

Evading Constitutional Challenge: DAPA’s Implications for Future Exercises of Executive Enforcement Discretion

LUCY CHAUVIN*

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In today’s highly globalized world, America’s status as a “nation of immigrants” faces many new challenges.¹ Although there are approximately 11.3 million immigrants residing in the United States today, the Department of Homeland Security (DHS) has the resources to remove less than 400,000 aliens each year.² Consequently, the concept of executive prosecutorial discretion has played an

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1. In light of factors including an enormous and steadily increasing immigration population and heightened concern over foreigners caused by the War on Terror, the issue of illegal immigration has been “catapulted to the top of the national agenda.” See, e.g., Ingrid v. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1281 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639, 641–50 (2004).

2. 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, 38 OP. OFF. LEGAL COUNSEL 1, 1 (2014) [hereinafter OLC Opinion].

increasingly important role in the development of U.S. immigration law. Tasked with overbearing caseloads and armed with such limited resources, enforcement officers necessarily must refrain from exercising the full scope of their enforcement power. “Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”³

While deferred action is a long established and traditionally accepted doctrine, President Obama’s chief immigration initiatives, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) have recently sparked a national dialogue regarding the precise scope of the executive’s authority in this area. The controversy arose after Secretary of Homeland Security Jeh Johnson announced a new immigration policy allowing certain aliens who arrived in the United States on or before January 1, 2010 to apply for deferred action.⁴ Together, the extended version of DACA and DAPA apply to individuals who came to the United States as children under the age of sixteen as well as parents of United States citizens and lawful permanent residents.⁵ DAPA was expected to affect approximately 3.7 million immigrants currently residing in the United States.⁶

The Obama administration declared DAPA to be a lawful exercise of the executive’s enforcement discretion, but opponents insist that DAPA grossly exceeded the limits of the executive’s power by making “a programmatic decision to confer benefits on millions of aliens—a significant policy decision that belongs to Congress.”⁷ Such was the challenge brought by several states in the Supreme Court case *United States v. Texas*—yet rather than bringing clarity to the heated debate, the Supreme Court simply issued a non-precedential per curiam opinion affirming the lower court’s decision.⁸

The debate gained new significance following the 2016 presidential election. Throughout his campaign, President Trump advocated for a complete immigration policy change, one that involves building “an impenetrable physical wall on the southern border,” “immediately terminat[ing] President Obama’s two illegal executive amnesties,” and “turn[ing] off the jobs and benefits magnet.”⁹ President

3. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

4. *Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/daca> [<https://perma.cc/3D7B-WKP4>].

5. *Id.*

6. Manuel Pastor, Tom Jawetz & Lizet Ocampo, *DAPA Matters: The Growing Electorate Directly Affected by Executive Action on Immigration*, CTR. FOR AMERICAN PROGRESS (Nov. 19, 2015, 12:01 AM), <https://www.americanprogress.org/issues/immigration/reports/2015/11/19/125787/dapa-matters/> [<https://perma.cc/NLE4-E3YX>].

7. Brief for the State Respondents at 74, *United States v. Texas*, No. 15-674 (U.S. Mar. 28, 2016).

8. *United States v. Texas*, 136 S. Ct. 2271, 2271 (2016).

9. *Full Text: Donald Trump’s Immigration Speech*, WASH. EXAMINER (Aug. 31, 2016, 10:57 PM), <http://www.washingtonexaminer.com/full-text-donald-trumps-immigration> -

Trump has declared that all immigration laws will be vigorously enforced and that anyone who enters the United States illegally will be subject to immediate deportation. He has further pledged to triple the number of Immigration and Customs Enforcement (ICE) agents to achieve these goals.¹⁰

Despite this aggressive campaign rhetoric, President Trump has since backed off on his promise to deport all undocumented immigrants. After taking office on January 20, 2017, President Trump promptly signed a pair of executive orders on immigration enforcement¹¹ and subsequently released two memorandums outlining how those orders are to be enforced.¹² According to the memoranda, President Trump intends to drastically expand the category of people classified as “priorities for removal”; this dramatic policy shift could affect up to 11 million people.¹³

One notable aspect of the memoranda was President Trump’s preservation of protections for DREAMers, as the memoranda explicitly states that DACA is to remain in effect.¹⁴ Yet despite this proclamation, in early September 2017 President Trump followed through his campaign promise and announced the effective end of DACA.¹⁵ President Trump emphasized that he did not intend to “just cut DACA off, but rather provide a window of opportunity for Congress to finally act,” and has given lawmakers six months to come up with a replacement for the Obama-era program.¹⁶ If Congress is unable to create a similar, lawful program by way of legislation, President Trump will “revisit this issue,” a statement that provides little certainty as to the fate of the some 800,000 young, undocumented immigrants who have benefited from DACA since its initiation in 2012.¹⁷

speech/article/2600729 [https://perma.cc/RG49-MV5C].

10. *Id.*

11. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

12. JOHN KELLY, U.S. DEP’T OF HOMELAND SECURITY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST (2017); JOHN KELLY, U.S. DEP’T OF HOMELAND SECURITY, IMPLEMENTING THE PRESIDENT’S BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS POLICIES (2017).

13. Camila Domonoske & Joel Rose, *What’s New In Those DHS Memos On Immigration Enforcement?*, NPR (Feb. 22, 2017, 5:40 PM), <http://www.npr.org/sections/thetwo-way/2017/02/22/516649344/whats-new-in-those-dhs-memos-on-immigration-enforcement> [https://perma.cc/R3JY-CZ9E].

14. *See* KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, *supra* note 12, at 2.

15. Adam Edelman, *Trump Ends DACA Program, No New Applications Accepted*, NBC NEWS (Sept. 5, 2017, 5:57 PM), <https://www.nbcnews.com/politics/immigration/trump-dreamers-daca-immigration-announcement-n798686> [https://perma.cc/ZE7H-73HB]. Under the plan, the Trump administration has stopped considering new applications but allowed any DACA recipients with a permit that is set to expire prior to March 5, 2018 to apply for a two-year renewal if they applied before October 5, 2017. DHS will recognize DACA authorizations until they expire at the end of their two-year lifespans, meaning the last authorization would end March 5, 2020.

16. *Id.*

17. Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [https://perma.cc/4E3J-WWFD].

Though President Trump's early attempts at immigration reform indicate a sharp reversal of the Obama administration's immigration policy, the reality is that unless this shift is accompanied by a drastic expansion of DHS's resources, such a broad policy is unlikely to prove enforceable. Lacking the necessary resources, President Trump will thus find himself in the same position as his predecessor: tasked with substantially narrowing enforcement priorities and, even if solely out of necessity, exercising the broad scope of the executive's enforcement discretion power. In light of the controversy surrounding Obama's actions and the recent challenge in *United States v. Texas*, it will be imperative that President Trump—and any future president for that matter—frame immigration reform in a way that will avoid a similar constitutional challenge.

To circumvent potential separation of powers issues, future immigration policies should involve clearly defined and transparently communicated enforcement priorities and be framed in terms of the executive's decision not to act against aliens who do not fall within these defined boundaries. This Note focuses on how President Trump and future presidents generally can achieve deferred-action-related goals without transgressing the boundaries of permissible enforcement discretion. Part I discusses *United States v. Texas* and addresses the specific challenge brought to President Obama's immigration policy as well as scholarly arguments regarding DAPA's constitutionality. Part II identifies the constitutional source of authority for enforcement discretion and explores interplay between the executive's somewhat conflicting duties under the Take Care Clause. Part III looks at the development of enforcement discretion over time and specifically within the context of immigration law. Part IV focuses on the historically limited role of the judiciary in this area of the law. Lastly, Part V addresses how President Trump can move forward with implementing his own immigration policy without running into the same constitutional roadblocks that his predecessor faced.

I. UNITED STATES V. TEXAS: DEFINING THE BOUNDARIES OF ENFORCEMENT DISCRETION

United States v. Texas represents the most recent challenge to an act of executive enforcement discretion. As immigration is undoubtedly one of the most divisive issues of the twentieth century, scholars and the general public alike have weighed in on the case that effectively brought an end to what President Obama had hoped would be one of the central legacies of his administration: comprehensive immigration reform.¹⁸

A. DAPA and the Constitutional Challenge

President Obama's executive action known as DAPA would allow parents of U.S. citizens who (a) have lived in the United States continuously since January 1, 2010; (b) had, on November 20, 2014, a son or daughter who is a U.S. citizen or lawful

18. See Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [<https://perma.cc/VZ5P-L24E>].

permanent resident; and (c) are not an enforcement priority for removal under the November 14th, 2014, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum¹⁹ to request deferred action and employment authorization for a period of three years.²⁰ Requests for deferred action were to be considered by the U.S. Citizenship and Immigration Services on a case-by-case basis.²¹

DAPA was challenged by the state of Texas along with several other states, resulting in a preliminary injunction under the Administrative Procedure Act (APA).²² The injunction was affirmed by the Fifth Circuit Court of Appeals, which reasoned that since the Constitution requires a uniform rule of naturalization—and enforcement of DAPA would interfere with the integrated statutory and regulatory schemes implemented by Congress—a nationwide injunction was warranted.²³ The case was further appealed to the Supreme Court, the central issue being whether the President acted unconstitutionally by exercising his enforcement discretion in a manner that violated the immigration and related benefits laws currently in place.²⁴

In response to this question, the United States Government (Petitioners) contended that DAPA's guidance was a perfectly lawful exercise of the Secretary's "broad authority to '[e]stablish[] national immigration enforcement policies and priorities'"²⁵ and "perform such acts as 'he deems necessary for carrying out his authority' to 'administ[er]' the INA."²⁶ Relying in part on dicta from *Arizona v. United States*, the Petitioners argued that this grant of authority reflects Congress's judgment that the executive has a specific need for flexibility in order to "balance pressing, often conflicting, and rapidly evolving resource, foreign relations, national security, and humanitarian imperatives in the immigration context."²⁷

On the other hand, the Respondents claimed that immigration policy (specifically, that pertaining to aliens entering the United States and possessing a right to remain in the country) is entrusted exclusively to Congress.²⁸ Congress has never given the executive carte blanche to allow aliens to be lawfully present in the United States; in fact, Respondents contended that DAPA directly conflicts with the Immigration and Nationality Act (INA) wherein Congress identifies particular categories of aliens

19. The Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants Memorandum lists DHS's enforcement priorities as including "national security, public safety, and border safety." JEH CHARLES JOHNSON, U.S. DEP'T OF HOMELAND SECURITY, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 1 (2014).

20. See *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/immigrationaction> [<https://perma.cc/38DP-DJZF>].

21. *Id.*

22. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 579 U.S. 1 (2016).

23. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015), *aff'd*, 579 U.S. 1 (2016).

24. Brief for the State Respondents, *supra* note 7, at 74.

25. Reply Brief for the Petitioners at 14, *United States v. Texas*, No. 15-674 (U.S. Apr. 2016) (citation omitted).

26. *Id.* (quoting 8 U.S.C. § 1103(a) (2012)).

27. *Id.* (citation omitted).

28. Brief for the State Respondents, *supra* note 7, at 2.

who may be admitted into and present in the country.²⁹ DAPA, the Respondents argued, not only affirmatively grants lawful presence to millions of eligible aliens, but goes a step further to provide additional benefits including work authorization.³⁰ This makes DAPA more than a simple exercise of enforcement discretion and crosses over into substantive rulemaking that directly conflicts with clear legislative mandates laid out in the INA.³¹

The Supreme Court issued its decision on June 23, 2016, and the highly anticipated opinion consisted of a single sentence: “The judgment is affirmed by an equally divided Court.”³² Less than four months later, the Court denied the Petitioners’ petition for a rehearing.³³ Yet, not all hope is lost: because the appeal involved only a preliminary injunction, the Court may have another opportunity to revisit the underlying constitutional issues following a final judgment.³⁴ Whether they will take advantage of that opportunity remains to be seen. And in the interim, the debate regarding the scope of the executive’s authority over immigration law will likely only intensify.

B. Scholarly Debate: Application of Youngstown Framework to DAPA

The debate over the constitutionality of the DAPA directive necessarily implicates the interdependence of the legislative and executive branches and raises many muddled separation of powers issues. For instance, critics such as Robert Delahunty and John Yoo have relied on the framework laid out in *Youngstown Sheet & Tube Co. v. Sawyer*³⁵ to claim that DAPA is not an exercise of case-by-case enforcement discretion as approved by the Court in *Chaney*.³⁶ In his famous concurring opinion in *Youngstown*, Justice Jackson sets out a framework for defining the limits of presidential power according to the relationship between the executive and legislative branches. For instance, when the President acts pursuant to express or implied authorization from Congress, his or her power is at its maximum and includes all of the authority possessed by the executive branch plus all that Congress

29. *Id.* This Note will discuss relevant provisions of the INA in greater detail. *See infra* Part III.B.

30. Brief for the State Respondents, *supra* note 7, at 11.

31. *See id.* at 14–17.

32. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

33. Rebecca Shabad, *SCOTUS Denies Administration’s Request to Rehear Immigration Case*, CBS NEWS (Oct. 3, 2016, 4:10 PM), <http://www.cbsnews.com/news/scotus-denies-administrations-request-to-rehear-immigration-case/> [https://perma.cc/KQ3Q-DP7D].

34. Zachary Price, *Symposium: The Immigration Punt*, SCOTUSBLOG (June 24, 2016, 2:36 PM), <http://www.scotusblog.com/2016/06/symposium-the-immigration-punt/> [https://perma.cc/M7LJ-KU6K].

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, the challenged executive order directed the Secretary of Commerce to seize most of the nation’s steel mills. *Id.* at 583. The Supreme Court held that it was not within the President’s constitutional authority to issue the order, since taking such an action without express authority from Congress intrudes on the lawmaking power of the legislative branch. *Id.* at 586.

36. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

is able to delegate.³⁷ When the President acts in absence of either a congressional grant or denial of authority, he or she is within the “zone of twilight” where the two branches have concurrent authority (or there is an uncertain distribution between the two); here, the President can rely only on the independent powers of the executive branch.³⁸ Lastly, when the President acts incompatibly with the express or implied intent of Congress, presidential power is at its “lowest ebb,” and he or she can rely upon only the executive powers minus any constitutional powers that Congress may possess.³⁹

The core of Delahunty and Yoo’s argument is that, since Congress failed to enact Obama’s DREAM Act,⁴⁰ President Obama now finds himself in *Youngstown* category three (“the lowest ebb”).⁴¹ Similarly, Professor Josh Blackman asserts that “the President is not acting in concert with Congress; Congress rejected or failed to pass immigration reform bills reflecting this policy numerous times.”⁴² Here Blackman flatly dismisses the possibility of either a category one or category two analysis because DAPA is in clear conflict with congressional intent, and thus President Obama could not be operating in a “zone of twilight.”⁴³ This argument, Professor Laurence Tribe asserts, treats Congress’s failure to act as an expression of intent and thereby presupposes that Congress can convert this supposed “will” into law without following the constitutional lawmaking process of bicameralism and presentment.⁴⁴

In actuality, applying the *Youngstown* framework is a matter of statutory construction. Tribe argues that the principles guiding President Obama’s DACA and DAPA programs are directly influenced by the INA and “give concrete and publicly articulated expression to those congressional priorities.”⁴⁵ He supports this assertion by pointing to the INA’s concern for preserving unity of families composed of U.S. citizens and immigrants.⁴⁶ The INA also has an expressed purpose to prioritize the deportation of criminals; specifically, Congress has directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”⁴⁷ Consistent with this purpose, DAPA prioritizes aliens convicted of criminal offenses involving participation in a criminal street gang, the majority of felony offenses within the convicting jurisdiction, offenses classified as “aggravated

37. *Youngstown*, 343 U.S. at 638.

38. *Id.*

39. *Id.*

40. The DREAM Act would have provided a path to citizenship for more than two million undocumented immigrants who entered the United States as children. See Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. § 1 (2011).

41. See generally Delahunty & Yoo, *supra* note 36.

42. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 265 (2015) (citing Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–38 (2011)).

43. *Id.* at 267.

44. Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. F. 86, 98 (2016).

45. *Id.*

46. *Id.*

47. OLC Opinion, *supra* note 2, at 10 (citation omitted).

felonies” under the INA, and certain misdemeanor offenses.⁴⁸ As for the constitutionality of DAPA’s benefits component, proponents assert that Congress has long afforded the executive branch broad discretion to grant work authorization.⁴⁹

Considering these arguments together, the alleged unconstitutionality of President Obama’s immigration initiative hinges on how it is categorized according to *Youngstown*. If the President acts in concert with congressional will when exercising enforcement discretion, such an action implicates no separation of powers issue. But the line is not always so clear, particularly in the current climate of legislative gridlock.

II. TAKE CARE: CONFLICTING INTERPRETATIONS OF THE DUTY TO FAITHFULLY EXECUTE THE LAW

In order to analyze the constitutionality of an exercise of enforcement discretion, it is necessary to consider the principal source of the executive’s authority in this area: the Take Care Clause of the U.S. Constitution.⁵⁰ As it has been interpreted throughout history, the Take Care Clause appears to stand for two, “at times diametrically opposed” propositions.⁵¹ On the one hand, the provision is understood to impose a duty upon the President to comply with and execute statutory directives as enacted by the legislature.⁵² On the other, it is viewed as a source of presidential power, or a means of securing the executive’s control over federal law enforcement.⁵³ The somewhat confusing result of these conflicting interpretations is that the Take Care Clause forms the constitutional basis for the executive’s obligation to enforce the law as well as his discretion not to do so.

Of course, the President plays an integral role in the legislative process through exercise of the various constitutional powers afforded to the executive branch.⁵⁴ However, once that bill has been signed into law (i.e., after the President has signed or the Presidential veto has been overridden), the President’s role in the process transitions to one of execution. The Supreme Court has repeatedly interpreted the Take Care Clause to safeguard presidential control over the enforcement of

48. *Id.*

49. *See, e.g.*, 8 U.S.C. § 1324a(h)(3) (2012).

50. *See* U.S. CONST. Art. II, § 3 (providing that “[the President] shall take Care that the Laws be faithfully executed”).

51. TODD GARVEY, CONG. RESEARCH SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 3 (2014).

52. *Id.*

53. *Id.* at 4.

54. These powers derive principally from Article II, Section 3, Article I, Section 7, and the general executive power afforded to the President under Article II, Section 1. *Id.* at 4, nn.18–20; *see also* U.S. CONST. Art. II, § 3 (“He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient”); U.S. CONST. Art. I, § 7 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated”); U.S. CONST. Art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

legislatively enacted directives.⁵⁵ For instance, in *INS v. Chadha*, the Court ruled that the legislative veto was unconstitutional.⁵⁶ Critics saw the legislative veto as an attempt to encroach upon executive authority, but constitutional scholar Louis Fisher asserts that this critique overlooks the fact that the legislative veto is actually a mechanism for balancing the interests of the two branches: “[T]he desire of administrators for greater discretionary authority and the need of Congress to maintain control short of passing another public law.”⁵⁷ The *Chadha* Court nevertheless insisted that it was unconstitutional to allow Congress to take affirmative action to change the law without complying with the constitutional process for enacting legislation (bicameralism and presentment to the President).⁵⁸

Following *Chadha*, *Bowsher v. Synar* invalidated a law that would have delegated some of the executive branch’s enforcement authority to the legislative branch.⁵⁹ *Bowsher* involved a challenge to the Budget and Accounting Act, specifically its creation of the office of the Comptroller General.⁶⁰ The Comptroller General was to be appointed by the President with the advice and consent of the Senate to serve a single fourteen-year term, and was removable only at the initiative of Congress.⁶¹ In its opinion, the Supreme Court noted that “[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. . . . This kind of congressional control over the execution of the laws . . . is constitutionally impermissible.”⁶²

Thus, interpretations of the Take Care Clause have recognized the need for the President to maintain a certain level of control over those who enforce the law, as well as discretion as to how the laws are enforced. This kind of discretion has been repeatedly recognized as essential to carrying out the executive’s constitutional duty under the clause.⁶³ However, it is also limited in the sense that it does not extend to

55. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (suggesting that vesting authority to enforce federal law in state and local officers may intrude on executive power to oversee those in charge of executing the law). But see, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that the establishment of Independent Counsel to investigate cases involving serious federal crimes and high-ranking public officials did not interfere with President’s duty to faithfully execute the law).

56. *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that the legislative veto provision in 244(c)(2) of the Immigration and Nationality Act, which authorized Congress to invalidate the Attorney General’s decision to allow a deportable alien to remain in the United States, was unconstitutional).

57. Louis Fisher, *Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case*, 45 PUB. ADMIN. REV. 705, 706 (1985); see also *INS v. Chadha*, 462 U.S. 919, 973–74 (1983) (White, J., dissenting).

58. *Chadha*, 462 U.S. at 957–59.

59. *Bowsher v. Synar*, 478 U.S. 714, 714 (1986).

60. *Id.* at 716.

61. *Id.*

62. *Id.* at 726–27. The Supreme Court reasoned that Congress could “simply remove, or threaten to remove, an officer for executing laws in any fashion found to be unsatisfactory to Congress.” *Id.* By placing responsibility for execution of the Act in the hands of someone subject to removal only by Congress itself, the Court states that Congress has effectively retained control over the Act’s execution and intruded into the executive function. *Id.* at 734.

63. GARVEY, *supra* note 51, at 10 (citations omitted).

presidential decisions to affirmatively suspend federal law or flat-out refusals to comply with clear legislative mandates or restrictions.⁶⁴ The power also does not encompass constitutional violations—such as basing the decision to prosecute on arbitrary classifications like race and religion—under the guise of exercising discretion in law enforcement.⁶⁵

In sum, the executive's power under the Take Care Clause is simultaneously broad and limited. In the specific context of enforcement discretion, it is frequently infeasible, if not altogether impossible, to fully implement federal law.⁶⁶ Congressional instructions—even when laid out in detail in explicit statutory enactments—are often disconnected from the reality of the situation.⁶⁷ In light of *Youngstown* and court-imposed limitations on the President's ability to delegate executive powers and Congress's ability to retain power for itself through mechanisms like the legislative veto, the President frequently confronts the question: if Congress's "will" cannot be fully effectuated, how can the statutes it has enacted be enforced in a way that respects the rule of law?

III. ENFORCEMENT DISCRETION: INTERACTION BETWEEN CONGRESS AND THE EXECUTIVE

A. Heckler v. Chaney: Early Recognition of Executive Enforcement Discretion

Out of the gap between legislative policy and resource appropriation arose the doctrine of enforcement (or prosecutorial) discretion. Enforcement discretion "developed without express statutory authorization," but has nonetheless become a "principal feature of the [immigration] removal system."⁶⁸ As defined by the Immigration and Naturalization Service (INS) in 2000, "[p]rosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone."⁶⁹ Consequently, enforcement discretion involves decisions related to whom and when to prosecute as well as decisions not to prosecute.

The Supreme Court confirmed executive and administrative authority over enforcement decisions in its seminal opinion in *Heckler v. Chaney*. In *Chaney*, prison inmates who had been convicted of capital offenses and sentenced to death by legal injection petitioned the Food and Drug Administration (FDA) alleging that the use of drugs for capital punishment purposes violated the Food, Drug, and Cosmetic Act (FDCA).⁷⁰ The inmates requested that the FDA take certain enforcement actions to prevent violations of the FDCA. After the FDA refused this request, the inmates proceeded to petition the court seeking the same enforcement actions; however, the Supreme Court held that the FDA's decision not to take the requested enforcement

64. *Id.*

65. *Id.* at 13.

66. Tribe, *supra* note 44, at 96.

67. *Id.*

68. *Arizona v. United States*, 567 U.S. 387, 396 (2012).

69. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES 1 (2000).

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

actions was not subject to review under the APA.⁷¹ Hence, the *Chaney* decision established that administrative non-enforcement is presumptively unreviewable under the APA. In so holding, the Court acknowledged that

an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”⁷²

The *Chaney* opinion also offers guiding principles for valid exercises of executive enforcement discretion, specifically noting that enforcement decisions should reflect “factors which are peculiarly within [the enforcing agency’s] expertise” including considerations such as “whether the agency has enough resources to undertake the action,” and “whether agency resources are best spent on this violation or another.”⁷³ Other relevant considerations may include “the proper ordering of [agency] priorities,” and “whether the particular enforcement action requested best fits the agency’s overall policies.”⁷⁴

In subsequent decisions, lower courts have interpreted *Chaney* to mean that enforcement decisions made on a case-by-case basis are constitutionally permissible and judicially unreviewable because they do not implicate many of the separation of powers concerns discussed above, and also because these decisions inevitably rest on “the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion.”⁷⁵ Furthermore, the Office of Legal Counsel asserts that enforcement decisions made on an individual basis after consideration of case-specific factors are generally unlikely to constitute “general polic[ies] that [are] so extreme as to amount to an abdication of [the agency’s] statutory responsibilities” as prohibited by *Chaney*.⁷⁶

On the other hand, constitutional scholars have suggested that complete, prospective categorical non-enforcement of a particular law is not a permissible exercise of enforcement discretion: the two concepts are conceptually distinct.⁷⁷ Categorical non-enforcement differs from enforcement discretion in the sense that categorical non-enforcement encompasses “presidential authority to refuse to enforce any and all laws the President believes are unconstitutional” in their entirety.⁷⁸ On the other hand, *Chaney* empowers the Executive and authorized executive branch officials to discriminate among issues or cases to pursue: in the

71. *Id.* at 824–25.

72. *Id.* at 832.

73. *Id.* at 831.

74. *Id.* at 831–32.

75. *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) (emphasis omitted); see also *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996).

76. OLC Opinion, *supra* note 2, at 7 (citations omitted).

77. See, e.g., Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 132 (2015).

78. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 10 (2000).

strictest sense, these decisions should be made on an individualized, or case-by-case basis.⁷⁹

B. Enforcement Discretion's Specific Application to Immigration Law

In *Arizona v. United States*, the Supreme Court recognized that the U.S. government's "broad, undoubted power" over immigration derives from Article I of the Constitution and therefore rests principally in the legislative branch.⁸⁰ Thus, DHS's authority to remove aliens from the country is derived from and rests on the INA, which establishes a detailed scheme to regulate the processes of immigration and naturalization.⁸¹ In addition to its extensivity, federal regulation of immigration and alien status is also complex.⁸² For instance, Congress identifies numerous grounds for "inadmissibility" to the United States; in general "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."⁸³ The INA provides that inadmissible aliens (those who do not lawfully gain entry to the United States) as well as lawfully admitted aliens who fail to maintain their legal status are subject to deportation.⁸⁴

Despite these far-reaching provisions, Congress has appropriated enough resources for DHS to remove⁸⁵ fewer than 400,000 of the eleven million aliens present in the United States each year.⁸⁶ In recognition of these constraints, the INA also provides executive officials with the means to temporarily delay or suspend removal of unauthorized immigrants. For example, executive officials have the authority to parole an alien into the country—without formally admitting that individual—"for urgent humanitarian reasons or significant public benefit,"⁸⁷ and immigration officials also have the authority to grant asylum and cancel removal.⁸⁸

79. *Chaney*, 470 U.S. at 834.

80. *Arizona*, 567 U.S. at 394–95.

81. *Id.*

82. *Id.*

83. 8 U.S.C. § 1182(a)(6)(A)(i) (2012) (providing a list of certain classes of aliens ineligible to receive visas or to be admitted into the United States). More specifically, aliens may be removed if fall within one or more classes of "deportable aliens," including those who were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. *See also* 8 U.S.C. § 1227 (2012).

84. 8 U.S.C. § 1227 (2012).

85. The INA also specifies the procedures for removing deportable aliens from the United States. *See* 8 U.S.C. § 1129 (2012) (governing initiation of removal proceedings); 8 U.S.C. § 1129(a) (2012) (describing removal proceedings); 8 U.S.C. § 1228 (2012) (detailing the procedure for expedited removal of aliens who have been convicted of committing aggravated felonies).

86. OLC Opinion, *supra* note 2, at 9 (citing E-mail from David Shahoulian, DHS Deputy General Counsel, to Karl R. Thompson, OLC Principal Deputy Assistant Attorney General (Nov. 19, 2014)).

87. *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <https://www.uscis.gov/archive/2014-executive-actions-immigration> [<https://perma.cc/6QZD-XMD9>].

88. *See* 8 U.S.C. § 1158(b)(1)(A) (2012) (asylum); 8 U.S.C. § 1229(b) (2012)

However, prior to turning to these statutory mechanisms for granting relief, “[f]ederal officials . . . must decide whether it makes sense to pursue removal at all”; officials also have the authority to terminate proceedings and decline to execute final orders of deportation once proceedings have initiated.⁸⁹

Decision making regarding an alien’s status involves a wide range of considerations.⁹⁰ As the *Arizona* Court explained, granting broad discretion to immigration officials embraces “immediate human concerns.”⁹¹ For example, an unauthorized worker attempting to support his or her family likely poses a lesser threat than an alien who has committed a serious crime.⁹² The equities of a particular case may turn on a number of factors including “whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”⁹³ Additionally, the *Arizona* Court notes that some discretionary decisions involve important policy choices, as immigration policy has wide-ranging effects including its influence on trade, investment, tourism, and diplomatic relations with other countries.⁹⁴ Given the dynamic nature of relations between countries, the executive branch is tasked with ensuring that U.S. enforcement policies are consistent with the Nation’s broader foreign policy.⁹⁵

C. The Meaning of “Deferred Action”

The term “deferred action” refers to an immigration official’s decision that no action will proceed against a deportable alien; in other words, it is an exercise of administrative discretion that results in temporary deferral of the removal of that individual.⁹⁶ Immediately following the enactment of the INA, INS officials began exercising enforcement discretion in order to grant “non-priority” status to removable aliens for humanitarian reasons.⁹⁷

In 1975, the INS issued the first specific instruction related to deferred action. The INS Instruction stated that “[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.” The Instruction further provided a list of factors to consider when determining whether a case should be recommended for deferred action, including: (1) advanced or tender age; (2) many years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family

(cancellation of removal).

89. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999).

90. These considerations will be explored in detail. *See infra* Part II.C.

91. *Arizona*, 567 U.S. at 396.

92. *Id.*

93. *Id.*

94. *Id.* at 395.

95. *See generally* Mathew Coleman, *Between Public Policy and Foreign Policy: U.S. Immigration Law Reform and the Undocumented Migrant*, 29 URB. GEOGRAPHY 4 (2008).

96. *Reno*, 525 U.S. at 484–85 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)).

97. Letter from E.A. Loughran, INS Associate Commissioner, to Leon Wildes (July 16, 1973).

situation in the United States; and (5) criminal, immoral or subversive activities or affiliations.⁹⁸ The regional commissioner must thereafter approve the district director's recommendation.⁹⁹ If approved, the alien is alerted that the INS will take no action will to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate under the circumstances of the particular case.¹⁰⁰

The INS Instruction has experienced a number of changes over time, but the amendments made in response to *Nicholas v. INS*—a Ninth Circuit case in which the Court held that the Instruction operated as a substantive rule as opposed to an internal procedural guideline¹⁰¹—were of particular significance. After *Nicholas*, the INS amended the Instruction to affirmatively state that grants of deferred action status were in no sense a noncitizen's "entitlement"; rather, they are a matter of administrative choice.¹⁰² According to Professor Shoba Sivaprasad Wadhia, the INS's decision to amend after *Nicholas* was likely motivated by the Ninth Circuit's "compassion-based theory for upholding judicial review."¹⁰³ By reframing the Instruction as a measure of "pure administrative convenience," the DHS sought to avoid further judicial review of administrative decisions.¹⁰⁴

The criteria outlined in the published INS Instruction was later affirmed and widely publicized in a memorandum issued by former INS Commissioner Doris Meissner. Meissner's memorandum details a range of possible actions taken by immigration enforcement officials that would fall within the meaning of enforcement discretion. The memorandum specifically provides that enforcement discretion may be exercised in a proactive manner such as granting affirmative relief in the form of deferred action.¹⁰⁵ However, enforcement discretion may not be used to affirmatively grant or approve legal permanent residence or citizenship: this can only be conferred through statutory authority.¹⁰⁶ By way of example, the memorandum provides: "the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA."¹⁰⁷

Furthermore, enforcement discretion extends only up to the substantive and jurisdictional limits of the law; it may never be used to justify actions that are illegal

98. IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975).

99. *Id.*

100. *Id.*

101. *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979). The Ninth Circuit made several other conclusions related to the language of the Instructions: "(1) [t]he sole basis for granting relief is the presence of humanitarian factors; (2) [t]he Instruction is directive in nature; and (3) [t]he effect of such relief upon a deportation order is to *defer it indefinitely*." *Id.* at 806.

102. Wadhia, *supra* note 3, at 250–51.

103. *Id.* at 251.

104. *Id.* The various constraints on judicial review of exercises of enforcement discretion are explored further. *See infra* Part III.

105. Memorandum from INS Commissioner Doris Meissner on Exercising Prosecutorial Discretion 2 (Nov. 17, 2000), <http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00> [<https://perma.cc/VWV3-Z88Z>].

106. *Id.* at 3.

107. *Id.* at 3–4.

under relevant law, or actions that may be legal in other contexts but are not within the authority of the agency or officer undertaking the action.¹⁰⁸ Finally, Meissner acknowledges that:

[E]xercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.¹⁰⁹

The development and expansion of the enforcement discretion doctrine over time demonstrates its increasingly important role in national regulatory policy. In its purest form, enforcement discretion contemplates striking a delicate but necessary balance of power between the legislative and executive branches, with the ultimate goal of “mak[ing] the norms of law actual: [enforcement] aims to make those norms obtain in the world.”¹¹⁰

IV. THE HISTORICALLY LIMITED ROLE OF THE JUDICIARY

Although the doctrine of enforcement discretion primarily implicates the executive and legislative branches, the judiciary has a role to play as well. As the above discussion demonstrates, it is a well-established principle that acts of executive discretion are granted deference but they are by no means immune from judicial review. Rather, as a general rule, “whenever the executive branch exceeds its express or implied congressional mandate, the matter is subject to judicial review.”¹¹¹ Nonetheless, it has become increasingly apparent that the exceptions have all but swallowed this “rule,” and there are significant ambiguities regarding the scope and rationale of judicial power in this context. In light of recent litigation—particularly *United States v. Texas*—clarifying the boundaries of judicial power in this area has gained “new urgency.”¹¹²

A. Presumptive Unreviewability

Addressing the Court's role in the enforcement process, Justice Rehnquist remarked in *Heckler v. Chaney* that “when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”¹¹³

108. *Id.* at 4.

109. *Id.*

110. Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293, 296 (2011).

111. Patrick J. Charles, *The Sudden Embrace of Executive Discretion in Immigration Law*, 55 WASHBURN L.J. 59, 72 (2015).

112. Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1572 (2016).

113. *Chaney*, 470 U.S. at 832 (emphasis omitted).

Rehnquist further noted that “when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.”¹¹⁴ In these circumstances, the judiciary can at least review said action to determine whether the agency has exceeded the scope of its statutory powers.¹¹⁵ By delineating between action and inaction, *Chaney* placed qualified exercises of enforcement discretion (specifically, non-enforcement) within the category of actions “committed to agency discretion by law” and exempted from review under the APA.¹¹⁶ According to the Court, non-enforcement is generally unsuitable for review because it hinges on a complicated balancing of various factors that fall specifically within the agency’s expertise.¹¹⁷

The *Chaney* holding was in clear tension with traditional doctrinal principles. Prior to this case, the Supreme Court had embraced a strong presumption in favor of judicial review of administrative action; by contrast, the *Chaney* Court invoked a background “tradition” of executive enforcement discretion in order to exempt these decisions from “the demand for legitimation through review.”¹¹⁸ In effect, as far as the Court had previously sought to validate agencies’ performance of traditional legislative and judicial responsibilities by specifically interpreting the APA for judicial review, *Chaney* reflects a “countervailing impulse to insulate a characteristically executive form of decision from judicial scrutiny.”¹¹⁹

B. Additional Procedural Hurdles

The Supreme Court has further insulated enforcement discretion decisions from judicial scrutiny through its strict interpretation of the “case or controversy” requirement of Article III of the U.S. Constitution. For instance, in *Linda R.S. v. Richard D.*, a single mother sought an injunction against the discriminatory application of a Texas criminal statute making a parent’s willful desertion, neglect, or refusal to provide for child support and maintenance of a child under the age of eighteen a misdemeanor.¹²⁰ The statute made no distinction between legitimate and illegitimate children, but the Texas courts had consistently interpreted it to impose no duty of support on the parents of illegitimate children.¹²¹ The Court rejected the mother’s standing to challenge Texas’s decision not to prosecute certain fathers who failed to pay child support, reasoning that “in the unique context of a challenge to a criminal statute, appellant ha[d] failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention.”¹²² To invoke the power of judicial review, a plaintiff must show that he or she sustained some type of direct injury as a result of the statute’s enforcement.¹²³

114. *Id.* (emphasis omitted).

115. *Id.*

116. Price, *supra* note 112, at 1577 n.26.

117. *Id.* at 1578–79 (quoting *Chaney*, 470 U.S. at 831–32).

118. *Id.* at 1578.

119. *Id.* at 1579.

120. *Linda R.S. v. Richard D.*, 410 U.S. 614, 615–17 (1973).

121. *Id.*

122. *Id.* at 617–18.

123. *Id.* at 618.

Following the *Linda R.S.* decision, the Court constitutionalized this concept by defending strict Article III standing requirements on separation of powers principles. In *Allen v. Wright*, the Supreme Court acknowledged that a plaintiff attempting to enjoin agency activity must first overcome the established principle that the government is entitled to “the widest latitude in the ‘dispatch of its own internal affairs.’”¹²⁴ And

[w]hen transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.¹²⁵

The Court went on to recognize that the Constitution assigns the duty to “take Care that the Laws be faithfully executed” exclusively to the President under Article III, Section 3.¹²⁶

After addressing these self-imposed limitations on judicial review of executive enforcement decisions, Associate Professor Zachary Price goes so far as to argue that executive non-enforcement authority implicates the political question doctrine and is therefore entirely unreviewable.¹²⁷ Price contends that, like other core executive functions, enforcement discretion is “an area where institutional limitations on courts place a gap between what executive officials ideally should do and what courts will require from them.”¹²⁸ Executive enforcement decisions, or even broader enforcement policies, may violate traditional understanding of the executive’s duty to faithfully execute laws, yet nonetheless still evade judicial scrutiny.¹²⁹

As the various limiting doctrines demonstrate, the relevant case law is somewhat of a jumbled mess that raises several unanswered questions relating to its scope and underlying justifications. What is clear, however, is that judicial review has proven to be a relatively inefficient and ineffective check on executive power to exercise discretion. As history and precedent have proven, it is not a matter of whether an executive may exercise this discretion, but a matter of how.

124. *Allen v. Wright*, 468 U.S. 737, 761 (1984) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

125. *Id.* at 761.

126. *Id.*; see also U.S. CONST. Art. II, § 3.

127. Price, *supra* note 112, at 1638–39.

128. *Id.* at 1573–74.

129. *Id.* at 1619. To illustrate this point, Price refers to the Obama administration’s marijuana enforcement policies. Although these policies are “framed in heavily caveated and noncommittal terms,” they might go far enough as to represent a form of illegitimate policy-based non-enforcement by violating the appropriate adherence to legislative policy and relevant statutory schemes. Nonetheless, judicial second-guessing of this kind of executive action involves questions of relative significance and appropriate “managerial” focus that courts have generally deemed unmanageable. *Id.*

V. MOVING FORWARD: LESSONS TO BE LEARNED FROM THE OBAMA
ADMINISTRATION

Irrespective of the current debate over the scope of the enforcement power, the fact remains that throughout the twentieth century U.S. presidents have continually exercised this power in order to assure the best use of the limited supply of governmental resources as well as to assert specific policy agendas.¹³⁰ And as history also demonstrates, this practice has appreciable value: enforcement discretion empowers the executive to adjust legislative policy according to unforeseen or changed circumstances, encourages innovative policy reform, and protects against the threat of legislative inertia.¹³¹ Despite these clear advantages, President Obama's initiative faced unprecedented backlash.¹³²

For President Obama, perhaps the fatal error was framing his policy in terms of an affirmative, large-scale deferred action plan. Although President Obama was arguably forced to take this path given legislative gridlock that defined his presidency,¹³³ such an approach opened the door to judicial review and encouraged critics to characterize DAPA as a unilateral lawmaking exercise. The arguments raised in *United States v. Texas* as well as those made by scholars on both sides of the debate are particularly instructive in terms of evaluating where President Obama went "wrong" from a separation of powers perspective, and how future presidents might accomplish similar goals while ideally avoiding constitutional challenge altogether.

A. Framing Enforcement Priorities: Distinguishing Nonstatus from Lawful
Presence

Given the INA's prioritization of criminals,¹³⁴ President Trump's immigration policy (or at least what he has publicly communicated and acted on thus far) appears to be aligned with congressional intent in that critical respect. However, prior to announcing the phaseout of DACA, President Trump also declared on a number of occasions his intention to "work something out" for the large number of unauthorized immigrants who came to the United States as children and have since become productive members of society.¹³⁵ President Trump has since indicated in a tweet that

130. See generally Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

131. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107 (2015).

132. In its Supreme Court Brief, the Government points to over twenty deferred action policies since 1960—including George H.W. Bush's Family Fairness policy—that were deemed lawful exercises of the enforcement power. See Reply Brief for the Petitioners, *supra* note 25, at 15.

133. See generally ISSUES IN AMERICAN POLITICS: POLARIZED POLITICS IN THE AGE OF OBAMA (John Dumbrell ed., 2013) (detailing the partisanship of contemporary U.S. politics and the issues it has raised for the Obama administration).

134. See *supra* text accompanying note 47.

135. See, e.g., Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME, Dec. 19, 2016, at 24. In his interview with TIME Magazine, Trump declared, "We're going to work

he will “revisit” the issue if Congress is unable to “legalize DACA.”¹³⁶ This comment seems to imply that he would be willing to act within the scope of his own authority if Congress fails to act. And if President Trump acts to implement any comprehensive deferred-action-style plan to protect these individuals, he will undoubtedly face the same obstacles that President Obama faced with respect to DAPA. Ultimately, how Trump frames his immigration plans will have a significant impact on how it is received by Congress, the judiciary, and the greater public.

To illustrate this point, consider the treatment of the legislative veto. In *Chadha*, the Supreme Court singlehandedly invalidated a device that the legislative branch had been using for more than fifty years.¹³⁷ Yet rather than inhibiting the practice, Congress continued to place legislative vetoes in its bills in addition to adopting informal agreements with agency committees.¹³⁸ Furthermore, Congress accomplished the same result indirectly and through subtler means such as crafting House and Senate rules and joint resolutions, so the Court’s decision simply “[drove] underground” a set of legislative vetoes that formerly operated in plain sight.¹³⁹ And ultimately the Court’s rigid adherence to traditional, formalized lawmaking processes encouraged non-compliance, subtle evasion, and “a system of lawmaking that is now more convoluted, cumbersome, and covert than before.”¹⁴⁰

There are clear parallels to be drawn between the legislative veto as scrutinized in *Chadha* and deferred action as addressed in *United States v. Texas*, at least in terms of potential effect on executive transparency. More specifically, Professor Michael Kagan contends that President Obama’s actions have significantly altered the dynamics of executive immigration policy for three reasons: (1) his actions are substantial in scale, (2) his policies are highly transparent, and (3) President Obama has intentionally drawn publicity to his policies, thereby “inject[ing] discretionary immigration policy into national politics at the highest level.”¹⁴¹ While it is certainly not a new practice to develop guidelines for exercising discretion, it was during the Obama administration that immigration agencies began announcing and disseminating to the public these internal guidelines.¹⁴² In doing so, President Obama more or less institutionalized the exercise of enforcement discretion by making it more rule-like and centralized.¹⁴³

something out that’s going to make people happy and proud They got brought here at a very young age, they’ve worked here, they’ve gone to school here. Some were good students. Some have wonderful jobs. And they’re in never-never land because they don’t know what’s going to happen.” *Id.*

136. Sophie Tatum, *Trump: I’ll ‘Revisit’ DACA if Congress Can’t Fix in 6 Months*, CNN POLITICS (Sept. 6, 2017, 9:13 AM), <http://www.cnn.com/2017/09/05/politics/donald-trump-revisit-daca/index.html> [https://perma.cc/QA2X-75GM].

137. See Fisher, *supra* note 57, at 705.

138. *Id.* at 706–07.

139. *Id.* at 707, 711.

140. *Id.* at 710–11.

141. Michael Kagan, *The New Era of Presidential Immigration Law*, 55 WASHBURN L.J. 117, 121 (2015).

142. Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama’s Executive Actions on Immigration*, 92 WASH. U.L. REV. 1083, 1095 (2015).

143. Cox & Rodríguez, *supra* note 131, at 111. It is important to note, however, that to the extent that executive action becomes more rule-like, it may trigger the notice and comment

Reflecting on the implications of these changes, Kagan believes it is advantageous for a new president to have the ability to rapidly alter how immigration law is enforced—so long as this change is made transparently.¹⁴⁴ The executive's actions enhance political accountability if discretion is exercised transparently.¹⁴⁵ However, Kagan also notes that the easier it is to shift enforcement policies, the more unstable immigration law will be (particularly in the face of political change of the kind the country is currently experiencing).¹⁴⁶ Given the challenge in *United States v. Texas*, there is also the chance that President Obama's transparency will discourage future presidents from taking a similar approach. Now more than ever—from the agency's perspective—transparency about deferred action and enforcement priorities may be perceived as not worth the risk. "Transparent rules tend to spotlight a value choice. Opponents of that choice will attack the agency's action, forcing the agency to expend its own resources for defense. Rules having low transparency thus become more attractive, since they conceal value choices."¹⁴⁷

Irrespective of its effect on transparency, President Obama's blocked attempt at immigration reform will certainly influence President Trump's strategy in terms of the means he chooses to implement his own deferred action plan. The central focus of Respondents' Supreme Court brief is the assertion that DAPA was unconstitutional in the sense that it "affirmatively grants lawful presence to aliens who would otherwise be unlawfully present."¹⁴⁸ This emphasis on the concept of "lawful presence" allowed Respondents to assert that President Obama took an action to change the status and bestow substantial benefits of a mass amount of undocumented aliens.¹⁴⁹ In light of this controversial interpretation of DAPA, future immigration policies would be better suited for constitutional challenge if framed in terms of "inaction," or rather as forbearance from removing qualified aliens. This approach is more consistent with the overall function and purpose of deferred action and does not raise the same issues related to usurpation of the legislative function. Indeed, deferred action is simply the "'discretion to abandon' the 'initiation or prosecution of various stages in the deportation process.' . . . But a decision not to initiate enforcement action cannot transform unlawful conduct into lawful conduct."¹⁵⁰ Inaction is also more difficult to classify under the traditional *Youngstown* framework. In particular, it is difficult to identify a specific violation of

procedures of the APA. See, e.g., DANIEL T. SHEDD & TODD GARVEY, CONG. RESEARCH SERV., R43710, A PRIMER ON THE REVIEWABILITY OF AGENCY DELAY AND ENFORCEMENT DISCRETION 9–10 (2014).

144. Kagan, *supra* note 141, at 127–28.

145. *Id.*

146. *Id.* at 128.

147. Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 57 (2012) (quoting Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 106 (1983)).

148. Brief for the State Respondents, *supra* note 7, at 11.

149. *Id.* at 40–41.

150. *Id.* at 41; see also Kagan, *supra* note 142, at 1092 ("[J]udicial precedents appear to speak only to the simple decision to refrain from taking enforcement action. They do not appear on their texts to deal with more affirmative actions, nor the kind of categorical rules and application procedures that the Obama administration has put into effect.").

separation of powers principles given that Jackson's theory of presidential power focuses entirely on the problem of presidential action.¹⁵¹

This strategy could be effectively implemented through an approach involving the public issuance of a prioritization memorandum. As referenced in the *United States v. Texas* Respondents' brief, on November 20, 2014, President Obama issued a memorandum that defined "three categories of aliens prioritized for removal."¹⁵² The memorandum was not challenged in the case, as the Respondents conceded it was enacted "pursuant to delegated authority to "[e]stablish[] national immigration enforcement policies and priorities."¹⁵³ The first category of aliens identified in President Obama's memorandum includes aliens representing "threats to national security, border security, and public safety."¹⁵⁴ Category one aliens are those who generally "must be prioritized" for removal.¹⁵⁵ The second category encompasses "misdemeanants and new immigration violators"; these individuals generally "should be removed."¹⁵⁶ Lastly, category three includes aliens who have committed "other immigration violations" and recently received a removal order; these individuals are the ICE's lowest removal priority.¹⁵⁷ The memorandum notes that it is not intended to prohibit or discourage the apprehension, detention, and removal of aliens who are not identified as priorities but are nonetheless unlawfully present in the United States; however, it provides that to the greatest extent possible, resources should be dedicated to the removal of aliens specified as priorities therein.¹⁵⁸ Aside from aliens who fall into these three categories, all other unlawfully present aliens can be removed only if an ICE Field Office Director makes the determination that removal would "serve an important federal interest."¹⁵⁹

Issuing a similarly structured memorandum would provide President Trump the opportunity to expressly indicate his enforcement priorities in a manner that does not take the form of an affirmative mandate. On February 20, 2017, President Trump did in fact issue an official memorandum seemingly seeking to clarify the boundaries of his immigration policy. However, the inherent problem with President Trump's memorandum—and what distinguishes it from that of his predecessor—is that it does not purport to create a hierarchy of priorities or even to establish realistic priorities at all; to the contrary, it has been described by immigration activists as a "blueprint for 'mass deportation.'"¹⁶⁰ In short, President Trump's memorandum simply dictates that DHS personnel "should prioritize removable aliens" who meet any of the extremely broad criteria listed within the same paragraph.¹⁶¹ The memorandum

151. Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195, 1207 (2014) (referencing "the missing theory of inaction").

152. JOHNSON, *supra* note 19, at 3.

153. Brief for the State Respondents, *supra* note 7, at 10 (citing 6 U.S.C. § 202(5) (2012)).

154. JOHNSON, *supra* note 19, at 3.

155. *Id.*

156. *Id.* at 3–4.

157. *Id.* at 4.

158. *Id.* at 5.

159. *Id.*

160. See Domonoske & Rose, *supra* note 13.

161. See KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, *supra* note 12, at 2.

drastically expands the category of immigrants classified as a “priority” without making any meaningful distinction among the various sub-categories or making explicit whether they are of equal significance. To illustrate this difference, consider that under the Obama administration, “Priority 1” aliens included aliens convicted felony offenses as well as aggravated felonies.¹⁶² On the other hand, President Trump’s enforcement policy identifies aliens who have been convicted of any criminal offense (no matter how minor), who have a pending criminal offense not yet resolved, or who have committed acts that constitute a chargeable criminal offense (even if they have not been charged).¹⁶³ Lawyers and advocates say that such language essentially criminalizes anyone residing in the country illegally.¹⁶⁴ Since immigrants can technically face charges for entering the country illegally, Trump’s order and accompanying memorandum suggest that these individuals are a top priority for deportation solely by virtue of being present in the United States.¹⁶⁵

Considering its potentially far-reaching implications, President Trump’s memorandum does not represent a workable exercise of enforcement discretion because the U.S. government simply does not have the resources to prosecute all of the roughly eleven million illegal aliens implicated by the policy.¹⁶⁶ Thus, unless he successfully ensures a substantial increase in DHS resources,¹⁶⁷ President Trump will be forced to define his priorities more narrowly in order to ensure that removal is carried out according to his overarching policy goals. For instance, by creating a hierarchy of priorities similar to that established in the Obama administration memorandum, President Trump could make the most effectively use of these limited resources by targeting a more specific class of offenders such as those with “criminal records, gang members, and drug dealers,” a category which President Trump referred to as his top priority prior to taking office.¹⁶⁸ On the other hand, DREAMers and other productive citizens would likely not fall under any category at all, thereby allowing an ICE officer to take into account (and give more weight to) humanitarian factors when making a determination regarding removal. Such a memorandum provides clear direction while also affording immigration officials the necessary

162. See JOHNSON, *supra* note 19, at 3.

163. See KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, *supra* note 12, at 2.

164. Adrian Florido, *How Trump Criminalized 11 Million with a Stroke of His Pen*, NPR (Jan. 28, 2017), <http://www.npr.org/sections/codeswitch/2017/01/28/512040631/how-trump-criminalized-11-million-with-a-stroke-of-his-pen> [https://perma.cc/FA8A-6P7T].

165. *Id.*

166. See *supra* note 2 and accompanying text.

167. To ensure that U.S. immigration laws are enforced in accordance with his directives, President Trump has ordered ICE to “hire 10,000 officers and agents expeditiously, *subject to available resources.*” KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, *supra* note 12, at 2 (emphasis added).

168. *60 Minutes Interview: President-elect Donald Trump* (CBS television broadcast Nov. 13, 2016). In his January 2 Memorandum, President Trump makes a similar reference when noting that, the Director of ICE may issue further guidance as to how to “allocate appropriate resources to prioritize enforcement activities within [the above listed] categories-for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.” KELLY, ENFORCEMENT OF THE IMMIGRATION LAWS TO SERVE THE NATIONAL INTEREST, *supra* note 12, at 2.

“discretion” in carrying out their enforcement duties on a case-by-case basis.¹⁶⁹ Therefore, it does not have the appearance of the kind of unilateral executive action that was condemned by critics of DAPA but rather takes the form of a permissible general policy statement.¹⁷⁰

The potential downside of this approach is that appears to accomplish little more than create a class of “nonstatus” aliens, or aliens that “occupy a paradoxical middle ground between legality and illegality, loosely tethered to this country by humanitarian concern or prosecutorial discretion.”¹⁷¹ This is the case because nonstatus aliens occupy a temporary status and do not have a pathway to citizenship; further, since nonstatus is tentative, holders have limited rights (both substantive and procedural) and thus live in a state of enduring ambiguity.¹⁷² Yet as Professor Shapiro points out, for many aliens, nonstatus is the only way to claim “some measure of dignity and legitimacy from a society that places a strong stigma on unauthorized immigrants.”¹⁷³ Further, publishing his prioritization memorandum as the Obama administration elected to do, Trump can publicly acknowledge these individuals and in turn, unlawfully present aliens will be more certain of their status and ability to remain in the country. In other words, while “nonstatus” does not completely alleviate the fear of deportation (given that nonstatus is both discretionary and temporary), at the very least an unlawfully present alien can more easily determine what category they fall into and may find some comfort in knowing that the chances are high that they will be left alone.¹⁷⁴

B. Conferring Benefits: Appealing to Conservative Values

On top of publicizing his enforcement priorities, President Trump’s recent call to lawmakers to craft a replacement for DACA provides the President the unique opportunity to work hand in hand with Congress to craft a workable solution for the roughly 800,000 young immigrants affected by his decision to phase out the Obama-era program. In recent statements, President Trump indicated both branches are “talking about taking care of people, people that were brought here, people that have done a good job, and were not brought here of their own volition.”¹⁷⁵ While it is not presently clear whether any plan to “take care” of these individuals would involve

169. See Brief for the State Respondents, *supra* note 7, at 17 (asserting that “DAPA is a binding rule that eliminates agency officials’ discretion”); see also Blackman, *supra* note 42, at 242 (“DHS weakened the scope of officer discretion by limiting the grounds for denial to checking boxes on a template Substantively, discretion was confined to the Secretary’s preferences, displacing any meaningful case-by-case review.”).

170. See Brief for the State Respondents, *supra* note 7, at 70 (“DAPA cannot be a general policy statement because it constrains agency discretion and grants individual rights.”).

171. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1120 (2015).

172. *Id.* at 1119.

173. *Id.* at 1116.

174. See, e.g., Kagan *supra* note 141, at 122–23 (referring to the benefits of transparent enforcement priorities).

175. Sheryl Gay Stolberg & Yamiche Alcindor, *Trump’s Support for Law to Protect ‘Dreamers’ Lifts Its Chances*, NEW YORK TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/us/politics/trump-daca-dreamers.html> [<https://perma.cc/BD2Y-RSU9>].

the conferral of specific benefits, historical practice has shown that work authorization is a practical corollary to withholding removal under the current statutory framework. Indeed, work permits appear to be the one immigration benefit that typically accompanies nonstatus.¹⁷⁶

In any case, benefits granted by exercise of enforcement discretion must be granted with caution. In fact, Professor Peter Margulies asserts that the “wholesale conferral of benefits” is perhaps the precise feature that shifts DAPA into the domain of agency action as opposed to unreviewable inaction.¹⁷⁷ In addition to making the action-inaction delineation, the *United States v. Texas* Respondents contended that providing President Obama with “unchecked power to grant work authorization and benefits to millions of aliens would be completely contrary to Congress’s ‘legislative mandate.’”¹⁷⁸ Critics of benefit-granting deferred action plans also suggest that instead of merely reallocating resources from low to high priority cases, these initiatives require the government to expend additional resources to provide benefits for qualified aliens.¹⁷⁹

Considering the arguably “unprecedented” practice of conferring certain benefits upon recipients of temporary status,¹⁸⁰ the safest option for the future President would be to work directly with Congress regarding this component of a deferred action plan. And with a Republican-dominated Congress, President Trump has the opportunity to avoid the kind of bipartisan gridlock that President Obama endured by appealing directly to the conservative values while working to create this new, lawful deferred action program. In fact, House Speaker Paul Ryan previously expressed his personal opinion that “for the undocumented, we have to come up with a solution that does not involve mass deportations, that involves giving people the ability to get right with the law, to come and earn a legal status while we fix the rest of legal immigration.”¹⁸¹ Ryan also clarified that despite President Trump’s campaign rhetoric, Congress has no intention to “erect[] a deportation force.”¹⁸² More recently, President Trump indicated that as far as replacing DACA is concerned, Paul Ryan is “on board” and the administration is “working with everybody,” both Republican and Democrat to craft a solution.¹⁸³

With Congress’s support, Trump could potentially advocate for a narrowly defined law providing that undocumented aliens who do not fall under any of the prescribed priority categories and who meet certain specified qualifications are eligible for a limited set of benefits such as work authorization. In addition to qualifications that are considered when defining an alien’s status (such as length of

176. Heeren, *supra* note 171, at 1172.

177. Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1193 (2015).

178. Brief for the State Respondents, *supra* note 7, at 43.

179. See, e.g., Blackman, *supra* note 42, at 257 (emphasis added).

180. See Brief for the State Respondents, *supra* note 7, at 58–59.

181. Eric Bradner, *Ryan: ‘We are not planning on erecting a deportation force’*, CNN POLITICS (Nov. 13, 2016, 3:10 PM), <http://www.cnn.com/2016/11/13/politics/paul-ryan-donald-trump-obamacare-deportation-force/> [https://perma.cc/K9N7-5P2Q].

182. *Id.* Ryan has not addressed this comment since the release of President Trump’s memorandum calling for the expansion of ICE resources.

183. Stolberg & Alcindor, *supra* note 175.

residency), qualifications for benefits might include education, past employment, and family status. A law limited in this way has the potential to appeal to conservatives in the sense that it would only benefit qualified individuals, or those who have benefitted the economy and society at large while residing in the United States: This kind of qualification-dependent law is sufficiently “water[ed] down” in order to avoid the “welfare magnet narrative.”¹⁸⁴

All in all, perhaps the key to aligning a law conferring benefits on nonstatus aliens with the INA is stressing the idea that such a law does not grant permanent residence to any eligible alien or grantee.¹⁸⁵ At the heart of DAPA opponents’ argument against the conferral of benefits is the assertion that “immigration statutes [do not] commit to agency discretion the power to grant lawful presence, work authorization, and benefits eligibility to millions of unlawfully present aliens.”¹⁸⁶ If the immigration plan or related law is interpreted as conferring “lawful presence” upon eligible aliens—as was argument against DAPA—then such a law could also potentially qualify these individuals for a host of other benefits including Social Security and Medicare.¹⁸⁷ Consequently, it is likely necessary (and possible) to draft a law narrow enough to provide necessary benefits to eligible aliens that demonstrate an ability to contribute to society while still not granting them the benefits of full citizenship.¹⁸⁸

CONCLUSION

Throughout history, enforcement discretion has consistently proven to be an indispensable means for making the most effective use of limited governmental resources in the face of mass immigration. The recent challenge to President Obama’s deferred action plan known as DAPA has sparked strong opinions from scholars and members of the general public on both sides of the debate, and has raised important questions regarding the precise scope of the executive’s authority over immigration law in the process. Though there is thus far no clear answer to that question, what has become apparent is the necessity for future Presidents to exercise caution and tactfulness in setting enforcement priorities and—perhaps more importantly—communicating those priorities to the greater public. To achieve his objectives, President Trump must learn from the perceived failings of DAPA in order to frame his immigration plans in a way that eludes constitutional challenge. Namely,

184. See Heeren, *supra* note 171, at 1174 (asserting that politicians acting to expand the boundaries of nonstatus in the future will need to dilute nonstatus benefits in order to “address the welfare magnet narrative”).

185. Aliens that are “lawfully present” in the United States are eligible for “valuable benefits” such as Medicare and Social Security among others. Brief for the State Respondents, *supra* note 7, at 1. If DAPA—or any future immigration policy—is interpreted as granting lawful presence to unauthorized aliens, then it would effectively remove the eligibility bar for these significant benefits. See *id.* at 16.

186. Brief for the State Respondents, *supra* note 7, at 15.

187. See Brief for the State Respondents, *supra* note 7, at 6.

188. See, e.g., Margulies, *supra* note 177, at 1257 (“DAPA’s award of benefits to unlawful entrants with no reasonable prospects of obtaining a legal status is a bridge [to legal status] too far.”).

he should avoid crossing the somewhat ambiguous line from inaction to the type of action that encroaches on the authority of the legislative branch. But regardless of the precise approach any future President chooses to take, enforcement discretion will continue to play a critical role in ensuring the efficient functioning and development of this “nation of immigrants.”