secretary for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (November 20, 2014), [URL](#).

¹¹⁸ Johnson, *Exercising Prosecutorial Discretion*.

¹¹⁹ *The Department of Homeland Security's Authority*, 20.

the United States for a fixed period (subject to revocation at the agency’s discretion)” and that it carries with it benefits apart from non-enforcement like employment authorization and suspension of unlawful presence.¹²⁰ As a form of prosecutorial discretion, OLC argues that deferred action does not confer lawful immigration status and nor does it provide a path to lawful permanent residence or citizenship. It is revocable at any time at the discretion of DHS. OLC also notes that the lack of resources to remove all purported eleven million undocumented immigrants presently in the country is a factor that is considered in executing such a discretion. They argue that deferment, as a practical matter considering this “severe resource constraint,” does not represent an abdication of DHS’s responsibilities.

Critics disagree. They argue that the President, acting through DHS, does not possess a discretionary power so “wide” and “broad” as to promulgate expanded DACA and DAPA. Opponents argue that President Obama’s executive actions do not constitute prosecutorial discretion to begin with, due to the lack of case-by-case evaluation. For example, Josh Blackman states that, “DAPA neither employs an individualized, case-by-case analysis, nor is consonant with long-standing congressional policy.”¹²¹ Schulberg similarly concedes in arguments made against the executive actions in *U.S. v. Juarez-Escobar* (2014), that the creation of expanded DACA and DAPA are unconstitutional as they “eclipsed prosecutorial discretion and constructed an inflexible framework for considering deferred action applications.”¹²² In sum, critics of the executive actions insist that the Executive cannot employ the very essence of prosecutorial discretion’s case-by-case discretion over the removal of a substantially large class of undocumented immigrants, thus rendering both DACA and DAPA unconstitutional.

¹²⁰ Ibid.

¹²¹ Josh Blackman, “The Constitutionality of DAPA Part II: Faithfully Executing the Law,” 19 *Texas Review of Law and Politics* 213 (Spring 2015).

¹²² Schulberg, “President Obama’s DAPA Executive Action: Ephemeral or Enduring.”

5. Separation of Powers

President Obama's 2014 executive actions on immigration raise serious concerns regarding the separation of powers. The separation of powers doctrine, as defined by the Wex Legal Dictionary, is "the political doctrine of constitutional law under which the three branches of government (Executive, Legislative, and Judicial) are kept separate to prevent abuse of power, also known as the system of checks and balances."¹²³ In the immigration context, which branch of government, whether the Executive or the Legislative, has the power to create the type of immigration-related programs Obama has proposed, is disputed. In promulgating the DACA and DAPA programs, the Obama Administration argues it is lawfully exercising its executive powers in an area over which it contends it has "broad discretion."

First, the Obama Administration has asserted that the DACA and DAPA programs do not in and of themselves provide deferred action individuals with the types of benefits that only the Legislative Branch can offer through a change in immigration law. These benefits include legal immigration status and the eligibility for certain public benefits from which they are otherwise statutorily barred (i.e. the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹²⁴). As OLC has emphasized, deferred action grants eligible immigrants reprieve from deportation, that is, the permission to *reside* lawfully in the U.S. for a specified period of time. President Obama echoed this distinction in his announcement, stating, "[the programs do] not grant [eligible undocumented immigrants] citizenship, or the right to stay here permanently, or

¹²³ "Separation of Powers," Wex Legal Dictionary, Cornell Legal Information Institute, https://www.law.cornell.edu/wex/separation_of_powers.

¹²⁴ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) barred undocumented immigrants from receiving public benefits with the exception of public health, emergency services, and programs identified by the Attorney General as necessary for protection of life and safety. (For more information see: Migrant Policy Institute's Immigrant and Welfare Use report, Aug. 1, 2002.)

offer the same benefits that citizens receive – only Congress can do that. All we’re saying is we’re not going to deport you.”¹²⁵ In addition, a *Congressional Digest* piece discussing the legality of the executive actions, addresses another important instance in which the Executive has discretion over the Legislative in immigration matters: the issuing of employment authorization documents (EADs) to deferred action individuals. In granting EADs, the immigration agencies rely on the definition of “unauthorized alien” in the INA.¹²⁶ The INA’s definition of “unauthorized alien” has “historically been interpreted as giving the Executive [not the Legislative] the authority to grant employment authorization documents to aliens who are not expressly authorized to work in the U.S. but upon showing “an economic necessity for employment.”¹²⁷ It is clear that the administration contends that in providing deferred action status to certain undocumented immigrants it is not breaching the bounds of its executive powers.

On the other hand, critics of the Obama Administration in this respect argue that the president’s executive actions are not only policy-making, essentially usurping the role of the Legislative Branch, but that they also run afoul of legislative intent. Many cite the fact that Congress rejected “at least ten times since 2001” the Development, Relief, and Education for Alien Minors (DREAM) Act which in effect would have provided a path to citizenship to undocumented youth 15 years and younger.¹²⁸

¹²⁵ Obama, “Remarks by the President in Address to the Nation on Immigration.”

¹²⁶ “Unauthorized alien” in the terminology used in the INA to describe an undocumented immigrant.

¹²⁷ Immigration and Nationality Act § 274A (h)(3).

¹²⁸ The DREAM Act was a failed immigration reform bill last introduced on May 11, 2011 in the Senate (S. 952) by Senator Dick Durbin (D-IL) and 32 fellow senators, and in the House of Representatives (H.R. 1842) by Representatives Howard Berman (D-CA), Ileana Ros-Lehtinen (R-FL), and Lucille Roybal-Allard. It would have enacted two changes to immigration law: “1) It would permit certain immigrant students who have grown up in the U.S. to apply for temporary legal status and to eventually obtain permanent legal status and become eligible for U.S. citizenship if they go to college or serve in the U.S. military; and 2) It would eliminate a federal provision that penalizes states that provide in-state tuition without regard to immigration status.” See “Dream Act Summary” by National Immigration Law Center (NILC): <https://nilc.org/dreamsummary.html>.

B. Judicial challenges to DACA/DAPA

Following President Obama's announcement in November 2014 creating extended DACA and DAPA, three judicial challenges subsequently ensued. The first was *U.S. v. Juarez-Escobar*, the second, *Arpaio v. Obama*, and the third and active case, *Texas v. United States*. These three judicial challenges, amid ongoing political debate, reveal core constitutional issues of both the president's power to promulgate such programs and the legality of the programs themselves.

1. *U.S. v. Juarez-Escobar*

A memorandum opinion filed by Judge Arthur Schwab in *U.S. v. Elionardo Juarez-Escobar* in the U.S. District Court for the Western District of Pennsylvania on December 16, 2014 was the first judicial challenge to President Obama's 2014 executive actions on immigration that specifically addressed their constitutionality.¹²⁹ The opinion, entitled, "Memorandum Opinion and Order of Court Re: Applicability of President Obama's November 20, 2014 Executive Action on Immigration to this Defendant," addressed the applicability of expanded DACA and DAPA to Elionardo Juarez-Escobar, an undocumented immigrant who had pled guilty to reentry (in violation of 8 U.S.C. § 1326, which issues criminal penalties for reentry of removed aliens) and who, at the time, was awaiting sentencing.¹³⁰ The court, concerned that the

¹²⁹ *U.S. v. Juarez-Escobar*, Criminal No. 14-0180, (W.D. Pa. Dec. 16, 2014). [PDF](#)

¹³⁰ Elionardo Juarez-Escobar was, at the time of the case, an undocumented immigrant from Honduras, who was arrested in New Mexico by U.S. Border Patrol and was subsequently issued an Expedited Removal Order and removed from the U.S. on December 5, 2005. He subsequently reentered illegally and was stopped by a New Sewickley Township Police Officer on April 7, 2014. Juarez-Escobar was found intoxicated whilst driving and thus was charged with two counts for a DUI and driving without a license. His immigration status was referred to DHS, where they found he was unlawfully present in the country after having been deported nearly a decade prior. The case came to the District Court, in part, "because of arguably unequal and arbitrary immigration enforcement in the U.S."¹³⁰ The Opinion cites that since the Defendant, Juarez-Escobar, was arrested and then subsequently referred to DHS in a non-"sanctuary city," meaning the city does not "refus[e] to fund law enforcement efforts to look for immigration law violating, leaving that to the federal government," a federal indictment or deportation proceedings were not inevitable.¹³⁰ The issue is that had the Defendant been arrested in a

executive actions could have had an impact on the Defendant's sentencing, requested counsel for the Government and for the Defendant to brief: I) on whether or not the actions applied to the Defendant and why, and II) if there were any constitutional and/or statutory considerations that the Court would need to address to the Defendant (and if so, what and how the Court should resolve the issues).¹³¹

On the request for briefing on the constitutionality of the actions, Judge Schwab argued that the executive actions creating DACA and DAPA raise concerns about the separation of powers between the Executive and Legislative branches of government and thus warrant judicial review "to ensure that executive power is governed by and answerable to the law such that 'the sword that execute the law is in it, and not above it.'" ¹³² The opinion states that the authority for executive actions and orders issued by the president must be based upon (1) the Constitution; (2) statutes or treaties; or (3) the president's inherent authority to ensure that the laws are "faithfully executed." Schwab also notes that President Obama has historically stated that executive actions and orders on immigration would exceed his executive authority. For example, he cites Obama stating, "Believe me, the idea of doing things on my own is tempting. I promise you. Not just on immigration reform. But that's not how our system works. That's not how our democracy functions. That's not how our Constitution is written." ¹³³ Though not dispositive of the constitutionality of the actions, such statements troubled the court. For these reasons, the court found it imperative to examine whether the President had the authority to issue his executive actions on immigration to determine whether they would "unjustly and unequally" impact the

sanctuary city or state, local law enforcement would have likely not reported him to DHS, and thus, he would have not subsequently been indicted for reentry as an undocumented immigrant.

¹³¹ *U.S. v. Juarez-Escobar*, 1.

¹³² *Ibid.*

¹³³ Barack Obama, "Remarks by the President to the National Council of La Raza," July 15, 2011,

[URL.](#)

Defendant “in light of the [] Court’s obligation to avoid sentencing disparities among defendants with similar records who have been found guilty of similar conduct.”¹³⁴

In its opinion, the court decided that the executive actions are unconstitutional because they violate the separation of powers doctrine and the Take Care Clause. First, the court argued, inaction by Congress to act on the issue of immigration does not render otherwise unconstitutional executive actions constitutional. Schwab argued that the executive actions “cross the line,” constitute “legislation,” and effectively change U.S. immigration policy. The president may only ‘take Care that the Laws be faithfully executed...’; he may not take any Executive Action that creates laws.”¹³⁵ Second, the court found that the executive actions exceed prosecutorial discretion and are rather, legislation. Judge Schwab argued that the executive actions: “(a) provide for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination; and (b) [the executive policy] allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights [e.g. work authorization documentation].”¹³⁶

The court and the Defendant’s counsel decided that should the actions be constitutional, the deportation and removal priorities would not apply to the Defendant and thus he would not be in “deportation mode” before the court. The government’s brief stated that even if the Defendant is not a priority for deportation, the executive actions are not applicable to him because the executive actions do not apply to individuals in criminal proceedings under 8 U.S.C. § 1326(a). However, the Defendant’s counsel argued that Juarez-Escobar’s familial relationship, which

¹³⁴ *U.S. v. Juarez-Escobar*, 16.

¹³⁵ *Ibid.*, 20, citing U.S. Const., Art. II, § 3.

¹³⁶ *Ibid.*, 21.

included the possibility that he may be a parent or step-parent to a U.S. Citizen or Lawful Permanent Resident, “would bolster his non-deportation and/or deferred action request.”¹³⁷

Though the memorandum opinion in *U.S. v. Juarez-Escobar*, is not binding, it raises some interesting implications of the executive actions, specifically in regards to their applicability to undocumented individuals in criminal proceedings.

2. *Arpaio v. Obama* Case Dismissal

Arpaio v. Obama was the first of two court cases that sued the federal government over the legality of President Obama’s executive actions. The case was filed in the U.S. District Court for the District of Columbia by Plaintiff Joe Arpaio, the notorious Sheriff of Maricopa County in Arizona who rose to recent fame, in part, for vehemently and publicly opposing illegal immigration.¹³⁸ Arpaio filed the lawsuit on November 20, 2014, against President Obama, the Secretary of DHS, the Director of USCIS, and the U.S. Attorney General, under the Declaratory Judgment Act and the APA. Arpaio claimed that the two federal programs promulgated by President Obama, DACA and DAPA, constituted unconstitutional abuses of presidential power. Specifically, Arpaio argued that the programs violated the APA for failure to go through a “notice-and-comment” period as required by the Act, the president’s constitutional duty to “take Care that the Laws be faithfully executed,” and the non-delegation doctrine.¹³⁹ On December 4, 2014, he sought a preliminary injunction on the actions. However, Judge Howell, writing for the

¹³⁷ *Ibid.*, 28.

¹³⁸ An article written by *the New Yorker* on July 20, 2009, stated “Arpaio is known as ‘America’s Toughest Sheriff.’” He wrote a book by the same title and published a second in 2008 entitled, “Joe’s Law: America’s Toughest Sheriff Takes on Illegal Immigration, Drugs, and Everything Else That Threatens America.” “Sheriff Joe: Joe Arpaio is tough on prisoners and undocumented immigrants. What about crime?” story written by William Finnegan for *the New Yorker*, <http://www.newyorker.com/magazine/2009/07/20/sheriff-joe>.

¹³⁹ *Arpaio v. Obama*, No. 14-5325 (Aug. 14, 2015), 9. [https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/\\$file/14-5325-1567834.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/D4C4C6269EE9758585257EA10052EE62/$file/14-5325-1567834.pdf)

Court, found that the Plaintiff did not suffer a legally cognizable injury and thus held that he had no standing to sue. The Court explained that Sheriff Arpaio did not suffer any injury as a result of the programs. His assertion of general grievances against federal immigration policy and alleged injuries were speculative, and he failed to show how the programs specifically authorized the conduct of which he complained.¹⁴⁰ Accordingly, Judge Howell denied the preliminary injunction and dismissed the case.¹⁴¹

On December 29, 2014, Sheriff Arpaio appealed to the D.C. Circuit Court of Appeals, which unanimously affirmed the lower court judgment on August 14, 2015. Judge Nina Pillard, who wrote the opinion of the court, stated that in regard to the claims that Arpaio brought to the court, alleging that President Obama's executive actions on immigration are "unconstitutional, arbitrary, capricious, and invalid under the Administrative Procedure Act," the court could not resolve the claims unless he had Article III standing to raise them.¹⁴² To have Article III standing, a plaintiff must "have suffered or be about to suffer a concrete injury fairly traceable to the policies he challenges and redressable by the relief he seeks."¹⁴³ Arpaio argued that the programs would incite more crimes and harm him as a sheriff because the increased crime would force him to spend more money policing the county and running its jails. He alleged that I) the deferred action would act as a magnet to draw more undocumented immigrants to cross the border from Mexico and into Maricopa County where they would commit crimes, and II) the programs would decrease total deportations which would cause more individuals to remain unlawfully in Maricopa and commit crimes than would be the case without deferred action.¹⁴⁴ The court

¹⁴⁰ "Arpaio v. Obama Case Profile," Civil Rights Litigation Clearinghouse, University of Michigan Law School, <http://www.clearinghouse.net/detail.php?id=14483>.

¹⁴¹ *Arpaio v. Obama*, 27 F.Supp.3d 185 (D.D.C. 2014).

¹⁴² *Ibid.*, 2.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, 3.

concluded that Sheriff Arpaio “failed to allege an injury that is both fairly traceable to the deferred action policies and redressable by enjoining them, as our standing precedents require.”¹⁴⁵ Judge Pillard, as did the lower District Court judge, found his claims of increased crime “rested on chains of supposition and contradicted acknowledged realities.”¹⁴⁶ For this reason, it was ordered that Sheriff Arpaio lacked standing to challenge DACA and DAPA.

3. *Texas v. United States*

The fate of President Obama’s DACA and DAPA programs may very well be decided in *Texas v. United States*, which first entered the court system in early 2015. The case highlights both constitutional and legal implications of Obama’s executive actions.

a) District Court Ruling

Texas v. United States, at the District Court level, was decided in the U.S. District Court for the Southern District of Texas Brownsville Division on Feb 16, 2015.¹⁴⁷ The plaintiffs of the case were twenty-six states and individuals that brought suit against the Defendants, the United States and several DHS officials, including Secretary Jeh Johnson.¹⁴⁸ The Plaintiffs sought injunctive relief which would stop the Obama Administration from implementing extended DACA and DAPA.¹⁴⁹ The question before the court was: “Do the laws of the United States,

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ *United States v. Texas*, Civil No. B-14-254, 2015 U.S. (S.D. Tex Feb 16, 2015).

<https://assets.documentcloud.org/documents/1668197/hanen-opinion.pdf>

¹⁴⁸ Defendants also include Leon Rodriguez, Director of USCIS; Thomas S. Winkowski, Acting Director of ICE (replaced by Director Sarah R. Saldana in Appeals case); R. Gil Kerlikowske, Commissioner of CBP; and Ronald D. Vitiello, Deputy Chief of the U.S. Border Patrol and the U.S.

¹⁴⁹ The Plaintiffs include: the State of Texas; State of Alabama; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Attorney General Bill Schuette, People of Michigan; Governor Phil Bryant, State of Mississippi; Governor Paul R. LePage, State of Maine; Governor Patrick L. McCrory; State of North Carolina; and Governor C. L. “Butch” Otter, State of Idaho; State of Tennessee; State of Arizona; and State of Nevada. *United States v. Texas*, Civil No. B-14-254, 2015 U.S. (Dist. Ct. S. Dist. Tex Feb 16, 2015).

including the Constitution, give the Secretary of Homeland Security the power to take the action at issue in this case?”¹⁵⁰ The Plaintiffs alleged that the Secretary’s actions (i.e. “establishing a new program [DAPA] utilizing deferred action to stay deportation proceedings and award certain benefits to approximately four to five million individuals residing illegally in the United States” and from here on out referred to as “DHS Directive”), violated the Take Care Clause of the Constitution and the APA. The Defendants, on the other hand, asserted two main arguments: “(1) [that] the States lack[ed] standing to bring th[e] suit; and (2) [that] the States’ claims [were] not meritorious.”¹⁵¹ Judge Andrew S. Hanen, who wrote on the behalf of court, addressed three issues concerning President Obama’s executive actions: standing, legality, and constitutionality.

i. Standing

On the issue of standing, the court sought to determine whether or not the Plaintiffs had standing to sue the U.S. Government. It assessed primarily two types of standing: Article III standing and prudential standing, both of which the court determined the Plaintiffs successfully met.¹⁵² Among other forms of standing, the court also confirmed that the Plaintiffs satisfied the standing requirements prescribed by the APA. The court found that the Plaintiffs met all three

¹⁵⁰ *Ibid.*, 4.

¹⁵¹ *Ibid.*, 7.

¹⁵² As decided in *Lujan v. Defenders of Wildlife* (1992), there are three “irreducible constitutional” standards to satisfy Article III standing, which requires parties seeking to resolve disputes before a federal court present actual “cases” or controversies.”¹⁵² The first, is that “a plaintiff must demonstrate that they have ‘suffered a concrete and particularized injury that is either actual or imminent; ‘second, a plaintiff must show that there is a causal connection between the alleged injury and the complained-of conduct—essentially, that the ‘injury is fairly traceable to the defendant;’” and “finally, standing requires that it ‘be *likely*, as opposed to *speculative*, that the injury will be redressed by a favorable decision.’” The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” The plaintiff must show that it has suffered or will suffer a sufficient injury in fact and demonstrate prudential standing, which requires that “the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute...in question.”

prongs of Article III standing which require the burden of proving injury, causation, and redressability.

To prove injury, the Plaintiffs alleged that the DHS Directive, upon enforcement, will cause significant economic injury to their fiscal interests. Texas, for example, argued that the directive will create a new class of individuals eligible to apply for driver's licenses that would in turn impose "substantial costs" on the state's budget for processing. In addition, the states also argued that even prior to applying for driver's licenses these undocumented immigrants, as a result of the REAL ID Act of 2005, which "require[s] states to determine the immigration status of applicants prior to issuing a driver's license or an identification card," will be required to submit queries to the federal Systematic Alien Verification for Entitlements (SAVE) program and thus the states will be required to pay a fee for each applicant processed.¹⁵³ The Defendants, however, argued that these costs are "self-inflicted" as the directive does not require states to provide any state benefits to deferred action recipients and because states can adjust their benefit programs to avoid incurring them.¹⁵⁴ The court found that the directive would nonetheless affect state programs and that the federal government would compel compliance by all states regarding the issuance of driver's licenses to deferred action recipients, as it ruled in *Arizona Dream Act Coalition v. Brewer* (2014).¹⁵⁵ The states could not avoid these costs as *Arizona* made clear, since any move by a plaintiff state to limit the issuance of driver's licenses would be viewed as illegal for violating the Equal Protection Clause. It would invoke unequal treatment of similarly-situated

¹⁵³ *United States v. Texas*, Civil No. B-14-254, 2015 U.S. (S.D. Tex. Feb 16, 2015), 23.

¹⁵⁴ *Ibid.*, 24.

¹⁵⁵ *Arizona Dream Act Coalition v. Brewer*, 757 F. 3d 1053 (9th Cir. 2014) was a case in which Governor Jan Brewer of Arizona, was sued by the Arizona DREAM Act Coalition (ADAC), a youth-led immigrants' rights organization, for issuing a state executive order which denied driver's licenses to deferred action recipients. The Court found that the policy "likely discriminated against similar-situated parties in violation of the Equal Protection Clause," and thus it ruled the order illegal and blocked the policy. The decision was upheld at the Supreme Court in January 2015.

individuals (i.e. non-citizens) who would otherwise be permitted to use employment authorization documents (EADs) to obtain driver's licenses. Thus, the DHS Directive, the court argued, "will directly injure the proprietary interests of the driver's license programs and costs the states badly needed funds."¹⁵⁶

To prove the second prong, causation, the Plaintiff must show that the alleged injury is not merely "remote and indirect: but is instead fairly traceable to the actions of the defendant."¹⁵⁷ The court determined that the Plaintiffs plead an injury sufficient to demonstrate standing since, at least in the issuing of driver's licenses, the DHS Directive would involve "fees mandated by federal law that are required to be paid by states directly to the federal government – damages that are a virtual certainty."¹⁵⁸ In addition, the Plaintiffs, primarily the state of Texas, met their burden of showing that their alleged injuries have been and will be directly "traceable" to the actions of the Defendants (i.e. the programs are the cause of the costs). Finally, the court also found sufficient the Plaintiffs' redressability argument which must examine whether the remedy a plaintiff seeks (in this case, injunctive relief) will redress or prevent the alleged injury. Judge Hanen stated that injunctive relief would "undoubtedly prevent the harm [the Plaintiffs] allege will stem from Defendants' DHS Directive."¹⁵⁹

Aside from Article III standing, the court also found that the Plaintiffs met the burden of proof required for prudential standing. The court found that the Plaintiffs pled a "generalized grievance" in showing that the DHS Directive, specifically DAPA, would directly injure their proprietary interests by creating a new class of individuals eligible to apply for driver's licenses which would, in turn, cause states to incur significant costs to process applications and issue the

¹⁵⁶ *United States v. Texas*, Civil No. B-14-254, 2015 U.S. (S.D. Tex. Feb 16, 2015), 28.

¹⁵⁷ *Ibid.*, 32.

¹⁵⁸ *Ibid.*, 34.

¹⁵⁹ *Ibid.*

licenses. An important part of proving prudential standing is showing that “the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute...in question.” This too, the court found the Plaintiffs proved. Judge Hanen confirmed that the Plaintiffs’ claims came within the “zone of interest” to be protected by immigration statutes, mainly that “the fact that DAPA undermines the INA statutes enacted to protect states puts the plaintiffs squarely within the zone of interest of the immigration statutes at issue.”¹⁶⁰ This the court found sufficient to prove prudential standing.¹⁶¹

ii. Legality

The second issue that the court addressed was the legality of the DHS Directive. The court affirmed that “Secretary Johnson’s decisions as to how to marshal Department of Homeland Security resources, how to best utilize DHS manpower, and where to concentrate its activities are discretionary decisions solely within the purview of the Executive Branch, to the extent that they do not violate any statute or the Constitution.”¹⁶² The Plaintiffs argued that DAPA does violate the Constitution since it lies outside of the Executive’s powers because it is legislating. Specifically, they argued, “the doctrine of separation of powers likewise precludes the Executive Branch from undoing this careful balance (“careful balance struck by Congress with respect to unauthorized employment”) by granting legal presence together with related benefits to over four million individuals who are illegally in the country.”¹⁶³ In addition, the Plaintiffs also argued that DHS failed to comply with procedural statutory requirements as mandated by the APA.¹⁶⁴

¹⁶⁰ *Ibid.*, 36.

¹⁶¹ The Court also confirmed that the plaintiffs met other forms of pertinent standing including *parens patriae*, *Massachusetts v. E.P.A.* standing, and abdication standing.

¹⁶² *United States v. Texas*, Civil No. B-14-254, 2015 U.S. (S.D. Tex. Feb 16, 2015), 70.

¹⁶³ *Ibid.*

¹⁶⁴ Under the APA, the required notice must include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues

Prior to assessing the validity of their claims, the court assessed the elements necessary to grant injunctive relief to the Plaintiffs. To be eligible for injunctive relief, the Plaintiff must establish four elements: “(1) a substantial likelihood of success on the merits; (2) a substantial threat that the [states] will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause [Defendants]; and (4) that the injunction will not disserve the public interest.”¹⁶⁵

To establish the first element, the Plaintiffs argued that the implementation of DAPA violates the APA because it constitutes “substantive” and “legislative” rule-making promulgated without the requisite notice-and-comment process as obligatory under § 553 of the Act. The Defendants, on the other hand, argued that DAPA is not subject to judicial review under the APA and even if it were, it is exempt from the APA’s procedural requirements. The court rebutted the Defendants’ unreviewability claim citing *Heckler v. Chaney* (1985), where the Supreme Court stated that an agency’s decision to “consciously and expressly adopt [] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities” would not warrant the presumption of unreviewability.¹⁶⁶ The court sided with the Plaintiffs in determining that the DHS Directive is a rule, and thus subject to APA requirements, because of its binding and legislative nature that “supplements a state, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy.”¹⁶⁷

The court also found that the Plaintiffs established the remaining three elements by proving that the DHS Directive would cause the States “irreparable harm” of the economic kind

involved.” Following the publishing of the notice, the agency must give interested parties the opportunity to participate and comment and the right to petition for or against the rule.

¹⁶⁵ *Ibid.*, 72, quoting *Jackson Women's Health Org. v. Currier*, 760 F.3d 448,452 (5th Cir. 2014) (quoting *Hoover v. Morales*, 164 F.3d 221,224 (5th Cir. 1998)).

¹⁶⁶ *Ibid.*, 98.

¹⁶⁷ *Ibid.*

upon implementation. The Plaintiffs cited the economic harm that states incurred when DACA was passed in 2012, which spiked driver's license costs in states like Texas. To establish the third and fourth prong, which require a balance of hardship to the parties and that the injunction not disserve public interest, the Plaintiffs are required to show that they would suffer more harm without the injunction than would the Defendants if it were granted.¹⁶⁸ The Plaintiffs argued that an injunction against the Directive would keep the status quo and not be "excessively burdensome" on the Defendants, who would continue to prosecute or not prosecute illegally-present individuals as current laws dictate. The court agreed and also found that "the public interest factor that weighs the heaviest is ensuring the actions of the executive comply with this country's laws and its Constitution."¹⁶⁹

iii. Constitutionality

On the issue of the constitutionality of the DHS Directive, the court found that for the Plaintiffs to receive the requested injunctive relief, they needed only to assess the likelihood of the success of one of its claims. In determining that the DHS Directive violated the APA, the court declined to address the constitutionality question. The Federal District Court for the Southern District of Texas thus blocked President Obama's executive actions on procedural grounds under the APA.

b) Fifth Circuit Court of Appeals Ruling

Subsequently, the U.S. Department of Justice appealed the lower court's decision to the Fifth Circuit Court of Appeals. They asked the court for an emergency stay (i.e. stop the injunction from being in effect) to allow the programs to proceed implementation. However, the

¹⁶⁸ Ibid., 118.

¹⁶⁹ Ibid., 121.

motion for an emergency stay was denied in a 2-1 decision on May 26, 2015.¹⁷⁰ Nearly six months later, the U.S. Fifth Circuit Court of Appeals upheld the District Court's order granting the preliminary injunction on November 9, 2015.¹⁷¹ The majority of the court, Circuit Judges Jerry E. Smith and Jennifer Walker Elrod, affirmed the lower court's three conclusions: I) that Texas had legal standing to sue based on the injury it, and other states, would incur in issuing driver's licenses to deferred action recipients; II) that the case is justiciable and reviewable under the APA; and III) that the states had established a substantial likelihood of success on the merits of their procedural and substantive APA claims.¹⁷² The court also concluded that the DAPA Memorandum is not only not authorized by statute but it also is a substantive violation of the APA because the federal government did not have the authority to promulgate them under the INA.

c) Supreme Court

On November 20, 2015, exactly a year after the programs were announced, the Department of Justice filed a petition for a *writ of certiorari*.¹⁷³ On January 19, 2016 the petition was granted. In addition to the questions presented by the petition which asked "(1) whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2)

¹⁷⁰ *Texas v. United States*, No. 15-40238, 2015 U.S. App. LEXIS 8657 (5th Cir. May 26, 2015).

¹⁷¹ *Ibid.*, (5th Cir. Revised Nov. 25 2015).

¹⁷² *Ibid.*, 2.

¹⁷³ "Writ of certiorari" is "a type of writ by which an appellate court decides to review a case at its discretion" as defined by the Legal Information Institute, Cornell Law School. Petition for a *writ of certiorari* (Nov. 20, 2015): <http://www.scotusblog.com/wp-content/uploads/2015/11/us-v-texas-petition.pdf> https://www.law.cornell.edu/wex/writ_of_certiorari

whether the guidance is arbitrary and capricious or otherwise not in accordance with law; and (3) whether the guidance was subject to the APA’s notice-and-comment procedures,” the Supreme Court also directed the parties to brief and argue the following question: “Whether the guidance violates the Take Care Clause of the Constitution, Art. II, Sec. 3.”¹⁷⁴ The Court will hear arguments on April 18, 2016 and is expected to make a decision before the term ends in June 2016.¹⁷⁵

C. *Youngstown Sheet & Tube Co. v. Sawyer* Presidential Power Framework Revisited

1. Applicability to Modern Government

Regarded by Constitutional law scholar Julian G. Ku as “ha[ving] become a canonical statement about the nature of U.S. presidential powers,” Justice Jackson’s presidential power framework created in *Youngstown Sheet & Tube Co. v. Sawyer* gives scholars (and perhaps the Supreme Court) a unique opportunity to analyze President Obama’s 2014 executive actions on immigration.¹⁷⁶ However, this is no easy feat. Bianca Figueroa-Santana, writing for the *Columbia Law Review*, states that “scholars have struggled to locate President Obama’s executive policies within the traditional tripartite framework of *Youngstown Sheet & Tube Co. v. Sawyer*” mainly because scholars employing the framework have announced wildly different results.¹⁷⁷

¹⁷⁴ “United States v. Texas,” SCOTUSblog, <http://www.scotusblog.com/case-files/cases/united-states-v-texas/>.

¹⁷⁵ *Understanding the Legal Challenges to Executive Action* (Washington, D.C.: American Immigration Council, January 21, 2016), <http://www.immigrationpolicy.org/just-facts/understanding-legal-challenges-executive-action>.

¹⁷⁶ Julian G. Ku, “Unitary Executive and Exclusive Presidential Powers,” 12 *University of Pennsylvania Journal of Constitutional Law* 615 (2010).

¹⁷⁷ Bianca Figueroa-Santana, “Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation,” *Columbia Law Review* Vol. 115, No. 8 (Dec. 2015): 2256, <http://www.jstor.org/stable/43655762>.

Lauren Gilbert, author of “Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform” published in the *West Virginia Law Review*, categorizes DACA, created via executive order in 2012, within Justice Jackson’s second zone. Zone 2 includes a “zone of twilight,” which allows the president to act in cases of “congressional inertia, indifferences or quiescence.”¹⁷⁸ Gilbert argues that the promulgation of DACA falls within this zone because the Executive Branch acted in the face of congressional gridlock and inertia, and soon after, rather than taking steps to undo the action, Congress immediately began to discuss the contours of comprehensive immigration reform.¹⁷⁹ By sharp contrast, Associate Professor of Law at the South Texas College of Law, Josh Blackman in his law review article “The Constitutionality of DAPA Part II: Faithfully Executing the Law” categorizes Obama’s most recent deferred action programs, including DACA, within the third zone. In Zone 3, the president’s acts are deemed unconstitutional when Congress explicitly or implicitly forbids the president from acting in a particular way. Blackman argues that Congress expressly denied the president the authority to grant reprieve to undocumented immigrants because it failed to pass immigration reform, did not and has not “acquiesced in a pattern of analogous executive actions,” and even sought to defund DAPA (but did not).¹⁸⁰

However, aside from the fact that employing Jackson’s framework on President Obama’s immigration action results in polarizing and conflicting conclusions, there are two fundamental reasons that explain why this framework is not the best metric for categorizing not only today’s

¹⁷⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

¹⁷⁹ Lauren Gilbert, “Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform,” *West Virginia Law Review* Vol. 116, No. 1, (2013): 279-280.

¹⁸⁰ Attempts to defund DHS began in January of 2015, when the House of Representatives voted to block funding for President Obama’s immigration executive actions by a measure of 236-191 and thus, threatened a government shutdown. The GOP-led Senate, however, did not acquire enough votes to pass such a measure and instead passed a “clean” funding bill free of provisions which would have defunded President Obama’s programs.

presidential actions but specifically those that lie within the scope of immigration policy. The first reason is the framework is antiquated. If in 1952 Justice Jackson called the framework “a somewhat over-simplified grouping of practical situations,” today it is still more over-simplified.¹⁸¹ Justice Jackson creates a classic interpretation of inter-branch relations that divides them into three simple categories that only consider agreement or disagreement between the president and Congress. Although he emphasizes “the imperatives of events and contemporary imponderables rather than...abstract theories of law,” it is not likely that Jackson at the time was able to predict how much executive power would expand (i.e. how much presidents have increased their exercise of UPDs in the last half century), how dysfunctional Congress has become, and how inter-branch conflict has intensified.¹⁸² As William G. Howell notes, “the ability to act unilaterally speaks to what is distinctly ‘modern’ about the modern presidency.”¹⁸³ Karl Manheim and Allan Ides also add that, “in [the president] administering and enforcing the laws created by Congress, it is inevitable that some degree of quasi legislative and quasi adjudicating will occur.”¹⁸⁴ In addition, certain areas of policy such as foreign affairs, where the Legislative and Executive have concurrent claims of authority, warrant a more nuanced framework for categorizing presidential power, one that takes into account the realities of power sharing within the modern American federalist system.¹⁸⁵

The second reason Justice Jackson’s presidential power framework is not sufficient for categorizing presidential powers in contemporary government is that it is difficult to apply to immigration law. Although virtually every issue has some degree of legislative and executive

¹⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Justice J., concurring), 637.

¹⁸² *Ibid.*

¹⁸³ Howell, *Power without Persuasion*, 13.

¹⁸⁴ Manheim, “The Unitary Executive.”

¹⁸⁵ *Ibid.*, 2259.

claims to power, immigration is one that “implicates far more than the separation of power between the president and Congress, [because it] also entails significant questions regarding the division of power between the federal government and the states.”¹⁸⁶ While the Legislative Branch enacts policy, the Executive Branch enforces it. In addition, while the federal government enacts and enforces policy, state and local governments most directly bear the consequences of such activity, perhaps bearing the most those that concern undocumented immigrants. As *Texas v. United States* and cases before it such as *Arizona Dream Act Coalition v. Brewer* (2014) demonstrate, federal policies that grant deferred action status to masses of undocumented immigrants can cause economic burdens to states with large undocumented immigrant populations. In a more general sense, “state and local authorities play an important role in the regulation of immigration because they shape the conditions of daily life for immigrants in their jurisdictions.”¹⁸⁷

Catherine Y. Kim, Assistant Professor at the University of North Carolina School of Law, notes that for these reasons, ordinary constitutional rules—like arguably, the *Youngstown* framework—are inapplicable to immigration law.¹⁸⁸ Most scholars, she argues, have focused instead on the federalism aspects of immigration law such as *immigration exceptionalism*, which involves the arguably distinctive allocation of authority over immigration between the federal government and the states, with the federal government having preemptive power over all immigration issues.¹⁸⁹ Kim further notes that, particularly today, the scope of the Executive

¹⁸⁶ *Ibid.*

¹⁸⁷ Jennifer Chacon, “Who is Responsible for U.S. Immigration Policy?” 14 *Insights on Law and Society* (Spring 2014), http://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s--immigration-policy-.html.

¹⁸⁸ Catherine Y. Kim, “Immigration Separation of Powers and the President's Power to Preempt,” 90 *Notre Dame L. Rev.* 691 (2014): 691, <http://scholarship.law.nd.edu/ndlr/vol90/iss2/6>.

¹⁸⁹ *Ibid.*

Branch's preemptive power in this sphere is "one of the most pressing questions in immigration law" because a great bulk of contemporary immigration policymaking stems not from Congress, but rather from Executive Branch agencies and states.¹⁹⁰ Congress, in its state of partisan gridlock, "coupled with shifting political alliances over national immigration policy, exacerbate the legislative inertia that exists in other areas of federal regulation."¹⁹¹ As a result, employing a presidential power framework that fails to address both the horizontal (inter-branch) and vertical (federal to state) power structures provides more questions than answers on the limits of executive vis-à-vis legislative power in immigration law.

2. Analysis of DACA/DAPA Under *Youngstown* Framework

Having determined that Justice Jackson's tripartite presidential power framework is not the best metric to categorize today's Presidential actions, specifically those that lie within the sphere of immigration, it is important nonetheless to consider why each zone may or may not be applicable to DACA and DAPA.

a) Zone 1

The first zone of Justice Jackson's presidential power framework "places the President at the apex of his powers when acting with the 'expressed or implied' authorization of Congress."¹⁹² This zone describes the situation in which Congress has explicitly delegated power to the Executive Branch or otherwise authorized its actions. Justice Jackson added that executive action in this zone would be given the "widest latitude of judicial interpretation" and "supported by the strongest presumption."¹⁹³ Zone 1 is inapplicable in this case, since in promulgating extended DACA and DAPA, the Obama Administration did not act with delegated power from

¹⁹⁰ Ibid., 692.

¹⁹¹ Ibid.

¹⁹² Turner, "Fade to Black," 635.

¹⁹³ Ibid., 637

Congress and it did not act in response to authorization of any kind. The Executive Branch, instead, acted using its own prosecutorial discretionary power, a power, that as aforementioned, does not require express delegation from Congress.¹⁹⁴ Prosecutorial discretion “is generally seen as affording the Executive wide latitude in determining when, against whom, how, and even whether to prosecute apparent violations of Federal law.”¹⁹⁵

b) Zone 2

In the second zone, or “zone of twilight,” presidential action requires a balance against any harms to constitutional rights or structure.¹⁹⁶ On its face, DACA and DAPA may be a Zone 2 situation under Justice Jackson’s categorization, in that the president arguably acted in the “absence of either congressional grant or denial of authority.”¹⁹⁷ In 2012, Congress’ failure to enact the DREAM Act, which would have provided a path to citizenship to undocumented immigrants brought to the U.S. as children, pushed the president to create DACA, a program that to this day has survived legal battles. Similarly, in 2014, following Congress’ failure to enact comprehensive immigration reform, the president again was pressed to act and thus created extended DACA and DAPA. Yet “the fact that the president has historically taken some action in the face of congressional silence does not in itself mean that the president gets to keep doing it once Congress tells him to cut it out.”¹⁹⁸ Zone 2 is unclear as to how to resolve DACA/DAPA, since Justice Jackson provided no clear mechanism for dealing with “zones of twilight.”

c) Zone 3

¹⁹⁴ “Legality of Obama’s Immigration Initiatives.”

¹⁹⁵ Ibid.

¹⁹⁶ Manheim, “The Unitary Executive.”

¹⁹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Justice J., concurring).

¹⁹⁸ Julian Davis Mortenson, “Agora: Reflections on *Zivotofsky v. Kerry Zivotofsky*: The Difference Between Inherent and Exclusive Presidential Power,” (August 21, 2015), [URL](#).

The third zone in Justice Jackson’s tripartite framework of presidential power places the president at his or her “lowest ebb.”¹⁹⁹ This zone describes the situation in which the Executive Branch takes an action that goes against the “expressed or implied” will of Congress.²⁰⁰ But in promulgating DACA and DAPA, President Obama did not act against the “expressed or implied” will of Congress. Although some scholars like Josh Blackmun argue that Congress has expressed and/or implied opposition to President Obama’s executive actions by not passing comprehensive immigration reform, not passing similar deferred action programs, and having sought to defund DAPA, the question remains whether such actions, or lack thereof, constitute “expressed or implied” wills of Congress.²⁰¹ Only in the case where the President acts contrary to Congress’ denial of authority, expressed by means of legislation that explicitly denies the Executive Branch discretionary power in the immigration context or by implicit but clear rejection of the executive action, would Zone 3 apply.

No such clear intent can be imputed to the deeply divided modern Congress. To suggest that congressional gridlock on the immigration issue is evidence that the president acted counter to the “expressed or implied” will of Congress is an incorrect conclusion. The White House and most in Congress have longed for an overhaul of the country’s immigration system since the last major bipartisan immigration reform in 1986 under the Reagan Administration. Since then, immigration reform bills have been introduced and, in part, passed but then ultimately shut down in both chambers of Congress. These attempts—which include, most notably, the Border, Protection, Antiterrorism, and Illegal Immigration Control Act, also called the Sensenbrenner bill (H.R. 4437) proposed in 2005 and the Border Security, Economic Opportunity, and Immigration

¹⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Justice J., concurring).

²⁰⁰ *Ibid.*

²⁰¹ Blackman, “The Constitutionality of DAPA Part II,” 2.

Modernization Act (S. 744) proposed in 2013— and the threats of government shutdowns have all failed to pass. Therefore, Congress’ failed efforts to oppose or support President Obama’s policies and to pass comprehensive immigration reform proposals are not evidence of implicit opposition to Obama, but rather, are illustrative of Congress’ inability to arrive at a unified stand on immigration and to act altogether.

Second, the claim that similar deferred action programs were not created by Congress is evidence of DACA and DAPA’s inconsistency with the Legislative Branch’s “expressed or implied” will is also incorrect. As aforementioned, the absence of congressional action cannot be in and of itself considered implicit opposition of the president’s programs. It is in this discussion that the distinction between “lawful status” and “lawful presence” is important, as it describes the types of statuses that the Legislative and Executive branches can grant to undocumented immigrants. “Whereas legal *status* implies a ‘right protected by law,’ legal *presence* simply reflects an ‘exercise of discretion by a public official.’”²⁰² USCIS confirms “an individual who has received deferred action is authorized by DHS to be present in the U.S., and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.”²⁰³ Like DACA, extended DACA and DAPA would grant “lawful presence” to otherwise undocumented immigrants residing in the U.S. illegally (i.e. unlawfully present), not “lawful status” such as citizenship or Lawful Permanent Resident status, statuses that may only be granted by legislation. Therefore, to say that because Congress did not

²⁰² *Texas v. United States* (5th Cir. 2015) (Justice Higginson, dissenting), 51, citing *Dhuka v. Holder*, 716 F. 3d 149, 156 (5th Cir. 2013).

²⁰³ “Frequently Asked Questions,” USCIS Website, last modified June 15, 2015, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions#top>.

create similar programs is evidence of their opposition to them is unfounded, as the Executive Branch has the exclusive power to use discretion in enforcing immigration law. That is indisputable. However, what is disputed is whether the President has abused this power and acted against congressional will by *categorically* granting deferred action status to classes of individuals instead of using discretion on a case-by-case basis.

Third, attempts to defund DAPA as evidence of “expressed or implied” will of Congress in opposition of DACA and DAPA is a faulty political presumption at best, rather than a policy objection. When Congress threatened to defund the Department of Homeland Security in early 2015, threatening a government shutdown (again²⁰⁴), the Senate had recently gained a Republican majority in the midterm elections a few months prior, giving the party control over both chambers. However, even with this majority, the House bill set to defund DHS failed and not because of Democrats. An article published by *The Hill* called the ordeal “GOP infighting” as House and Senate Republicans were at odds on whether or not to defund DHS because of President Obama’s immigration actions. The House bill contained provisions that would strip away the president’s executive actions. GOP Senators like Mark Kirk (R-Ill.) called for a vote on a “clean” DHS spending bill stripped of immigration language, while other conservatives called for Senate GOP leader Mitch McConnell “to gut the Senate’s filibuster if necessary to move the House bill to President Obama.”²⁰⁵ In the end, the vote fell short and a “clean” DHS funding bill was passed, avoiding a partial government shutdown. This episode, threatening an imminent government shutdown as a result of a divided and dysfunctional GOP, demonstrates how partisan

²⁰⁴ In 2013, there was a 16-day government shutdown of a government-funding bill proposed by House Republicans that sought to defund ObamaCare.

²⁰⁵ Cristina Marcos and Rebecca Shabad, “GOP infighting grows over DHS funding,” *The Hill*, February 13, 2015, <http://thehill.com/homenews/senate/232704-gop-infighting-grows-over-homeland-security-funding>.

divide *and* intra-partisan divide in Congress makes it impossible to ascertain that Congress as a whole has expressed or implied any unified stance on the legality of President Obama’s executive actions.

3. A Fourth Zone? – A Look at the Relational Conception Model

Although Justice Jackson’s tripartite presidential powers framework in *Youngstown* is a useful tool for disciplining separation of powers analysis, the framework lacks consideration of important contextual factors that warrant executive action in certain times over others. Mariah Zeisberg, political scientist and Associate Professor at the University of Michigan, expands the “zone of twilight” in the Zone 2 of the framework with her interpretation of constitutional politics in settling inter-branch disputes over institutional and constitutional authority to take the country to war. Contrary to the *Youngstown* framework which asks only whether the branches agree or disagree, the relational model questions to what extent inter-branch “agreement or disagreement with one another is predicated on the application of their constitutional strengths to the matter at hand.”²⁰⁶ Branches of government generate constitutional authority when they “mobilize their institutional capacities, develop good understandings of the security needs of the moment, and place themselves in responsive relationship.”²⁰⁷

a) The Relational Conception Explained

Zeisberg, in her book entitled *War Powers: The Politics of Constitutional Authority*, develops “the relational conception,” a robust theoretical model designed to put value in inter-branch interpretative struggle in the dispute over constitutional war authority. In light of the fact that “the Constitution does not draw clear boundaries between legislative and executive powers in

²⁰⁶ Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton: Princeton University Press, 2013), 258

²⁰⁷ *Ibid.*, 45.

a variety of policy areas,” including war, the relational model focalizes on Legislative-Executive branch interactions rather than strict textual interpretations of the Constitution.²⁰⁸ Zeisberg states that the “relational conception...asks us to engage a set of decidedly political and contextual questions about institutional performance in developing meaning for constitutional vocabulary.”²⁰⁹ She identifies this model as the best rationale for broad presidential war powers when circumstances demand them.²¹⁰

The relational model is best employed in situations in which both the Legislative and Executive branches have legitimate claims of authority over a particular action, such as declaring and conducting war. In such cases, Zeisberg argues that one must “evaluate [the branches] in terms of how well they bring their special institutional capacities to bear on the problem of interpreting the Constitution’s substantive standards.”²¹¹ That is, one must assess constitutional performance, not whether Congress, for example, has voted to authorize war, but “rather whether deliberation about the war is done the proper way and for the right reason.”²¹² Moreover, the theory “prioritizes good judgment in the particular context over and above consistency across cases,” thus rejecting “precedent-based reasoning.”²¹³ This normative way of assessing constitutional authority in the context of war is outlined as follows:

- 1) *Identify relevant substantive terms at stake in the Constitution’s allocation of power.*

This first prong requires identifying the substantive standards for the allocation of power in the text of the Constitution and indicating why the powers have been

²⁰⁸ *Ibid.*, 222.

²⁰⁹ *Ibid.*, 145.

²¹⁰ Stephen M. Griffin, “Zeisberg’s Relational Conception of War Authority: Convergence and Divergence in Achieving a New Understanding of War Powers,” *Boston University Law Review* Vol. 95 (2015).

²¹¹ Zeisberg, *War Powers*, 18-19.

²¹² Jeremy D. Bailey, “It’s the War Power, Again,” *50 Tulsa Law Review* 649 (2015): 654.

²¹³ Zeisberg, *War Powers*, 251.

distributed as they have been. Using the war power as an example, Zeisberg identifies the preamble of the Constitution as a source of substantive standards that commit all institutions to advance the “general warfare” and a system of “common defense.” While the president vows to “preserve, protect, and defend” the constitutional order, the Legislature is granted the authority to “declare war.” Zeisberg notes that the most common distinction between the “war” that requires legislative authorization and that which the president may authorize is with reference to scale. Though the Constitution’s idea of war may be “big” wars that are expensive, time consuming, and pose heavy risk of casualties, Zeisberg notes that there are some conceptual problems with this demarcation. Congress’ power to issue letters of marque and reprisal, for one, implies that Congress has legislative authority over small and big wars. And second, “small” wars that are anticipated to be cheap, can become big, expensive, and may be highly significant for foreign policy. Zeisberg argues that Congress’ substantial role in foreign policy, as illustrated by its powers in Article I, § 8, is “for good reason [since] legislatures can be useful institutions for developing sound policy in a complex world.”²¹⁴ In addition, the president’s oath to “preserve, protect, and defend” implies war powers and is widely accepted as also meaning that the President’s use of military force must be for defensive purposes.

- 2) *Identify the institutional process(es) harnessed to give content to that substantive vocabulary.* These institutional processes, Zeisberg argues, “are based on the branches’ distinctive governance capacities and structural positions.”²¹⁵ She

²¹⁴ Ibid., 20.

²¹⁵ Ibid., 21.

identifies three important structural conditions for the ordinary and constitutional politics of national security. Named the “conditions of conflict,” they are 1) that each branch enjoys an *independent source of political authority*; 2) that the branches have *distinctive governance capacities* (which thereby create distinctive perspectives on public matters); and 3) that the actual exercise of each branches’ powers brings them into a relationship with one another. The first condition, that each branch enjoys an independent source of political authority, discusses how officials in either branch are elected and by whom. The president and legislators are elected from different geographical bases (i.e. the president, in a nationwide vote decided by the Electoral College, and Congress, by their respective constituencies in either states or districts) and for different periods of time (e.g. House members for two years, Presidents for four, and Senate members are elected for six years in staggered times). The branches do not rely on each other for continuity in office nor evaluation, with the exception of presidential impeachment. And finally, no officials can work in multiple branches.

The second condition, that the branches have distinctive governance capacities and therefore distinctive political perspectives on public matters, discusses the rules that configure the offices and support each branch in performing its designated functions. Vis-à-vis each other, the Legislative and Executive Branch have different governance capacities. Legislatures, for example “enjoy a special capacity to clarify the dimensions of conflict, that exist in civil society; to harness the intelligence of its members, who may have important experience in security; they also have special capacities to advance broad consensuses and to make general law that

accommodates many different points of view.”²¹⁶ The Executive Branch, which Zeisberg calls a “unitary office” and “the most efficient of the three,” enjoys the capacity to “deliver military responses, provide initiative to the legislature, provide for law enforcement” in addition to its diplomatic, intelligence, and consultative capacities.²¹⁷ Zeisberg notes that in the war power context, Congress often assesses war with a focus more on domestic costs, while presidents are often more alert to war’s diplomatic implications. An example Zeisberg gives of how each branch’s distinct structures encourage divergent judgments on constitutional meaning is Salmon Chase, Secretary of the Treasury under the Lincoln Administration, who supported the President in issuing paper money during the Civil War to raise money without raising taxes, which he advocated for because he viewed winning the war as a constitutional imperative. However, when he became a Supreme Court justice, he argued that the money he had advocate for violated the constitutional rights of the individual.

3) *Theorize the terms on which these different processes are related to one another.*

This prong requires identification of the terms on which the branches are related (i.e. analysis of the inter-branch relationship). The third condition of the “conditions of conflict” emphasizes the important inter-branch relationship that premises the relational conception framework: “that the actual exercise of their powers brings the branches into relationship with one another, a relationship that may activate the conflictual possibilities inherent in their independent sources of authority and

²¹⁶ Ibid.

²¹⁷ Ibid.

distinctive perspectives on public matter.”²¹⁸ This requires determining how the exercise of each branches’ powers brings them into a relationship with one another, that is, determining what their shared powers and duties are. In the war context, Zeisberg argues that in order to be effective, many government decisions require the cooperation of more than just one branch. The government’s power to make war is shared by the Executive and the Legislative Branch because the activity required to make war such as raise funds, organize troops, deploy them, communicate with foreign governments, and negotiate and ratify peace treaties, can only be done with the cooperation of both branches.

- 4) *Develop standards related to these institutional processes.* These processual standards, as Zeisberg notes, are intended to evaluate each branches’ political performance by assessing “whether each institution demonstrated appropriate regard for reasons that were in fact, or should have been, available; whether they were appropriately responsive to one another; and whether the institutions were applying appropriately their own distinctive strengths to the problem at hand.”²¹⁹ These standards help to assess whether or not the branches used powers *responsibly*. The first processual standard requires that each branch politically defend its judgment. She states, “the processual standard of *independent judgment* asks that each branch view itself as authorized and equipped to judge the constitutional and policy claims that it confronts while conducting its business.”²²⁰ An example Zeisberg mentions of a president using his independent judgment in acts of war is

²¹⁸ Ibid.

²¹⁹ Zeisberg, *War Powers*, 45.

²²⁰ Ibid., 32.

President John F. Kennedy during the 1962 Cuban Missile Crisis. In the fall of 1962, President Kennedy assured Congress that there were no offensive missiles in Cuba, confirmed by statements from the Soviet Union and beliefs from U.S. intelligence. However, when it became apparent that there were missiles on the island, he decided not to notify Congress or the public, notifying only allies. He initiated a blockade which was kept under wraps and was not announced until it was being executed. Although this act of war was not statutorily authorized by Congress, it was justified according to the president's independent war authority during the Cold War.

A second processual standard Zeisberg develops is that “the branches engage in a reasoning over public policy that is *sensitive to the []realities they encounter.*”²²¹ This standard means that each branch should be equipped, as a result of exposure, to use reality-based assessments about security in their deliberations. Both the president and Congress should (and should be able to) assess knowledge, multiple considerations, alternatives, and prioritization in their deliberations, confirming that their deliberations are premised on reality rather than fantasy. In the Cuban Missile Crisis example, President Kennedy, before initiating a blockade, was aware of the possible threat of the Soviet Union shipping missiles to Cuba. Thus, he initiated a process to coordinate the views of the Executive Branch intelligence analysts, who came to the conclusion that the Soviet Union could get “considerable military advantage from placing longer range ballistic missiles in Cuba, or, more likely, establishing a base for missile-launching submarines there,” but that such behavior

²²¹ Ibid., 33.

was unlikely because of the risk it would cause to the U.S.-Soviet relationship.²²²

However, the missiles did become a reality, though not an immediate one. Realities such as that the U.S. had been threatened by Russian missiles for some time and that their existence would not affect the strength of the U.S.' retaliatory response, put into question whether Kennedy's reasoning to engage in war activity was sensitive to the realities he was faced with. The reality was that the "Cuban missile crisis was a threat, . . . but it did not itself represent an immediate hostile invasion or even the threat of an immediate hostile invasion."²²³

A third processual standard is that "the branches actually *link their arguments about constitutional authority to their substantive agendas*."²²⁴ This standard pertains to whether each branch makes judgments vulnerable to repudiation by the other branch. This standard does not imply the value of inter-branch agreement, but rather, the value of inter-branch deliberation. In the Cuban missile crisis example, Zeisberg states that "the processes Kennedy used in the lead-up to the blockage fell within the terms of the bipartisan consensus."²²⁵ Congress had pressured Kennedy to act and many attacked him for ignoring a building crisis. This frustration and perception of a weak president translated into bipartisan legislation which granted the president authority to call reservists into armed forces without opposition and a resolution which expressed determination "to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United

²²² Ibid., 148.

²²³ Ibid., 150.

²²⁴ Ibid., 33.

²²⁵ Ibid., 161.

States.”²²⁶ Though none of Congress’ personal pleas to act in bipartisan meetings with the president, which included aggressive advocacy for military action, represent congressional authorization of Kennedy’s war action, Zeisberg notes that he was clearly acting “within the terms set by elites of both parties.”²²⁷ After all, in Executive Committee deliberation, Kennedy revealed he feared impeachment if he did nothing to counter the Cuban missiles. However, when Kennedy was warned of possible missiles in Cuba, he tried to keep them quiet because he judged that the information he was receiving did not signify a threat and he wanted to avoid public hysteria and Republican opposition. Preserving secrecy supported his capacity to make an independent and distinctive presidential judgment. Zeisberg notes that although the president’s constitutional authority according to this condition would have been enhanced had he been transparent to the full Congress sooner, “his use of secrecy to protect the political space he needed to come to a developed judgment of his own enhanced the constitutional authority available to him under the processual standards associated with the second condition of conflict.”²²⁸

Another standard Zeisberg creates is one that assesses the branches’ *relationship to an electorate*. For the president, his positional authority stems from a plethora of resources, including intelligence, diplomacy, and agencies which he or she can mobilize. Zeisberg calls for assessing the decision-making of the president by how he or she utilizes the intelligence, diplomatic, and consultative capacities of the Executive Branch. Zeisberg contends that in the Cuban missile crisis, “Kennedy

²²⁶ Ibid., 162.

²²⁷ Ibid., 163.

²²⁸ Ibid., 180.

benefited deeply from his office's resources and then advanced his policies in a coherent way for legislative judgment."²²⁹ Having run a presidential campaign that promised a more active foreign policy in which the U.S. would participate in 'counterinsurgency' against communist guerillas and support developing nations in resisting communism, he displayed considerable political awareness. He used a great deal of bipartisan consultation procedures which included a bipartisan meeting with Republican and Democratic leadership to discuss Cuba. He also took full advantage of Executive Committee deliberative resources which helped to develop possible responses to the missile crisis as well as their domestic political consequences. Zeisberg also commends Kennedy for his skillful use of intelligence capacities (i.e. CIA, the Defense Department) at his disposal which accomplished the difficult task of discovering the missiles to begin with.

- 5) *Assess moments of constitutional politics in terms of those relevant substantive and processual standards.*²³⁰ Zeisberg notes that the relational conception model is "political" in that it considers that constitutional authority is "judged by electoral branches, that the branches develop and evaluate constitutional claims in ways that are at least partially responsive to governance needs; that their reasoning is grounded in the relatively open web that is characteristic of public policy justification; that their constitutional positions are reflected by partisanship and other forms of affiliative reasoning; and that the relational conception prioritizes judgment that is relatively resistant to precedent-based reasoning and yet can be

²²⁹ Ibid., 169

²³⁰ Ibid., 223.

done well, nonetheless ethical.”²³¹ In the Cuban missile crisis example, President Kennedy’s decision to act in Cuba and keep the mission a secret from Congress and the public until it was being enacted was in part motivated by politics. Zeisberg notes that “Kennedy was embedded in a political context that made it unlikely he could achieve the full authority connected to each dimension of the relational conception’s standards at the time.”²³² For given the Cold War ideology, the danger posed by the Cuban missiles was a shift in the balance of power politics. While congressional Democrats were concerned over escalation and held back Republican efforts to pass a direct legal war authorization, Republicans pushed for action, some arguing even after the crisis was over that the president was not being forceful enough and that he had ignored important CIA warnings.

b) Taking *Youngstown* a Step Further

The relational conception is a model that goes beyond Justice Jackson’s framework which, particularly in regard to Zone 2, does not provide guidance on how to deal with many situations. In contrast, the relational conception model provides a clear step-by-step mechanism for assessing the branches that rejects Justice Jackson’s “emphasis on inter-branch agreement or disagreement as a generalized pivot for constitutional authority because it explicitly contemplates the possibility that both conflict and settlement may be linked to the branches’ exercise of their institutional strengths.”²³³ Zeisberg argues that asking only whether the branches agree or disagree fails to answer the central question of the model, which seeks to understand to what extent the the branches’ agreement or disagreement is “predicated on the application of their

²³¹ Ibid., 243.

²³² Ibid., 180.

²³³ Ibid., 253.

constitutional strengths on the matter at hand.”²³⁴ As Political Scientist Jeremy D. Bailey notes, it is clear that Zeisberg’s methodology improves Justice Jackson’s tripartite framework for presidential powers in *Youngstown* by considering whether and when inter-branch agreement is properly authoritative.²³⁵ It does this by allowing scholars to “evaluate executive and legislative actions in context and relationship and ask whether they are successfully using their distinctive capacities for governance rather than evaluating them against a rigid list of rules.”²³⁶ In addition, it enables a normative analysis of constitutional politics in light of constitutional ideals and that seeks governance that is consistent with the explicit and implicit values manifest in how the Constitution allocates power.²³⁷ These features are what make this model appropriate for assessing DACA/DAPA.

c) Analysis of DACA/DAPA Under the Relational Conception

i. Substantive Standards

The first step of the relational conception framework is to identify the relevant substantive terms at stake in the Constitution’s allocation of power and indicate why the powers have been distributed as they have been. In the immigration sphere, the Constitution offers a rather limited set of substantive standards to both the Legislative and Executive for fulfilling their institutional responsibilities. Much like other policy areas, immigration is also a policy area in which the Constitution provides no branch of government (the Legislative or Executive) enumerative power to regulate. It does, however, entrust the Legislative Branch with the first substantive standard in Article I, § 8, clause 4 of the Constitution: the power to “establish an uniform Rule of

²³⁴ *Ibid.*, 260.

²³⁵ Bailey, “It’s the War Power, Again,” 654.

²³⁶ Griffin, “Zeisberg’s Relational Conception of War Authority,” 8.

²³⁷ Zeisberg, *War Powers*, 223.

Naturalization.”²³⁸ That is, Congress has the responsibility to craft the laws that determine how and when noncitizens can become naturalized citizens of the United States.²³⁹ The Take Care Clause provides the first substantive standard for the president: that he “shall take care that the laws be faithfully executed.”²⁴⁰ In the immigration context, this means that the president is responsible for seeing that the immigration law, which Congress passes, is faithfully executed. In other areas of immigration where the Constitution remains silent, the Supreme Court has provided guidance through judicial review.

Historically, the Supreme Court has upheld nearly all manner of federal statutes regulating immigration.²⁴¹ In doing so it has acknowledged that in the federal government lies a broad power to regulate the admission, removal, and naturalization of noncitizens, a power that is now considered an inherent sovereign power.²⁴² The Supreme Court, in its earliest cases looked to the federal power over foreign commerce as a source of power over immigration. The Commerce Clause in Article I, § 8, clause 3, of the Constitution provides Congress with the power “to regulate Commerce with foreign Nations, and among the several States.” In addition, the War Power, found in Article I, § 8, clause 11, could also be cited as a potential source of federal control over immigration, even though it gives Congress the authority to “declare war.”²⁴³ The Naturalization Clause in Article I, § 8, clause 4, has also served as an argument for federal

²³⁸ Chacon, “Who is Responsible for U.S. Immigration Policy?” 15.

²³⁹ *Ibid.*

²⁴⁰ U.S. Const. art. III, § 2, § 3.

²⁴¹ David Weissbrodt and Laura Danielson, “Chapter 2: The Source and Scope of the Federal Power to Regulate Immigration and Naturalization,” in *Immigration Law and Procedure in a Nutshell*, (St. Paul, Minnesota: Thompson/West Press, 2004), <http://www1.umn.edu/humanrts/immigrationlaw/chapter2.html>.

²⁴² *Ibid.*

²⁴³ *Ibid.*

control over immigration, though it explicitly gives Congress only the authority “to establish a uniform Rule of Naturalization.”

International human rights law scholar David Weissbrodt and immigration attorney Laura Danielson argue that in viewing the Constitution with original intent, these three clauses (Commerce, War, and Naturalization) together imply a federal right to regulate non-citizens, though that “later [Supreme Court] cases clarified that such constitutional provisions are not the source of an implied right of the federal government to regulate non-citizens, but only to show that the federal government is the national government and therefore the keeper of inherent sovereign power to regulate international affairs.”²⁴⁴ The Court has repeatedly stated that the regulation of immigration implicates the foreign affairs power, a power presidents have also claimed in issuing executive actions on immigration.²⁴⁵ In addition, as recently as 2012 in *Arizona v. U.S.*, the Supreme Court recognized that prosecutorial discretion in immigration cases is an inherent constitutional power that the Executive Branch holds.

All in all, the power to make immigration policy is a power that is shared by the Legislative and the Executive branches primarily because the Constitution’s text is not clear on the question. In fact, the Supreme Court in *Chae Chan Ping v. United States* (1889) held that the federal government has the authority to regulate migration, even though such a power is not enumerated in the Constitution.²⁴⁶ This decision and subsequently others led to the creation of the *plenary power doctrine*, which grants Congress the plenary power to make and regulate immigration policy while limits the Judiciary’s power to police immigration regulation. The Court has since emphasized that immigration is an issue best left to the political branches.

²⁴⁴ Ibid.

²⁴⁵ Figueroa-Santana, “Divided We Stand,” 280.

²⁴⁶ *Chae Chan Ping v. United States*, 130 U.S. (1889).

ii. Institutional Processes

The second step of the relational conception framework is to identify the institutional processes harnessed to give content to the substantive vocabulary discussed in step one. Here, the institutional processes will be identified by addressing the first two “conditions of conflict.”

The first, that each branch enjoys an *independent source of political authority*, will address how each branch was elected and by whom. The political authority of President Obama, in this respect, stems first from his nomination as the Democratic candidate for the presidency and subsequently from his election and reelection to the presidency by a nationwide vote decided by the Electoral College. Of course, upon taking office, the president does not only represent the Democratic Party, but rather, he represents the nation as a whole, which naturally requires him to perform his responsibilities as president vis-à-vis opposing party views, particularly those expressed by Congress. The president’s political authority is also independent from that of Congress which need not (and does not always) hold majorities in the party of the president. President Obama enjoys this authority for the remainder of his second term until January 2017, free from congressional evaluation, with the exception of impeachment.

The independent source of political authority for the Legislative Branch is also independent from that of the president. Members of Congress, both in the Senate and House of Representatives, enjoy an independent source of political authority which stems from their election into office by their respective constituencies in either states or districts and for different periods of time. Midterm elections, which elect 435 House of Representatives and 33 or 34 of the total 100 Senators, can play a decisive role in shifting the party majorities in both chambers. In the midterm elections of 2014, weeks before President Obama announced his executive actions, the Democratic Party lost nine Senate seats and thirteen House seats, causing the Republican party to gain control of the Senate for the first time since 2006 and increase its majority in the

House. This also resulted in two different parties leading the Legislative and Executive branches, in itself a prime catalyst for inter-branch conflict.

The second condition of conflict, that the branches have distinctive governance capacities and therefore distinctive political perspectives on public matters, will address what each branches' governance capacities are in immigration and how those capacities affect their political perspectives on DACA/DAPA. In immigration, the Executive Branch's governance capacity is centered in law enforcement and foreign policy. Historically, the president can issue executive actions or orders to address immigration concerns such as it has done with DACA/DAPA. Since the president is not an agency, such programs are not subject to regulations of the APA, consistent with the president's broad discretion in immigration. Agencies like the Department of Homeland Security, however, are. Founded in 2002, DHS is the Executive agency geared with keeping America safe. Its mission is: "to secure the nation from the many threats we face. This requires the dedication of more than 240,000 employees in jobs that range from aviation and border security to emergency response, from cybersecurity analyst to chemical facility inspector."²⁴⁷ In fulfilling this mission, DHS holds the executive power of prosecutorial discretion, "[a] discretion not to immediately arrest or endeavor to removal an illegal immigrant because the immigrant does not meet the federal government's immigration-enforcement priorities."²⁴⁸ During the Obama Administration, the agency has assessed immigration law enforcement with a focus on both the cost and feasibility of removing the estimated 11-12 million undocumented immigration and on national security. Citing its "severe resource constraint," DHS has prioritized the enforcement of immigration law to "threats to national security, public safety,

²⁴⁷ "About DHS," Official Website of the Department of Homeland Security, accessed March 21, 2016, <https://www.dhs.gov/about-dhs>.

²⁴⁸ See *Black's Law Dictionary* 565 (10th ed. 2014).

and border security,” over the undocumented immigrants that would otherwise be eligible for deferred action under DACA/DAPA.²⁴⁹

Presidents also evaluate their immigration policies in light of their foreign policy objectives. For example, in 2014 the U.S. faced a humanitarian crisis when an influx of unaccompanied minors from violence-ridden Central American countries crossed the U.S.-Mexico border. U.S. Customs and Border Protection reported that in fiscal year 2014, between October 1, 2013 and September 30, 2014, 68, 541 unaccompanied children were apprehended at the southwest border.²⁵⁰ President Obama, faced with considering how his response may affect the U.S.’ international reputation and credibility, approved a plan to allow thousands of young children from Central American countries apply for refugee status.

On the other hand, the Legislative Branch’s governance capacities with respect to immigration are to advance broad consensus and to pass immigration laws that accommodate the different points of view of the nation, as expressed by Members of Congress. During Obama’s presidency, Congress has specifically sought to overhaul or rather, reform current immigration law. As evidenced by the bipartisan immigration bill proposed in the Senate during President Obama’s first term, S. 744 “Border Security, Economic Opportunity, and Immigration Modernization Act,” Congress has generally identified areas of reform that focus on long-term and sustainable modifications of current immigration law which address legalization of certain undocumented immigration, new employment-based immigrant visas, mechanisms for stronger border and interior enforcement, and the creation of an “enhanced and flexible system of rules for

²⁴⁹ Johnson, *Policies for the Apprehension*.

²⁵⁰ “Southwest Border Unaccompanied Alien Children FY 2014,” CBP, Official Website of the Department of Homeland Security, accessed March 2016, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014>.

future immigration flows.”²⁵¹ Forming a consensus on these points is unquestionably one of the reasons that make legislating at times arduous and time-consuming, particularly when the views of Members of Congress are often contingent on the realities they face, such as the number of estimated undocumented immigrants residing in their respective states or districts. For example, it is no coincidence that the states in opposition to DACA/DAPA include states like Texas and Arizona which hold anywhere from half a million to over two million undocumented immigrants and thus, face specific challenges that other states such as Maine, with less than 40,000 undocumented immigrants, may not.²⁵²

iii. The Inter-Branch Relationship

The third condition of conflict is that the actual exercise of each branches’ powers brings them into a relationship with one another. This step requires theorizing the terms on which each branches’ institutional processes, discussed in step two, are related to one another in making, regulating, and enforcing immigration policy. In terms of making immigration policy, with the rise of the modern administrative state, Congress has delegated more of its immigration powers to the Executive. Some examples of these delegated powers are: the authority to determine whether certain foreigners should be granted Temporary Protected Status (TPS), the authority to determine whether a person is to be allowed to work in the U.S., the authority to grant a person permission to be in the U.S. when the person does not qualify for a visa, and the authority to decide whether a person’s deportation should be deferred. Historically, presidents have exercised all of these powers. As aforementioned, President H.W. Bush granted Salvadoran refugees TPS

²⁵¹ *Built to Last: How Immigration Reform Can Deter Unauthorized Immigration* (Washington, D.C.: American Immigration Council, May 20, 2013), <http://www.immigrationpolicy.org/just-facts/built-last-how-immigration-reform-can-deter-unauthorized-immigration>.

²⁵² Jeffrey S. Passel and D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States: II. Where Do They Live?* (Washington, D.C.: Pew Research Center, April 14, 2009), accessed March 2016, <http://www.pewhispanic.org/2009/04/14/ii-where-do-they-live/>.

status in 1990, a status that President Clinton extended during his first term, and nearly all presidents since President Reagan have issued some sort of executive action or order that granted deferred action status and work authorizations to certain undocumented immigrants. President Obama is the most recent president to exercise this power through the creation of DACA and extended DACA/DAPA.

Apart from delegated powers, the Legislative Branch and the Executive Branch share the power of enforcing immigration law because the activity required to enforce it, particularly in the removal of immigrants deemed deportable by Congress, can only be done by the cooperation of both branches. This cooperation requires that the president and Congress inform and assist each other, especially when enforcement issues arise. For example, Congress decides how much funding DHS is to receive each fiscal year. Like other agencies, DHS is constrained by the resources (i.e. funding) that Congress votes to allot it. DHS claims that with this funding it is able to remove approximately 400,000 undocumented immigrants per year.²⁵³ Simple calculations demonstrate that it is impossible, at least with this limited funding, to deport all 11 or 12 undocumented immigrants in any given year. Thus, in accordance with the amount of funds it received from Congress, DHS exercises its power of prosecutorial discretion to prioritize the deportation of certain undocumented immigrants, usually threats to national security, over others.

Cristina Rodriguez, writing for the *Yale Law Journal*, describes this relationship between the president and Congress as “[having] been defined by Congress’ dramatic expansion of federal immigration law over the course of the twentieth century through the creation of a complex, rule-

²⁵³ Raquel Aldana, “Obama’s Constitutional Authority on Immigration is Well-Recognized,” *The New York Times*, November 18, 2014, <http://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/obamas-constitutional-authority-on-immigration-is-well-recognized>.

bound legal code, which has given rise to a comprehensive regulatory system.”²⁵⁴ Congress has utilized its plenary powers to make a detailed immigration code covering substantive criteria for admitting and deporting immigrants. The president, on the other hand, has possessed “tremendous power” over core screening policy, particularly through asymmetrical de facto delegation from Congress. Congress, she explains, has delegated screening authority to the Executive by radically expanding the grounds of deportation and delegating the power to deport undocumented immigrants and to set enforcement priorities, which are essentially powers to screen immigrants at the back end of the system. These powers, she argues, have had the effect of giving the president tremendous policymaking power, particularly because of the sizable undocumented population residing in the country today. Rodriguez notes, “the significant population of formally deportable people gives the president vast discretion to shape immigration policy by deciding how (and over which types of immigrants) to exercise the option to deport.”²⁵⁵ It is this asymmetrical de facto delegation model that drives the relationship—and conflict—between Congress and the president today.

iv. Processual Standards

The fourth step in the relational conception model is to develop standards related to the institutional processes determined in step three. The standard that will be stressed in analyzing DACA/DAPA, and which is at the core of the relational conception model, is to determine whether the branches have used their powers *responsibly*. Though both branches have, to some degree, acted irresponsibly with respect to immigration, Congress has failed to act responsibly more than the president. In reforming the current immigration system, Congress has acted only in so far as proposing bills. It has otherwise failed to actually pass any of them into law. A report

²⁵⁴ Rodriguez, “The President and Immigration Law,” 461-462.

²⁵⁵ *Ibid.*, 511.

released by the Center for American Progress, entitled, *What the President Can Do on Immigration If Congress Fails to Act*, remarks that as a result of failed legislation, “two-thirds of unauthorized immigrants currently living in the United States have resided here for more than a decade.”²⁵⁶ These statistics indicate that absent congressional reform, the immigration problem has only intensified, making it progressively more difficult (and costly) to deport masses of people, many of whom are now well integrated into communities across the country.

The following analysis will assess two degrees of acting responsibly: 1) whether the branches have acted in immigration at all and 2) if they have, whether the action(s) were executed in a responsible fashion, meaning the branches acted in a coherent way, used their institutional strengths to address the problems reasonably, and acted with due attention and respect for the other branch. First, however, it is important to contextualize congressional action by briefly describing the political landscape of views on immigration, for this has affected, in many respects, how the Legislative and the Executive branches have responded to the illegal immigration question. Previously a bipartisan issue in the late 80s and early 90s, as evidenced by the Immigration Reform and Control Act of 1986, immigration has become an increasingly divisive issue, stringently divided on partisan lines, with most Republicans vehemently against granting any sort of relief to undocumented immigrants, while most Democrats are generally united in giving some sort of relief, if not a path to citizenship, to nearly all undocumented immigrants. This shift from a bipartisan issue to a partisan-divided issue is reinforced by the way in which the Senate and House have voted in immigration reform bills in the past. The following

²⁵⁶ Marshall Fitz, *What the President Can Do on Immigration If Congress Fails to Act* (Washington, D.C.: Center for American Progress, July 2014), 1, <https://cdn.americanprogress.org/wp-content/uploads/2014/07/FitzAdminRelief-report2.pdf>.

will discuss the legislative histories of congressional action with respect to comprehensive immigration reform and to providing a path to citizenship to undocumented minors.

1. *Congressional action on immigration reform*: Congress' most active comprehensive immigration reform efforts took place during the 109th and 110th Congresses (period from 2005-2009), efforts that heavily informed ensuing efforts in the 113th Congress (period from 2013 – 2015). A Congressional Research Service report detailing the history of these efforts states that “most policymakers agree that the main issues on comprehensive immigration reform (CIR) include increased border security and immigration enforcement, improved employment eligibility verification, revision of legal immigration, and [‘the thorniest of these issues’] options to address the millions of unauthorized aliens residing in the country.”²⁵⁷

During the 109th Congress, although each chambers passed CIR bills “sweeping in scope [that] ranged from just under 500 pages to over 800 pages,” both chambers did not reach agreement on a comprehensive reform package which particularly addressed the status of undocumented immigrants.²⁵⁸ The House passed H.R. 4437, the “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,” also called the Sensenbrenner bill, named after the main sponsor, chairman of the House Judiciary Committee, Representative James Sensenbrenner (R-W15). The Act, unpopular among most Democrats and favored by most Republicans, would have criminalized unauthorized presence. In a Republican-controlled House, the bill was debated and passed, as amended on December 16, 2005. The Senate, on the other

²⁵⁷ Ruth Ellen Wassem, “Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress,” *Congressional Research Service*, February 27, 2013, <https://www.fas.org/sgp/crs/homesecc/R42980.pdf>.

²⁵⁸ *Ibid.*, 1.

hand, passed S. 2611, the “Comprehensive Immigration Reform Act of 2006,” which proposed revisions to legal immigration including an expansion of the guest worker visa program and increased legal permanent admissions. S. 2611 also would have enabled certain undocumented immigrants to become Lawful Permanent Residents (LPRs) if they met certain criteria and paid penalty fees. The bill also included DREAM Act provisions. The bill passed, as amended, by a vote of 62-36 on May 25, 2006.²⁵⁹ To overcome the disagreement between chambers and make it possible to form a conference committee on CIR, during the summer of 2006, CRS reports that congressional leaders attempted via procedural agreements to form such a committee but were unsuccessful. Thus, the separate bills passed in both chambers expired at the end of the 109th Congress.

During the 110th Congress, on May 9, 2007, S. 1348, entitled “the Comprehensive Immigration Reform Act of 2007,” a bill virtually identical to S. 2611, was introduced by Democrat and Senate Majority Leader, Harry Reid (D-NV) and co-sponsored by Edward Kennedy (D-MA), Patrick Leahy (D-VT), Bob Menendez (D-NJ), and Ken Salazar (D-CO). The legislation, intended to overhaul the immigration system from enforcement to border security, included provisions which would have provided legal status and a path to citizenship to all undocumented immigrants residing illegally in the country, including DREAMers. Republican support for the bill was lacking. According to *Roll Call*, all 23 Republicans who had voted for S. 2611 in the 109th Congress sent Majority Leader Reid a letter “warning they would not vote for the measure again and calling on the Majority Leader to allow more time to work out a

²⁵⁹ Wasem, “Brief History of Comprehensive Immigration Reform Efforts,” 3.

bipartisan deal.”²⁶⁰ After being reported out of committee, it failed cloture (i.e. end of debate before voting on a bill) by Senate Republicans. A subsequent modified bill, sponsored by Ted Kennedy, S. 1639, was introduced on June 18, 2007 and followed a similar lifecycle, filibustered just ten days later with a failure to invoke cloture by a vote of 46 to 53 with *both* Democrats and Republicans opposing the cloture motion. The death of this bill marked a hiatus on comprehensive immigration reform efforts. The House did not act on CIR legislation during this Congress.

It was not until the 113th Congress that the Legislative Branch reintroduced bipartisan efforts overhauling the immigration system. On April 16, 2013, Senator Charles Schumer (D-NY) introduced the Gang of Eight bill, S.744, “Border Security, Economic Opportunity, and Immigration Modernization Act.” The comprehensive immigration bill included a provision to provide legal status to the 11 million undocumented immigrants the U.S. With a Democratic majority in the Senate, the bill, as amended, was passed on June 27, 2013 by a vote of 68-32. An article released by the Center for American Progress called the passing of S.744 a “historic and bipartisan step toward an immigration system that works for all.”²⁶¹ Yet, the bill, like the rest of them, died and not by a filibuster. House Majority Leader John Boehner (R-OH) instead refused to consider it or any immigration reform bill under his leadership. He blamed President Obama for the unaccompanied minor crisis of 2013 to 2014, when the number of Central American unaccompanied minors crossing the border

²⁶⁰ Ibid., 3, citing John Stanton and Erin P. Billings, “Reid Set to Move Border Bill,” *Roll Call*, May 10, 2007.

²⁶¹ Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform* (Washington, D.C.: Center for American Progress, June 24, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/>.

surged at unprecedented levels. Boehner stated: “the American people and their elected officials don’t trust him to enforce the law as written. Until this changes, it is going to be difficult to make progress on this issue...It is sad and disappointing that faced with this challenge President Obama won’t work with us, but is instead intent on going it alone with executive orders that can’t and won’t fix these problems.”²⁶² The current 114th Congress has not introduced a comprehensive immigration bill of its kind.

2. *Congressional action on the DREAM Act*: The Development, Relief, and Education for Alien Minor Act, otherwise known as, the DREAM Act, is a piece of bipartisan legislation first introduced in both chambers of Congress in 2001. The DREAM Act, at its core, is legislation that would help undocumented minors who meet certain requirements to have an opportunity to enlist in the military or go to college and have a path to citizenship. It was reintroduced in the 107th Congress as S. 1291 by Senators Orrin Hatch (R-UT) and Richard Durbin (D-IL) in the Senate and as H.R. 1918 by Representatives Howard Berman (D-CA) and Chris Cannon (R-UT) in the House in 2001.²⁶³ Since then, it “has come up for a vote several times and has garnered as many as 48 co-sponsors in the Senate and 152 in the House, yet it has failed to become law.”²⁶⁴ Between 2003 and 2004, even with Republican majorities in both chambers, the Act passed the Senate Judiciary Committee twice and as an amendment to the Comprehensive Immigration Reform (CIR) bill S. 2611 in 2006. After a similar CIR

²⁶² Steven T. Dennis, “Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says,” *Roll Call*, June 20, 2014, <http://www.rollcall.com/white-house/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year/>.

²⁶³ Ibid.

²⁶⁴ *The DREAM Act* (Washington, D.C.: American Immigration Council, last modified May 2011), <http://www.immigrationpolicy.org/just-facts/dream-act>.

bill failed in 2007, the Act was considered as a stand-alone bill, S. 2205, which garnered a bipartisan majority vote in the Senate but failed to invoke cloture. The Act was reintroduced during the 111th Congress, which had a Democratic majority in both chambers, as H.R. 5281. The bill was brought to a vote and passed by a vote of 216 to 198. However, the bill died in the Senate on December 18, 2010, just five votes short of cloture (55-41).

A report by the American Immigration Council contends that one of the main reasons the DREAM Act has failed to become law, although it has garnered broad support by both parties over the years, is that former supporters, mainly Republicans, have switched positions after coming under fire from their respective constituencies and challenges by the right.²⁶⁵ For example, Senator Orrin Hatch, the original Republican co-sponsor of the bill, switched from supporting the bill to being against it after facing criticism by his home state of Utah for being “liberal” on the issue. In addition, Republican Senator John McCain of Arizona, also a former co-sponsor of the Act, has since become more conservative on the issue as a result of his 2008 presidential campaign, while trying to appeal to a more right Republican base.

The legislative history on congressional efforts in comprehensive immigration reform indicate that the Legislative Branch has only acted in immigration in so far as introducing bills, rather than enacting legislation, its primary responsibility as the lawmaking branch of U.S. government. This mere fact puts into question the efficacy of Congress and its ability to leverage its institutional capacities to garner support in both chambers and fulfill its responsibility to pass legislation. Though it is difficult to assert that Congress has not acted at all—since at least

²⁶⁵ Ibid.

introducing bills and debating them is *some* action, though not enough—the action that has an effect on the status quo is law, not bills. Passing a bill in one branch is only half of the process to properly enact legislation.

What most puts into question Congress' ability to perform its designated functions thus far, however, is not gridlock, but rather politics. The Gang of Eight Bill, the latest and most optimistic of congressional efforts to overhaul the immigration system, died in the 114th Congress because of the Republican leadership's unwillingness to even consider it. The current Senate Majority Leader Mitch McConnell (R-KY) has also chosen to retaliate against the president for creating DAPA. In a press conference in August of 2015, McConnell stated when asked if immigration reform would be passed in the current Congress, "Not this Congress. I think when the president took the action he did, after the 2014 election, he pretty much made it impossible for us to go forward with immigration this Congress."²⁶⁶ In addition, following the announcement of President Obama's executive actions in 2014, GOP leaders immediately threatened to sue and impeach the president, describing his actions as "an abuse of power," "lawless," "wrong," "wholly unconstitutional," "reckless conduct," and even asserting that the actions "literally could be the death of the Republic."²⁶⁷

This political tactic of retaliating against and criticizing the president for policies it is not in favor of (i.e. DACA/DAPA) is telling of the Legislative Branches' irresponsible conduct in

²⁶⁶ Caroline May, "Mitch McConnell: No Immigration Reform This Congress, 'Hopefully in the Next Congress,'" *Breitbart*, August 6, 2015, <http://www.breitbart.com/big-government/2015/08/06/mitch-mcconnell-no-immigration-reform-this-congress-hopefully-in-the-next-congress/>.

²⁶⁷ Quotes taken from GOP Congressmen and 2016 presidential candidates, in order, Governor Jeb Bush, Senator Ted Cruz, Former Governor Mike Huckabee, Representative Mo Brooks (AL), and Representative Trent Franks (AZ). Source: Keegan, Michael. "The GOP Responds to President Obama's Executive Actions on Immigration," *Right Wing Watch*, May 18, 2015, <http://www.rightwingwatch.org/content/edit-memo-responses-republican-presidential-candidates-former-and-current-elected-officials->.

refusing to fulfill its constitutional obligations and work with the Executive Branch in an area of policy that demands a respectful and collaborative relationship between the branches, irrespective of their political affiliations. Congress has also acted irresponsibly in their attempt to dismantle the progress the president has made at the expense of putting the nation's security at risk. In January of 2015, for example, the Republican-controlled House of Representatives voted to not fund DHS in order to strip DHS of the funding it would need to implement extended DACA and DAPA. The measure passed the House by a margin of 236-191 and thus, threatened a government shutdown. The Senate, however, did not secure enough votes to pass such a measure and instead passed a "clean" funding bill free of provisions which would have defunded President Obama's programs.

By contrast, the Executive Branch has generally acted more responsibly than the Legislative Branch with respect to acting coherently and using its distinctive strengths to address illegal immigration. First, this analysis will discuss the ways in which the president has acted responsibly in immigration and then in ways in which he has not. One of the ways Zeisberg notes a president acts responsibly while facing a problem is when "he exercises his powers in ways that prompt Congress to address" said issue.²⁶⁸

Since the last major immigration reform in 1986, various presidents have acted responsibly with respect to immigration, for many of their UPDs either were prompted by or prompted congressional action. For example, President Reagan issued an executive action shielding undocumented immigrants not covered by IRCA in 1987; the Immigration Act of 1990 incorporated President H.W. Bush's executive action shielding even more undocumented immigrants from deportation; and the Nicaraguan Adjustment and Central American Relief Act

²⁶⁸ Zeisberg, *War Powers*, 39.

and the Haitian Refugee Immigrant Fairness Act provided legal status to refugee and immigrant groups that President Clinton, via executive action, protected from deportation years prior. Under this criterion, President Obama acted responsibly when he created DACA in 2012 and DACA/DAPA in 2014, for the actions played an important part in prompting Congress to bring forth legislation, both in line with and against the president's actions. Those in line with the president's actions include the bipartisan "Gang of Eight" bill proposed in the Senate in 2013, while those against include House Republican attempts to block DHS funding for President Obama's immigration executive actions in 2015. Though both legislative attempts did not result in approval by both chambers of Congress, they constitute, at the very least, attempts of congressional action.

Another way of demonstrating responsible conduct is, as Zeisberg notes, when the president, unpersuaded by Congress' efforts (or lack thereof), takes action within his structural and processual capacities even during inter-branch conflict. In creating DACA in 2012 and then DACA/DAPA in 2014, President Obama acted responsibly in an area of policy where Congress time and again failed to act. The president enacted both measures with respect for the Legislative Branch, in that he actively called for it pass a comprehensive immigration reform bill, even promising to sign it into law. When the president created DACA, he expressed his disappointment with Congress, stating, "I have said time and time and time again to Congress that, send me the DREAM Act [which would have provided a path to citizenship to undocumented immigrants brought to the U.S. as children], put it on my desk, and I will sign it right away."²⁶⁹ But, since House Republicans blocked the bill, the president felt compelled to act within his structural and processual capacities (i.e. prosecutorial discretion) to shield millions of

²⁶⁹ Barack Obama, "Remarks by the President on Immigration," June 15, 2012, <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

young undocumented immigrants from deportation. Similarly, months prior to announcing DACA/DAPA, Obama stated, “I take executive action only when we have a serious problem, a serious issue and Congress chooses to do nothing. And in this situation, the failure of House Republicans to pass a darn bill [the 2013 “Gang of Eight” bipartisan bill which would have have created a pathway to citizenship to millions of undocumented immigrants] is bad for our economy’ and bad for our country.”²⁷⁰ Lack of legislation once again compelled the president to act by creating expanded DACA and DAPA to shield a larger group of undocumented immigrants from deportation.

The president also acted responsibly in taking care that immigration laws were faithfully executed. While Congress debated impending immigration bills, President Obama (controversially) deported undocumented immigrants in record numbers. As of July 2014, “more than 4 million people [had] been removed from the United States since 2001, with 2 million people removed during the Obama administration alone.”²⁷¹ DHS claims that during Obama’s first six years in office, the period from 2009 to 2014, approximately 2.4 million undocumented immigrants were removed from the United States.²⁷² With a removal rate of nearly 400,000 a year, a figure that DHS, with the resources Congress provides it is able to remove per year, the president is “one of the most effective enforcers of the immigration laws” and accordingly, “cannot be accused of not enforcing the immigration laws.”²⁷³ Data alone proves that arguments claiming the president violated the Take Care Clause by creating DACA and DAPA without considering the fact that the president is using (and even exhausting) the resources delegated to

²⁷⁰ Seung Min Kim and Jennifer Epstein, “Obama to take action on immigration,” *POLITICO*, July 1, 2014, <http://www.politico.com/story/2014/06/obama-immigration-reform-108447>.

²⁷¹ Fitz, *What the President Can Do on Immigration If Congress Fails to Act*, 2.

²⁷² *Ibid.*

²⁷³ Aldana, “Obama’s Constitutional Authority on Immigration is Well-Recognized.”

him to remove undocumented immigrants, are unsubstantiated. A president cannot, in practice, disregard the Take Care Clause when the Executive Branch exhausts all of its resources provided to him to faithfully execute the law.

It is important to note, however, that in acting responsibly, new problems ensued. President Obama's mass deportations led to a public outcry particularly among immigration activists who began to call him "Deporter-in-Chief." This in turn impaired his political reputation and approval among liberal and Hispanic factions. Most importantly, the strict law enforcement prompted state and local municipalities to pass legislation that created "sanctuary cities," cities that have policies designed to prohibit local law enforcement from complying with Immigration and Customs Enforcement (ICE). These sanctuary cities, which today amount to over 300 nationwide, do not prosecute nor report resident undocumented immigrants to federal law enforcement.²⁷⁴ Whether these cities have or could impede the president from faithfully executing immigration law is an issue that, at least today, necessitates further study.

Although the president has acted responsibly in immigration in the various respects mentioned above, he has also acted irresponsibly. A major critique of President Obama in regards to immigration is that he waited nearly six years to act, acting only after re-election in 2012. When he campaigned for the presidency in 2008, he promised, "I can guarantee that we will have, in the first year, an immigration bill that I strongly support."²⁷⁵ No bill was proposed even as the Democratic Party controlled both chambers of Congress. He announced the Immigration

²⁷⁴ Bryan Griffith, Jessica Vaughan and Marguerite Telford, *Map: Sanctuary Cities, Counties, and States* (Washington, D.C.: Center for Immigration Studies, January 2016), accessed March 2016, <http://cis.org/Sanctuary-Cities-Map>.

²⁷⁵ Josh Hicks, "Obama's failed promise of a first-year immigration overhaul," *The Washington Post*, September 25, 2012. https://www.washingtonpost.com/blogs/fact-checker/post/obamas-failed-promise-of-a-first-year-immigration-overhaul/2012/09/25/06997958-0721-11e2-a10c-fa5a255a9258_blog.html

Accountability Executive Action, the largest executive action on immigration to date, shortly after the Republican Party took control of the Senate in midterm elections, resulting in Republican majorities in both chambers of Congress, and at a time when “prospects for a congressional vote on immigration reform waned.”²⁷⁶ Unsurprisingly, twenty-six states, led by Texas, sued the administration. This puts into question whether President Obama truly acted responsibly in an area of policy so divided on partisan lines.

v. Constitutional Politics

The final step in the relational conception model is to assess the moments of constitutional politics in terms of the relevant substantive and processual standards. Zeisberg observes that “given the lack of an ultimately authoritative interpreter, it is the branches themselves that must construct useful meaning out of these substantive terms.”²⁷⁷ In *Texas v. United States*, the political nature of the dispute over which branch of government has the constitutional authority to promulgate DACA/DAPA is evident. While the federal government contends that DHS’s discretion over enforcement is consistent with the president’s constitutional “duty to take care that the laws be faithfully executed,” citing *Heckler v. Chaney* (1985), where the Court recognized that “faithful” execution of the law implores the agency to “balance[e]...a number of factors,” such as allocation of resources and compatibility with existing overall agency policies,²⁷⁸ the Plaintiffs, twenty-six conservative states and critics, ignoring the failure of Congress to provide him adequate resources, still contend the president is not taking care to enforce the law.

²⁷⁶ Danielle Renwick and Brianna Lee, *The U.S. Immigration Debate* (New York: Council on Foreign Relations, February 26, 2015), <http://www.cfr.org/immigration/us-immigration-debate/p11149>.

²⁷⁷ Zeisberg, *War Powers*, 21.

²⁷⁸ *The Department of Homeland Security’s Authority*, 4.

Members of Congress are similarly engaged in interpretive struggle. On the one hand, a coalition of Republican Members of Congress, three senators and sixty-five House members, signed an *amicus brief* filed by the conservative advocacy group, the American Center for Law and Justice, claiming the actions are illegal.²⁷⁹ On the other hand, fifteen Democratic states, including California, New York, and the District of Columbia, filed a separate *amicus brief* stating the programs are necessary given congressional gridlock on immigration reform and that they denounce mass deportation for logistical and ethical reasons. 181 House Democrats similarly filed an *amicus brief* in support of the president’s executive actions.²⁸⁰

However, where interpretative struggle will matter most is when the constitutional conflict posed by *Texas v. United States* is judged by the Supreme Court in June. The Supreme Court is composed of judges nominated and confirmed on some level of political and ideological criteria depending on the partisan affiliation of both the president that nominates them and the Senate that confirms them. Thus, like Members of Congress, even judges’ “constitutional positions are inflected by [some level of] partisanship and other forms of affiliative reasoning.”²⁸¹ Although the District Court for the Southern District of Texas Brownsville Division and the Fifth Circuit Court of Appeals, leaned conservative—the latter being “among the most conservative courts in the country”—and consequently ruled against the actions, the Supreme Court’s ideological leaning on the constitutionality of DACA/DAPA is unclear.²⁸²

²⁷⁹ See *Amici Curiae* of the American Center for Law & Justice and the Committee to Defend the Separation of Powers in Opposition to Defendants’ Emergency Expedited Motion to Stay the Preliminary Injunction, *United States v. Texas*, No. 15-674 (2016).

²⁸⁰ See Brief for 181 Members of the United States House of Representatives as Amici Curiae in Support of Defendants-Appellants, *United States v. Texas*, No. 15-674 (2016).

²⁸¹ Zeisberg, *War Powers*, 248.

²⁸² Ian Millhiser, “The Simply Breathtaking Consequences of Justice Scalia’s Death,” *Think Progress*, February 13, 2016, <http://thinkprogress.org/justice/2016/02/13/3749464/the-simply-breathtaking-consequences-of-justice-scalias-death/>.

With the passing of conservative Justice Antonin Scalia in February, the Court is likely to split 4-4, with Justice Elena Kagan (Democrat, appointed by Barack Obama), Justice Sonia Sotomayor (Democrat, appointed by Barack Obama), Justice Stephen Breyer (Democrat, appointed by Bill Clinton), and Justice Ruth Bader Ginsburg (Democrat, appointed by Bill Clinton) on the liberal side of the court, likely to vote in favor of the U.S. government, and Justice Samuel Alito (Republican, appointed by George W. Bush), Chief Justice John Roberts (Republican, appointed by George W. Bush), Justice Clarence Thomas (Republican, appointed by George H.W. Bush) and possibly Justice Anthony Kennedy (Republican, appointed by Ronald Reagan) on the conservative side of the court, likely to vote against the U.S. government. In this scenario, the Supreme Court would uphold the appellate decision striking down the executive actions on an APA violation. Alternatively, the Court may order the case to be reargued once a new justice is sworn in who could break the deadlock. In any case, the justices' constitutional assessment will ultimately depend on their respective understandings of Executive power which point to different conclusions.

As this research paper has demonstrated, there is strong evidence that President Theodore Roosevelt's stewardship theory, President Franklin D. Roosevelt's prerogative theory, and Zeisberg's relational model support the president's executive actions. To recall, Theodore Roosevelt's stewardship theory held that the president can do anything not explicitly forbidden by the Constitution or by laws passed by Congress. FDR's prerogative theory held that the president's executive powers broaden when faced with emergency situations, such as war. In tandem, these theories justify President Obama's decision to act on immigration by creating the extended DACA and DAPA programs for: 1) the president did not act contrary to an explicit denial of power in the Constitution or laws passed by Congress; and 2) the president acted when

faced with an illegal immigration crisis that today includes roughly 11 million undocumented immigrants, or about 3.5 percent of the U.S. population, residing in the country.

Zeisberg's relational model, which states that branches of government generate constitutional authority when they "mobilize their institutional capacities, develop good understandings of the security needs of the moment, and place themselves in responsive relationship," justifies President Obama's executive actions still more specifically.²⁸³ With respect to DACA/DAPA, the Executive Branch has fulfilled its constitutional responsibilities far better than the Legislative Branch, which has failed to properly act on immigration. Whereas the president has deported an unprecedented number of undocumented immigrants (which he is able to deport with the resources Congress has allotted it) and owing to these limited resources has used his discretionary power to fulfill his domestic and foreign policy powers, Congress, as an institution, has not fulfilled its constitutional responsibility to reform the country's outdated immigration laws. In light of Congress' failures and the Executive's responsible conduct, the president has rightfully generated the constitutional authority to promulgate DACA and DAPA.

Yet, the justices may also adopt a more conservative interpretation of executive powers, one which narrowly limits the Executive Branch's ability to enact policy in immigration. For example, President William Howard Taft's constitutional theory, which stated that the president derived his powers strictly from powers enumerated in the Constitution or granted by Congress, would rule DACA/DAPA as constitutionally groundless. This interpretation of executive power is weak in part because of the increase of executive powers over time, which have generally allowed the president broader domestic and foreign policy powers than ever before, and the rise of the administrative state in the U.S. contemporary practice of government, which puts into

²⁸³ Zeisberg, *War Powers*, 45.

question whether the courts, even the Supreme Court, has any role—obligated or empowered—to serve as a check on the actions of administrative agencies such as DHS.²⁸⁴ There are reasons, to be sure, to be concerned about whether these developments are endangering the constitutional system of separate and limited powers and checks and balances. Nonetheless, the strongest case lies in favor of President Obama’s actions.

V. Conclusion

As contentious and polarizing as immigration has become in recent years, this does not remove the U.S. government’s responsibility to coherently and appropriately address the illegal immigration issues that currently plague the nation. The government as a whole has acted mostly irresponsibly in both enacting law and enforcing it, to the detriment of millions of hardworking and otherwise law-abiding immigrants and their families. However, as this research paper has proved, of the two branches responsible for enacting and enforcing immigration policies, there is no question that the Executive Branch has acted with the most responsibility and coherency in addressing the illegal immigration crisis of today. By creating DACA in 2012, the president has provided deportation relief to nearly one million undocumented youth, and hopes to do the same with the extension of DACA and DAPA, announced in 2014, which would provide deportation relief to millions of undocumented immigrants, many of whom are the parents of Americans raised on U.S. soil. Congressional deadlock in passing comprehensive immigration reform does not alone justify the actions President Obama has taken and hopes to take. It is equally the Executive Branch’s responsible conduct, as outlined in the assessment of President Obama’s

²⁸⁴ JV Delong, “Texas v. U.S. (The Immigration Case) And The Administrative State,” *Forbes*, May 30, 2015, <http://www.forbes.com/sites/jvdelong/2015/05/30/texas-v-u-s-the-immigration-case-and-the-administrative-state/2/#f3dbfaf559dd>.

actions under the relational conception, that has allowed it to generate the constitutional authority to do so. The Supreme Court must recognize this significant fact and rule accordingly by lifting the injunction and letting DACA/DAPA proceed implementation immediately.

Aside from its constitutional legitimacy, lifting the injunction on DACA/DAPA would be both beneficial to the U.S. as a whole and simply, the right thing to do. DACA/DAPA would be beneficial to the country as a whole in that the initiatives would benefit millions of people, their families and their communities. They would allow employed undocumented individuals, previously too afraid to come out of the shadows for fear of deportation, to finally come out and have access to better jobs and improved working conditions. The economic benefits too would be plentiful. By providing deferred action to employed undocumented immigrants, the programs would benefit the economy at large, much like DACA has, “by permitting greater levels of contribution to the workforce by educated individuals who previously had limited employment opportunities.”²⁸⁵ DACA/DAPA would also be beneficial because they would allow families, at least temporarily, to stay together and feel secure as a family unit.

Despite its benefits, DACA/DAPA does not solve the core deficiencies in the current U.S. immigration system and nor does it provide the true relief that undocumented immigrants so desperately need and deserve: a path to citizenship. Congress must once and for all set aside politics and do its job. As President Obama stated in his announcement of DACA/DAPA in November of 2014: “We are and always will be a nation of immigrants. We were strangers once, too. And whether our forebears were strangers who crossed the Atlantic, or the Pacific, or the Rio Grande, we are here only because this country welcomed them in, and taught them that

²⁸⁵ Brief of American Immigration Council, National Immigration Law Center, Service Employees International Union. Advancement Project, LatinoJustice, PRLDEF, The Leadership Conference on Civil and Human Rights, and Others As *Amici Curiae*, *United States v. Texas*, No. 15-674 (2016).

to be an American is about something more than what we look like, or what our last names are, or how we worship. What makes us Americans is our shared commitment to an ideal -- that all of us are created equal, and all of us have the chance to make of our lives what we will.”²⁸⁶ And thus, not just undocumented immigrants, but rather, America can no longer wait.

²⁸⁶ Obama, “Remarks by the President in Address to the Nation on Immigration.”

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