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## Executive Action On Immigration: Constitutional or Direct Conflict?

Todd Curtin

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# Executive Action On Immigration: Constitutional or Direct Conflict?

## **Cover Page Footnote**

Many thanks to Professors Joseph Hurt and Robert Minarcin for their guidance in writing this article.

# EXECUTIVE ACTION ON IMMIGRATION: CONSTITUTIONAL OR DIRECT CONFLICT?

Todd Curtin<sup>A</sup>

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## INTRODUCTION

In the United States, many immigrants—both of legal and illegal status—may never understand the fallout of the events that took place on November 20, 2014. On that day, the White House released a press statement notifying viewers that President Obama would do everything within his executive powers to solve the problems surrounding the immigration system.<sup>1</sup> The press release went on to explain that every president in office since the Eisenhower Administration has used executive authority to address immigration issues.<sup>2</sup> The White House was clearly communicating to both legal and illegal immigrants about the opportunity for change.

On the evening of November 20, 2014, President Obama laid out the steps he planned to take to fix the country’s “broken immigration system.”<sup>3</sup> The White House made it clear that the President would

<sup>A</sup> J.D., Florida A&M University College of Law, 2015. Many thanks to Professors Joseph Hurt and Robert Minarcin for their guidance in writing this article.

1. Press Release, The White House, Here’s What the President is Doing to Fix our Broken Immigration System (Nov. 20, 2014), *available at* 2014 WL 6478419, at \*1.

2. *Id.*

3. Lindsay Holst, *Weekly Address: Immigration Accountability Executive Action*, THE WHITE HOUSE (Nov. 22, 2014, 6:00 AM), <https://www.whitehouse.gov/blog/2014/11/21/weekly-address-immigration-accountability-executive-action>.

be acting with legal authority in taking these steps.<sup>4</sup> This paper addresses whether or not the Obama Administration did, in fact, act with legal authority by initiating the following steps using his executive authority: “cracking down on illegal immigration at the border; deporting felons, not families; and accountability through criminal background checks and taxes.”<sup>5</sup>

President Obama, acting through Secretary of Homeland Security Jeh Johnson, had two primary objectives in issuing executive actions on immigration.<sup>6</sup> The first was to expand the already-enacted policy under the Deferred Action for Childhood Arrivals (DACA) program.<sup>7</sup> The second was to create a new program for a new class of citizens, called the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.<sup>8</sup> However, the Obama Administration has hit a massive roadblock in introducing these actions. On February 16, 2015, in *Texas v. United States*, United States District Court Judge Andrew Hanen issued a temporary injunction that prevents the Department of Homeland Security from accepting applications under the new, expanded portions of the DACA program.<sup>9</sup> The order also enjoined the implementation of the new DAPA program; however, the injunction does not hinder or change any of the already existing policies under DACA.<sup>10</sup>

Judge Hanen issued the order because the Obama Administration, in expanding DACA and creating DAPA, created a substantive rule without abiding by the procedural requirements set out in the Administration Procedure Act (APA).<sup>11</sup> The court held that the Obama Administration was required to follow the APA requirements in issuing DAPA and failed to do so by not providing the proper “notice-and-comment rule making procedure mandated” by the APA.<sup>12</sup> Judge Hanen avoided discussing broad constitutional claims or “tackling

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4. *Id.*

5. *Id.*

6. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2015).

7. *Id.*

8. *Id.*

9. Austin T. Fragomen, Jr., & Careen Shannon, *DHS Postpones Expanded DACA Applications After Federal Court Injunction*, FRAGOMEN BUS. ALERTS, Feb. 18, 2015, available at Westlaw, FRAGALERTS 1 2-18-15.

10. *Id.*

11. *Texas v. United States*, 86 F. Supp. 3d 591, 604, 677 (S.D. Tex. Feb. 16, 2015).

12. *Id.* at 671. *See also* 5 U.S.C.A. § 553 (2014).

presidential powers head-on.”<sup>13</sup> Thus, the order issued by Judge Hanen did not specifically address any constitutional claims falling under the Take Care Clause or the separation of powers doctrine.<sup>14</sup> However, this paper addresses those issues head-on in order to make an accurate prediction of the arguments and potential decisions that the court could face if the injunction is lifted.

Before addressing the constitutional questions, however, a correction must first be made to the media in its misuse of the terms “executive order” and “executive action.” Judge Hanen correctly addressed the public’s misunderstanding of the two in the following:

Finally, both sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the . . . Executive Branch[’s] . . . public statements to the contrary, there are no executive orders or other presidential proclamations or communiqué that exist regarding DAPA. The DAPA Memorandum issued by Secretary Johnson is the focus of this suit.<sup>15</sup>

Judge Hanen correctly asserted that President Obama has not actually signed or executed any formal documents regarding the expansion of DACA or creation of DAPA. However, in his statements to the media, the President has accepted responsibility for these actions.<sup>16</sup>

For these reasons, the President cannot escape constitutional scrutiny for his own actions by seeking cover from his cabinet members. Additionally, lawyers for President Obama have admitted that Secretary Johnson acted in accordance with the President’s requests.<sup>17</sup> Based on these facts, executive orders and executive actions can and should be used interchangeably. This paper groups both President Obama and Secretary Johnson’s actions collectively under the Executive Branch.

Due to the communications by the President and the actions of Secretary Johnson, the issue of existing legal authority to expand DACA and create DAPA still remains. To answer this question, this

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13. David Ingram & Mica Rosenberg, *Texas Judge’s Immigration Rebuke May Be Hard to Challenge*, REUTERS (Feb. 18, 2015), <http://www.reuters.com/article/2015/02/18/us-usa-immigration-courts-analysis-idUSKBN0LM02Y20150218>.

14. *Texas*, 86 F. Supp. 3d at 676.

15. *Id.* at 607.

16. Press Release, The White House, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

17. Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Preliminary Injunction at ¶ 1, *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.C. Cir. 2014) (No. 1:14CV01966), 2014 WL 7330455 [hereinafter Defs.’ Mem. of P. & A.].

paper analyzes the expansion of DACA, creation of DAPA, the courts' responses to these measures, and the constitutional framework of executive action. In the end, applying the framework to President Obama's actions will show that the President did not act within his legal authority, and thereby violated the United States Constitution.

## I. EXPANSION OF DACA AND CREATION OF DAPA

In order to understand whether the President and the Department of Homeland Security (DHS) are acting within their legal authority, one must analyze the existing DACA program, the proposed expansion of DACA policies, and the newly proposed DAPA program. Understanding the differences between the original program and the new proposals is necessary in this analysis.

### A. DACA

DACA was originally initiated on June 15, 2012, under the direction of then Secretary of Homeland Security Janet Napolitano.<sup>18</sup> Secretary Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."<sup>19</sup> Secretary Napolitano issued this memorandum to her department heads, specifically U.S. Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement.<sup>20</sup> Throughout her memorandum, she set forth how department heads could use their prosecutorial discretion in cases involving young individuals who were brought to the United States during their childhood and know only this country as home.<sup>21</sup> Secretary Napolitano's memorandum instructed department heads to exercise *prosecutorial discretion* for illegal immigrants if they met the following five criteria:

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18. Janet Napolitano, Memorandum from the U.S. Dep't of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children 1, 1 (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano Memo].

19. *Id.*

20. *Id.*

21. *Id.* Prosecutorial discretion is used by a governmental agency that has the discretion to enforce the law against an individual. It is a "choice whether to exercise coercive power of the state in order to deprive an individual of a liberty or property interest" when the law allows the governmental agency authority to take action. *See* U.S. DEP'T OF HOMELAND SEC. & CUSTOM ENFORCEMENT OFF. OF RETENTION & REMOVAL, DETENTION AND DEPORTATION OFFICER'S FIELD MANUAL 20.9 (March 27, 2006), *available at* <http://www.immigration.com/sites/default/files/icedetention.pdf>.

[the immigrant] came to the United States under the age of sixteen; has continuously resided in the United States for a least five years preceding [June 15, 2012] and is present in the United States on [June 15, 2012]; is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and is not above the age of thirty.<sup>22</sup>

At the end of the memorandum, it was noted that only Congress can grant substantive rights regarding immigration status and citizenship, but the executive branch still has the authority to enact policies that allow exercise of discretion within the framework of existing law.<sup>23</sup>

### B. Expanding DACA

The expanded DACA program—announced on November 20, 2014, under the direction of Secretary of Homeland Security Jeh Johnson<sup>24</sup>—was issued via memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents.”<sup>25</sup> Secretary Johnson issued this memorandum to the same department heads as Secretary Napolitano, specifically U.S. Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement.<sup>26</sup> Ironically, Secretary Johnson’s memorandum maintained the same title as that of Secretary Napolitano with respect to children; however, he created a new program with a different title regarding parents of U.S. citizens or permanent residents.

Secretary Johnson’s memorandum specifically notes that it is “intended to reflect new policies for the use of deferred action” by way of Secretary Napolitano’s June 15, 2012 memorandum.<sup>27</sup> Therefore, there is no question that Secretary Johnson enacted new policies that

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22. Napolitano Memo, *supra* note 18.

23. *Id.*

24. Jeh Charles Johnson, Memorandum from the U.S. Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents 1 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter Johnson Memo].

25. *Id.*

26. *Id.*

27. *Id.*

had not yet been executed. Secretary Johnson further noted that the legal authority for this policy was well established because DHS has the power to exercise prosecutorial discretion, as does every other law enforcement agency.<sup>28</sup> The memorandum also stated that deferred action is allowed under the memorandum because it is a mechanism that has been in place and implemented for decades, “by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.”<sup>29</sup> Secretary Johnson acknowledged that deferred action historically has been used on a case-by-case basis, but the expansion of DACA policies should be treated no differently.<sup>30</sup>

Secretary Johnson’s memorandum instructed Department heads to expand DACA in the following three areas:

[ (1) DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or today . . . ; (2) [t]he period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments . . . ; and (3) [i]n order to align with [DAPA] the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.<sup>31</sup>

Secretary Johnson, acting under President Obama, clearly expanded DACA. First, he removed the age cap on any potential applicant.<sup>32</sup> An applicant will no longer need to be under the age of thirty-one to apply for deferred action.<sup>33</sup> Second, he extended the DACA renewal and work authorizations from two years to three years.<sup>34</sup> Finally, he adjusted the date of entry requirement by moving it up almost three years to allow more applicants to fit within the criteria of DACA.<sup>35</sup> By expanding each of the aforementioned policies, there is no question that Secretary Johnson and President Obama attempted to enlarge the application pool for illegal immigrants to receive potential deferred action, which would allow them to remain legally in the United States for a period of time.

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28. *Id.*

29. Johnson Memo, *supra* note 24, at 2.

30. *Id.*

31. *Id.* at 3-4.

32. *Id.* at 3.

33. *Id.*

34. *Id.* at 3-4.

35. Johnson Memo, *supra* note 24, at 4.

### C. Creation of DAPA

In addition to expanding DACA, Secretary Johnson created a new program—Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)—“for exercising prosecutorial discretion . . . on a case-by-case basis”<sup>36</sup> if the applicant:

[has], on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident; ha[s] continuously resided in the United States since before January 1, 2010; [is] physically present in the United States on the date of this memorandum, and at the time of making a request for consideration of deferred action with the USCIS; ha[s] no lawful status on the date of this memorandum; [is] not an enforcement priority as reflected in the November 20, 2014 Polices for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and present[s] no other factors that, in the exercise of discretion makes the grant of deferred action inappropriate.<sup>37</sup>

Secretary Johnson supported the creation of DAPA for two reasons. First, the DHS does not have enough resources to locate and remove all illegal immigrants in the United States; second, there are humanitarian concerns that justify implementation of the program.<sup>38</sup> Effectively, by way of creating DAPA, Secretary Johnson created a new class for the protection of illegal immigrants who could apply for deferred action and remain legally in the United States for a period of time. Therefore, both President Obama and Secretary Johnson have made the potential applicant pool even larger for illegal immigrants who could apply for deferred action.

Like Secretary Napolitano, Secretary Johnson, at the end of his memorandum, noted that these new policies do not create any substantive rights regarding immigration status or citizenship.<sup>39</sup> He also stated that the executive branch must establish the necessary policies for the exercise of prosecutorial discretion within the framework of the existing law.<sup>40</sup> These statements at the end of the memoranda by Secretary Napolitano and Secretary Johnson indicate that they foresaw the division these actions would create within Congress. Both Secretary Johnson and Secretary Napolitano asserted the power to defer action with respect to certain illegal immigrants based upon historical practice.

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36. *Id.*

37. *Id.*

38. *Texas*, 86 F. Supp. 3d at 613.

39. Johnson Memo, *supra* note 24, at 5.

40. *Id.*

## II. THE CONFRONTATION CASES

Shortly after President Obama addressed the nation on Secretary Johnson's memorandum expanding DACA and creating DAPA, a number of courts throughout the United States heard challenges based on these actions. Three cases in particular have addressed the issues associated with the executive actions. Each case addresses the potential constitutional arguments. For this reason, it is important to understand these cases and analyze the potential constitutional arguments that may arise if the injunction in *Texas v. United States* is lifted.

A. *Arpaio v. Obama*

In *Arpaio*, the elected Sheriff in Maricopa County, Arizona, brought suit and sought a preliminary injunction against President Obama, Secretary Johnson, and other federal officials.<sup>41</sup> His suit was based on the President's televised address to expand deferred action for DACA and create DAPA, and he asserted that the actions were "unconstitutional, otherwise illegal, and should be stopped from going into effect."<sup>42</sup> The defendants moved to dismiss the case on the ground that the sheriff did not have standing to bring the lawsuit.<sup>43</sup> The court had to decide (1) whether to grant the Sheriff's motion for preliminary injunction, or (2) whether to grant the defendants' motion to dismiss for lack of standing.<sup>44</sup>

The sheriff pointed out that, as a result of the executive order, the President and his Cabinet Secretaries were granting illegal amnesty to thousands of undocumented immigrants in the United States.<sup>45</sup> He argued that the executive action was illegal and provided three constitutional reasons in support of this argument.<sup>46</sup> First, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."<sup>47</sup> Second, "Congress shall have Power . . . To establish an uniform Rule of Naturalization."<sup>48</sup> Third, there is no provision in the

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41. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 190 (D.C. Cir. 2014).

42. *Id.*

43. *Id.* at 196.

44. *Id.*

45. Civil Complaint at 10, *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.C. Cir. 2014) (No. 1:14-cv-01966), 2014 WL 6542779, at \*3 [hereinafter *Arpaio* Complaint].

46. *Id.* at 12-18.

47. *Id.* at 3 (citing U.S. CONST. art. I, § 1).

48. *Id.* (citing U.S. CONST. art. I, § 8).

United States Constitution that dictates power to the executive branch “with regard to immigration, admission of aliens to the country, or naturalization or citizenship.”<sup>49</sup> With respect to the latter, the only duty the President has is to make sure that he “shall take Care that the Laws be faithfully executed . . . .”<sup>50</sup>

Regarding the first constitutional reason, the sheriff argued that the President violated Article I, Section 1 of the United States Constitution because President Obama sought to legislate in place of Congress.<sup>51</sup> DACA and the Executive Order Amnesty are unconstitutional because legislation must pass both the Senate and House of Representatives before being sent to the President under the Presentment Clause.<sup>52</sup> Here, the sheriff argued that the President and his administration legislated unilaterally and then “dare[d] Congress to disagree.”<sup>53</sup>

In addressing the second and third points, the sheriff argued that the President and his administration could not use discretion in determining how much congressional funding could be used on immigration or in deciding not to fully enforce a law.<sup>54</sup> The sheriff argued that the Supreme Court held in *Train v. City of New York* that the President does not have the power to “frustrate the will of Congress by killing a program through impoundment.”<sup>55</sup> The sheriff’s argument was very simple—the President and his administration were tweaking the law that was already on the books by using a tool called *deferred action*, and deferred action cannot be used because it goes against the intent of Congress in approving already existing clear immigration law and regulations.<sup>56</sup>

The Executive Branch, in its response memorandum to the sheriff’s request for a preliminary injunction, argued that their executive action was legal for two reasons. First, the Executive Branch has the authority to exercise discretion over immigration enforcement.<sup>57</sup>

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49. *Id.*

50. *Id.* (citing U.S. CONST. art. II, § 3).

51. *Arpaio Complaint*, *supra* note 45, at 6.

52. *Id.* at 7. *See also* U.S. CONST. art. I, § 7, cl. 2-3 (“Every Bill which shall have passed the House of Representatives and Senate, shall, before it become Law, be presented to the President of the United States.”).

53. *Arpaio Complaint*, *supra* note 45, at 7.

54. *Id.*

55. *Id.* (citing *Train v. City of New York*, 420 U.S. 35 (1975)).

56. *Id.* at 3.

57. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 4.

Second, the Executive Branch has long exercised the use of deferred action in immigration enforcement.<sup>58</sup>

In addressing the first point, the President argued that Congress has conferred to the Secretary of Homeland Security the right to supervise and enforce immigration laws.<sup>59</sup> Because this authority has been granted, it allows the Secretary to perform any such acts, including establishing regulations and issuing instructions, that he deems necessary to perform this duty as delegated by Congress.<sup>60</sup> The President argued that the appropriations from Congress are inadequate to allow the removal of all illegal immigrants.<sup>61</sup> For this reason, the Secretary must use the appropriations granted by Congress for the highest priorities, such as controlling illegal immigrants attempting to cross over the border.<sup>62</sup>

The President's second argument was based on the premise that deferred action has been the historical practice for many years,<sup>63</sup> as reflected in the following actions:

[f]rom 1956 to 1990, discretionary mechanisms similar to deferred action were used to defer enforcement against aliens who were beneficiaries of approved visa petitions,<sup>64</sup> nurses who were eligible for H-1 visas,<sup>65</sup> nationals of designated foreign states,<sup>66</sup> and the ineli-

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58. *Id.* at ¶ 5.

59. *Id.* at ¶ 4. *See* 8 U.S.C.A. § 1103(a)(1) (2014) (“The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, that determination and ruling by the Attorney General with respect to all question of law shall be controlling.”) (emphasis added).

60. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 50. *See* 8 U.S.C.A. § 1103(a)(3) (2014) (“He shall establish such regulations; prescribe such forms of bond, reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.”).

61. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 10.

62. *Id.* at ¶¶ 9, 10.

63. *Id.* at ¶ 12. *See also Arpaio*, 27 F. Supp. 3d at 193 (“Deferred action is simply a decision by an enforcement agency not to seek enforcement of a given statutory or regulatory violation for a limited period of time. In the context of the immigration laws, deferred action represents a decision by DHS not to seek the removal of an alien for a set period of time. In this sense, eligibility for deferred action represents an acknowledgment that those qualifying individuals are the lowest priority for enforcement.”).

64. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 12; *see United States ex. rel Parco v. Morris* 426 F. Supp. 976, 979-80 (E.D. Pa. 1977).

65. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 12; *see Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776-01 (Jan. 19, 1978) (finding foreign nurses were allowed in the United States on a temporary basis under the Immigration Nationality Act in order to practice if they secured temporary licenses and passed the State examinations for permanent licensure).

gible spouses and children of aliens who have been granted legal status under the immigration Reform and Control Act of 1956.<sup>67</sup>

The President noted that the Supreme Court, too, has recognized that the Executive Branch has been granted the authority to exercise prosecutorial discretion in the field of immigration through deferred action.<sup>68</sup> In recent years, the Supreme Court reaffirmed the notion that deferring the initiation of immigration removal proceedings falls within the Executive Branch's authority.<sup>69</sup>

The District Court in *Arpaio* noted that the Immigration and Nationality Act (INA) is the statute governing immigration and naturalization practices.<sup>70</sup> The INA, which was approved by Congress, separates immigrants into two categories—those who are inadmissible upon their first entrance into the United States,<sup>71</sup> and those immigrants who are subject to removal once they arrived in the United States.<sup>72</sup> Additionally, the court stated that the immigration laws require prioritization because, per the DHS, there are approximately 11.3 million undocumented immigrants who may qualify for removal residing in the United States, but the agency only has enough resources to remove about 400,000 of those immigrants.<sup>73</sup>

The Obama Administration argued that Secretary Johnson issued the DACA and DAPA directives in accordance with his authority under the INA.<sup>74</sup> As mentioned above, however, the sheriff argued that the President and DHS were not acting pursuant to the INA because

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66. Defs.' Mem. of P. & A., *supra* note 17, at ¶ 12; see CHARLOTTE J. MOORE ET AL., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES: A REPORT 9, 12-14 (1980), available at <http://files.eric.ed.gov/fulltext/ED206779.pdf>.

67. Defs.' Mem. of P. & A., *supra* note 17, at ¶ 12; see Memorandum from Gene McNary, Commissioner, INS, Family Fairness: Guidelines for Voluntary Departure Under 8 C.F.R. 242.5 for the Ineligible Spouses and Children of Legalized Aliens to Regional Commissioners, INS (Feb. 2, 1990), available at <http://cdn.factcheck.org/UploadedFiles/2014/11/McNary-memo.pdf>.

68. Defs.' Mem. of P. & A., *supra* note 17, at ¶ 13; *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.").

69. Defs.' Mem. of P. & A., *supra* note 17, at ¶ 13; see *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.").

70. *Arpaio*, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1101 (2015).

71. *Arpaio*, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1182 (2015).

72. *Arpaio*, 27 F. Supp. 3d at 192; see 8 U.S.C.A. § 1227 (2015).

73. *Arpaio*, 27 F. Supp. 3d at 192-93.

74. Defs.' Mem. of P. & A., *supra* note 17, at ¶ 2.

they were “frustrating the will of Congress” by using deferred action as a tool to circumvent enforcing the INA to the fullest extent practicable.

The court did address the constitutional arguments presented by both parties. Specifically, the court, by way of dictum, acknowledged that “the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of law to the unconstitutional rewriting of the law for the following reason: the programs still retain provision for meaningful case-by-case review.”<sup>75</sup> Furthermore, the court agreed with the President in that “case-by-case decision making reinforces the conclusion that the challenged programs amount only to the valid exercise of prosecutorial decision.”<sup>76</sup>

The court dismissed the sheriff’s complaint on the basis that the sheriff was unable to demonstrate how the case could be successfully litigated on the merits, and the sheriff did not suffer an irreparable harm, thus finding a lack of standing.<sup>77</sup> Had the *Arpaio* court ruled on the legal authority of the Executive Branch in expanding DACA and creating DAPA, the court would likely have concluded the President and Secretary Johnson acted with legal authority.

### B. *United States v. Juarez-Escobar*

The District Court in *Juarez-Escobar* had a much different take on the constitutionality of the Executive Branch’s recent executive action on DACA and DAPA. The court, on its own motion, held a hearing before sentencing the defendant, who was an illegal immigrant due to his re-entering the United States.<sup>78</sup> Ultimately, the court had two issues to examine. The first was whether the expansion of DACA and creation of DAPA fell within the President’s executive authority.<sup>79</sup> If so, then the second issue the court had to examine was whether the President’s executive action would unjustly and unequally impact the defendant, because the court has a duty to avoid sentencing disparities among defendants who undergo similar situations.<sup>80</sup>

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75. *Arpaio*, 27 F. Supp. 3d at 209; see *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”).

76. *Arpaio*, 27 F. Supp. 3d at 210.

77. *Id.* at 207.

78. *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 777 (W.D. Pa. 2014).

79. *Id.* at 784.

80. *Id.*

This case is unique because Judge Schwab asked the Government, which was trying to deport the defendant, why deferred action did not apply.<sup>81</sup> The Government responded by stating that executive action did not apply in this case because it applies only to “civil immigration enforcement status.”<sup>82</sup> Defense counsel, however, was quick to point out that the recent executive action by Secretary Johnson could be “an additional avenue of deferred action that will be available for undocumented parents of United States citizen[s] or permanent resident children” and could apply to the defendant in this case.<sup>83</sup>

The court held that the Executive Branch acted illegally because, even if Congress does not act, an unconstitutional executive action does automatically become constitutional, and executive action becomes legislation if it exceeds the scope of prosecutorial discretion.<sup>84</sup> Judge Schwab, in addressing the court’s first point, noted, “Congress’s lawmaking power is not subject to Presidential supervision or control.”<sup>85</sup> The court cited many statements by President Obama in attempting to force Congress’s hand. Specifically, he noted that President Obama pressured Congress by telling it to “pass a bill” and that “the day I sign that bill into law, the actions I take will no longer be necessary.”<sup>86</sup> These statements are indicative that the President acted without congressional approval.

Furthermore, the court found that, despite Congress’s dereliction of duty regarding invalidating previous executive actions, as evidenced by the failure to invalidate DACA in 2012, such failures do not indicate that effectuating unlawful executive actions are lawful.<sup>87</sup> This also does not create a grant of lawmaking power to the President.<sup>88</sup> For this reason, the court held that this executive action crosses the line and constitutes legislation by its changing the United States immigration policies and procedures.<sup>89</sup> Therefore, the President may only “take care that the Laws be faithfully executed” and is not allowed to create laws through executive action.<sup>90</sup>

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81. *Id.* at 779.

82. *Id.*

83. *Id.*

84. *Juarez-Escobar*, 25 F. Supp. 3d at 785-86.

85. *Id.* at 786; see *Youngstown Sheet & Tube Co. v. United States*, 343 U.S. 579, 588 (1952).

86. *Juarez-Escobar*, 25 F. Supp. 3d at 786.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

In addressing the second point that the executive action created legislation, the court noted that presidents and certain members of their administrative agencies are granted prosecutorial discretion in cases dealing with criminal matters; however, such prosecutorial discretion is exercised on a case-by-case basis.<sup>91</sup> The court, applying this logic to the case at hand, found that President Obama's executive action exceeded prosecutorial discretion because "it provides 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 it grants substantive rights to those individuals who fall within a broad category, such as the undocumented immigrants.<sup>92</sup> The court determined that the Obama Administration's Executive Action does not provide a case-by-case review for illegal immigrants because it creates a "threshold eligibility criteria" before illegal immigrants can apply.<sup>93</sup> This eligibility requirement modifies the application process because it "substantively changes the statutory removal system" and does not adapt "its application to individual circumstances."<sup>94</sup>

According to the court, individuals who qualify under the "threshold eligibility criteria" will obtain substantive rights because they have the right to apply for deferred action.<sup>95</sup> In doing so, they can apply for work authorization documentation and they will temporarily cease "accruing unlawful presence" for the purposes of federal law.<sup>96</sup> In addition, the court reasoned that the Obama Administration overreached because the predominant purpose underlying the executive action was a humanitarian one aimed at promoting family unity.<sup>97</sup> The court thus concluded that, given the aforementioned actions, the Executive Branch acted unconstitutionally because the executive action violated the separation of powers doctrine and the Take Care Clause.<sup>98</sup>

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91. *Id.*

92. *Juarez-Escobar*, 25 F. Supp. 3d at 787.

93. *Id.*

94. *Id.* at n.7 ("According to the White House, the Executive Action will apply to more than 4 million undocumented immigrants. There are an estimated 11.2 million unauthorized immigrants in the United States.").

95. *Id.*

96. *Id.*

97. *Id.* at 788.

98. *Id.*

*C. Texas v. United States*

As previously discussed, *Texas v. United States* is the current roadblock to the Executive Branch's expansion of DACA and creation of DAPA. The court sought to address three issues: standing, legality, and constitutionality of the plaintiffs' claims.<sup>99</sup> As noted above, Judge Hanen ordered the injunction because the Obama administration, by expanding DACA and creating DAPA, clearly performed a task that falls within the scope of the legislature and enacted a substantive rule without complying with the procedural requirements under the APA. Therefore, the court did not address the constitutional arguments. In addressing the Executive Branch's actions under the APA, however, the court analyzed issues that could be relevant when discussing whether or not the Executive Branch acted with constitutional authority in expanding DACA and creating DAPA.

The court addressed the President's argument justifying the creation of DAPA because of historical precedent that illustrates Executive-granted deferred action as being a lawful exercise of discretion.<sup>100</sup> The plaintiffs countered by arguing that all of these previous deferred action scenarios were much smaller in scope.<sup>101</sup> The court was quick to point out that "[p]ast action previously taken by DHS does not make its current action lawful."<sup>102</sup> The court cited to *Youngstown Sheet & Tube Co. v. Sawyer*, where President Truman claimed his action was legal because of "executive precedents."<sup>103</sup> In *Youngstown*, the Supreme Court rejected this position because past executive actions could not be considered binding authority nor a historical standard.<sup>104</sup> Based on this decision, the court rejected the Government's argument that historical precedent justified the current action.

Under the APA, there are two exceptions to the notice-and-comment requirement.<sup>105</sup> The APA's formal rulemaking requirements do not apply to (1) "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;" and (2) "matter[s] relating to agency management or personnel or to public property,

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99. *Texas*, 86 F. Supp. 3d at 644.

100. *Id.* at 663.

101. *Id.*

102. *Id.*

103. *Id.*; see *Youngstown*, 343 U.S. at 648.

104. *Texas*, 86 F. Supp. 3d at 663-64 (citing *Youngstown*, 343 U.S. at 649).

105. *Id.* at 665.

loans, grants, benefits, or contracts.”<sup>106</sup> However, if the rule is substantive, the exception does not apply and the formal rulemaking requirements must be adhered to in a diligent manner.<sup>107</sup>

The court determined that the Executive Branch was making substantive changes in the existing law.<sup>108</sup> If the court’s reasoning was correct, this would support the argument that the Executive Branch exceeded its constitutional authority by creating substantive law. Here, the court held that DAPA was a substantive change in the law because

[i]t is a program instituted to give a certain, newly-adopted class of 4.3 million illegal immigrants not only “legal presence” in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled.<sup>109</sup>

The court was very clear that the expansion of DACA and creation of DAPA do more than just supplement the INA. It, in fact, contradicts the INA.<sup>110</sup> The court held that, in effect, this executive action created new law because:

DAPA turns its beneficiaries’ illegal status (whether resulting from an illegal entry or from illegally overstaying a lawful entry) into a legal presence. It represents a massive change in immigration practice, and will have a significant effect on, not only illegally-present immigrants, but also the nation’s entire immigration scheme and states who must bear the lion’s share of its consequences.<sup>111</sup>

Here, the court determined that President Obama and Secretary Johnson were not just giving mere advice or guidance, but rather were giving benefits and imposing obligations based on detailed criteria to those responsible for enforcing it.<sup>112</sup>

Judge Hanen noted that the DHS was not given any sort of discretion by law to give 4.3 million illegal immigrants the legal authority

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106. *Id.*

107. *Id.*; see *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

108. *Texas*, 86 F. Supp. 3d at 671.

109. *Id.* at 670, n.102 (“One could argue that it also benefits the DHS as it decides who to remove and where to concentrate their efforts, but the DHS did not need DAPA to do this. It could have done this merely by concentrating on its other prosecutorial priorities. Instead, it has created an entirely new bureaucracy just to handle DAPA applications.”).

110. *Id.*

111. *Id.*; see *Shalala*, 56 F.3d at 597 (concluding the agency’s policy guidance was not a binding norm largely because it did “not represent a change in [agency] policy and [did] not have a significant effect on [the subjects regulated]”). In the instant case, the President, himself, described it as a change.

112. *Texas*, 86 F. Supp. 3d at 671.

to remain in the United States.<sup>113</sup> Furthermore, the DHS adopted new rules that changed the status and employability of millions of illegal immigrants.<sup>114</sup> Because of these substantial changes, the Obama administration went beyond mere enforcement or even non-enforcement of the nation's immigration laws.<sup>115</sup>

In holding that the executive actions were substantive and, therefore, not in compliance with the APA, the court did not address whether or not the executive actions were unconstitutional. The court's conclusion that the President's actions were substantive for the purpose of the notice-and-comment requirements of the APA, however, indicates that it would have held these actions to be unconstitutional.

### III. CONSTITUTIONAL FRAMEWORK OF EXECUTIVE ACTION

The court in *Juarez-Escobar* noted that federal courts in two cases have found Executive Orders unconstitutional: *Youngstown Sheet & Tube Co. v. Sawyer* and *Chamber of Commerce of United States v. Reich*.<sup>116</sup> Precedent has shown that most federal courts will apply *Youngstown* to questions involving whether or not the President is acting within his constitutional power when he issues executive orders.

In *Youngstown*, the main question was whether the President was acting within his constitutional powers when he ordered the Secretary of Commerce to seize and operate many of the nation's steel mills.<sup>117</sup> The plaintiffs argued that these actions by the President amounted to an encroachment on the legislative process because the Constitution expressly delegates the power to make laws to Congress and not the President.<sup>118</sup> The Government argued that the President's decisions and actions were necessary because, if steel production was halted, a national catastrophe could occur.<sup>119</sup> President Truman, acting as the Chief Executive and Commander-in-Chief of the Armed Forces, determined that potential strikes by a majority of the nation's steel mills would immediately jeopardize the production of the military and war materials needed in the Korean War.<sup>120</sup> For this reason, Presi-

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113. *Id.*; see 5 U.S.C.A. § 701 (2014) (“[A]gency action is committed to agency discretion by law”).

114. *Texas*, 86 F. Supp. 3d at 671.

115. *Id.*

116. *Juarez-Escobar*, 25 F. Supp. 3d at 782.

117. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

118. *Id.*

119. *Id.* at 583.

120. *Id.*

dent Truman issued an executive order to the Secretary of Commerce to take possession of a majority of the steel mills and make sure they continued to operate.<sup>121</sup> The Court had to consider whether or not the President had the constitutional authority to seize the mills.<sup>122</sup>

The Court expressed that the “President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”<sup>123</sup> The Court held that, in this case, there was no “statute that expressly authorizes the President to take possession of property . . . nor is there any act of Congress to which [ ] attention has been directed from which such power fairly be implied.”<sup>124</sup> The Court addressed the President’s powers under Article II and found that President Truman’s seizures did not fall within the scope of those granted to the President under the Constitution.<sup>125</sup> Specifically, the President’s power is to see that laws are faithfully executed and not that the President become the lawmaker.<sup>126</sup>

Generally, the courts will apply Justice Jackson’s three-tier designation of presidential power found in his concurring opinion in *Youngstown* to determine whether the President is acting in an area that is usually governed by Congress under the Constitution.<sup>127</sup> A review of these designations as they apply to the Executive Branch’s actions on expanding DACA and creating DAPA is warranted here. When the President’s actions fall within the first area of presidential powers, his authority is at its apex because he is acting pursuant to an express or implied authorization by Congress.<sup>128</sup> The first area of presidential power “includes all that [the President] possesses in his own right plus all that Congress can delegate.”<sup>129</sup> Simply put, if Congress authorizes the action, there is a strong presumption in favor of the executive action.

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121. *Id.*

122. *Id.*

123. *Youngstown Sheet & Tube Co.*, 343 U.S. at 585.

124. *Id.* at 587.

125. *Id.*

126. *Id.*

127. Brief for the Members of Congress et al. as Amici Curiae Supporting Plaintiffs’ Motion for Preliminary Injunction, *Texas v. United States*, 2014 WL 7497765 (No. 1:14-CV-00254).

128. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582; see *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1981) (“[S]ince the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it is an executive function in the face of judicial challenge and doubt.”).

129. *Youngstown Sheet & Tube Co.*, 343 U.S. at 582.

Second, “when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but here is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>130</sup> When the President falls within the second category, it is more likely to “depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>131</sup> Finally, the President’s powers are at its lowest ebb when he acts contrary to the express or implied authorization of Congress.<sup>132</sup> In this third tier of presidential power, the President can only rely on his constitutional powers, for the constitutional powers of Congress will not support his actions.<sup>133</sup> Justice Jackson expressed that the courts must often disable the President when his actions fall under this category.<sup>134</sup> The reason for disabling the President is because “what is at stake is the equilibrium established by our constitutional system.”<sup>135</sup>

#### IV. YOUNGSTOWN APPLICATION

In applying the three categories to President Obama and Secretary Johnson’s actions, the first would not be applicable. Based on the history of DACA and DAPA, there is nothing in the record that shows Congress has given the expressed or implied authority to President Obama, Secretary Napolitano, or Secretary Johnson to enact such policies. There has been no express authority granted to the Executive Branch to create DACA and to expand DAPA. As the court noted in *Juarez-Escobar*, the President chastised Congress on such policies by telling them to “pass a bill” and that “the day I sign that bill into law, the actions I take will no longer be necessary.”<sup>136</sup> Those statements referencing the expansion of DACA and creation of DAPA indicate that the President knew he acted unilaterally and without the express authority of Congress.

However, a potential argument for the Government could be that Congress *implied* this authority because it failed to take action

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 638; *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (“President Roosevelt’s effort to remove a Federal Trade Commissioner was found to be contrary to the policy of Congress and impinging upon an area of congressional control, and so his removal was cut down accordingly.”).

135. *Youngstown Sheet & Tube Co.*, 343 U.S. at 638.

136. *Juarez-Escobar*, 25 F. Supp. 3d at 786.

against the original implementation of DACA by Secretary Napolitano on June 15, 2012. Since Congress failed to challenge the original DACA program, they have impliedly given its approval to the executive action. This position is flawed because, as the court stated in *Texas*, “past action previously taken by DHS does not make its current action lawful.”<sup>137</sup> Additionally, *Youngstown* rejected this position because past executive actions are not considered precedent, nor authorization for the President to take more action.<sup>138</sup> Here, the President cannot create new executive actions by arguing that his previous executive actions, such as the creation of DACA, were legal. Further, as noted in *Juarez-Escobar*, the court found that, regardless of Congress’ failure to take action against past executive actions, such as implementing DACA in 2012, it does not indicate that taking such executive actions are lawful, nor does it confer authority to the Executive to create laws.<sup>139</sup> Based on this analysis, Congress has not implied this authority by failing to act. Therefore, Justice Jackson’s first category does not apply to the Executive Branch’s actions.

Justice Jackson’s second category would not be applicable, either, to the expansion of DACA and creation of DAPA. There is no “zone of twilight” present because Congress has expressly legislated in the area of immigration enforcement. Specifically, Congress has enacted the INA to establish laws governing immigration and naturalization.<sup>140</sup> The Executive Branch, however, would probably argue that their actions fall within the “zone of twilight” because Congress is silent in telling DHS exactly how to enforce the INA. This is because Congress has sent mixed signals by conferring on the Secretary of the DHS the right to administer and enforce immigration laws.<sup>141</sup> Because this authority has been granted, it has allowed the Secretary of the DHS to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the powers delegated by Congress.<sup>142</sup> This argument is flawed because, as the court in *Texas* noted, the expansion of DACA and creation of DAPA did more than just supplement the INA. It actually stands contrary to the INA.<sup>143</sup> For this reason, there is no “zone of twilight” present, as Congress expressed how to

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137. *Texas*, 86 F. Supp. 3d at 663.

138. *Youngstown Sheet & Tube Co.*, 343 U.S. at 648.

139. *Juarez-Escobar*, 25 F. Supp. 3d at 786.

140. *Arpaio*, 27 F. Supp. 3d at 192; see 8 U.S.C. § 1101 (2014).

141. *Arpaio*, 27 F. Supp. 3d at 192; see 8 U.S.C. § 1103(a)(1) (2009).

142. *Arpaio*, 27 F. Supp. 3d at 140; see 8 U.S.C. § 1103(a)(3).

143. *Texas*, 86 F. Supp. 3d at 670.

enforce rules against certain illegal immigrants and the Executive Branch failed to do so by expanding DACA and creating DAPA.

Finally, President Obama and Secretary Johnson's executive actions do fall under Justice Jackson's third category. Here, the Executive Branch has taken measures that contradict the will of Congress.<sup>144</sup> President Obama and Secretary Johnson crossed the line by creating legislation that changed the United States immigration policies and procedures.<sup>145</sup> This is clear as there would be a substantial number of illegal immigrants who would be eligible to apply for deferred action. The DHS estimated that there are around 11.3 million undocumented immigrants residing in the United States.<sup>146</sup> As the court pointed out in *Texas*, the expansion of DACA and creation of DAPA would allow a "class of 4.3 million illegal immigrants not only legal presence in the United States, but also the right to work legally and the right to receive a myriad of governmental benefits to which they would not otherwise be entitled."<sup>147</sup> Strictly based on numbers alone, almost one-third of all undocumented immigrants would have the ability to apply for deferred action. This is clearly incompatible with the "express or implied will of Congress" because, if Congress wanted to protect this newly created class, even for a period of time, Congress would have done so by enacting legislation.

The Government has repeatedly argued throughout these legal challenges that they are not creating legislation because deferred action on each immigrant is done on a case-by-case basis, and history has shown that such an exercise of prosecutorial discretion is allowed.<sup>148</sup> Because there is discretion with deportation proceedings on certain illegal immigrants, the Obama Administration contends its action is not legislation.<sup>149</sup> As the court noted in *Juarez-Escobar*, the President's executive action was more than prosecutorial discretion because "it provides 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] it allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights."<sup>150</sup> The Executive Branch dispenses these

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144. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635.

145. *Juarez-Escobar*, 25 F. Supp. 3d at 786.

146. *Arpaio*, 27 F. Supp. 3d at 192-93.

147. *Texas*, 86 F. Supp. 3d at 670.

148. *Juarez-Escobar*, 25 F. Supp. 3d at 786.

149. *Id.*

150. *Id.* at 787.

substantive rights because a very small percentage of those immigrants who apply for deferred action are actually denied.

The Government has argued that there are no alternate means to control illegal immigrants because the appropriations from Congress are inadequate in removing all illegal immigrants.<sup>151</sup> Thus, requiring appropriations to be spent on keeping illegal aliens out and not deporting ones here is valid.<sup>152</sup> There is no doubt that this could be a realistic issue. This, however, does not give the Executive Branch the right to “frustrate the will of Congress” by creating legislation based on a budget deficit. Thus, the Executive Branch is in direct conflict with Congress’ intent, as the INA was enacted to enforce rules and procedures that the DHS directives aim to protect. In applying *Youngstown*, since the President is in direct conflict with Congress, his constitutional powers are the only ones available to him.<sup>153</sup> Here, the President and DHS do not have any constitutional authority to legislate substantive laws over immigration and naturalization. Instead, the President is authorized to make sure that the INA laws are faithfully executed under the Take Care Clause of Article 2.<sup>154</sup> For this reason, if the Executive Branch fails to execute the INA as intended by Congress, the courts must disable the President and his administration from acting to the contrary.<sup>155</sup>

#### CONCLUSION

Secretary Napolitano and Secretary Johnson, at the end of their directives, iterated that these new policies did not give any substantive rights or pathways to citizenship.<sup>156</sup> In fact, this may be true. The problem, however, is that the Executive Branch has failed to enforce the INA directives by exercising prosecutorial discretion and deferred action.<sup>157</sup> This type of non-enforcement is in direct conflict with Congress’ intent under the INA. Therefore, President Obama and the Executive Branch are not acting within their constitutional powers. Under the President’s Article II powers, he must be diligent in making sure that the laws are faithfully executed. The INA is no different in this context. The President, however, has gone against the will of Con-

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151. *Id.*

152. Defs.’ Mem. of P. & A., *supra* note 17, at ¶ 10.

153. *Id.*

154. U.S. CONST. art. II, § 3.

155. *Youngstown Sheet & Tube Co.*, 343 U.S. at 638.

156. Johnson Memo, *supra* note 24, at 5.

157. *Id.*

gress by creating policies that do not enforce immigration laws against approximately one-third of the nation's illegal immigrant population. This is evident because President Obama and the Executive Branch are exercising prosecutorial discretion and deferred action for a class of immigrants that the INA does not protect.

President Obama's executive actions implemented on June 15, 2012, under the direction of Secretary Napolitano, are illegal. Even though these actions have not yet been challenged, it does not make the actions legal. Hence, these initial actions cannot be regarded as precedent.<sup>158</sup> Furthermore, the President cannot use these previous actions to justify his authority for initiating new actions on immigration.

For the foregoing reasons, President Obama and Secretary Johnson's actions on November 20, 2014, expanding DACA and creating DAPA, are in direct conflict with Congress' intent and are thus unconstitutional. The Executive Branch did not act with legal authority to fix our broken immigration system. Accordingly, these illegal actions should neither be implemented nor enforced under the law.

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158. *Youngstown Sheet & Tube Co.*, 343 U.S. at 648.

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