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Obama Asks the Supreme Court to Rewrite His Immigration Policy

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With the Supreme Court poised to rule against President Obama's executive actions on immigration, his lawyers have once again asked the justices to save the policy by rewriting it.

In 2012 and 2015, the Court rewrote key provisions of Obamacare — "penalty" means *tax*, and "state" means *federal* — to avoid unraveling a democratically enacted law that was of great social import. Having worked twice before to get the Court to rewrite legislation, the government is now trying a third time: It has asked the justices to alter Obama's immigration policy by using a "red pencil" to salvage it. The Court should not take the bait. While the judicial branch owes some duty to Congress to find ways to uphold statutes, the justices have absolutely no obligation to rewrite the president's unilateral executive actions to save them. If the policy is flawed, nothing prevents the executive branch from bringing it into compliance with the law. It is not the job of the courts to bail the president out of a jam of his own making.

On November 20, 2014, President Obama announced the policy known as Deferred Action for Parents of Americans (DAPA). This executive action purported to rely on "prosecutorial discretion" to defer the deportations of up to 5 million aliens and grant them work authorization and other federal benefits. Critically, the memorandum announcing DAPA included this sentence: "Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States." (Emphasis added.)

Herein lies the conundrum: Aliens who receive relief under DAPA do not have "any form of legal status," but at the same time they are "lawfully present in the United States." During oral arguments in *U.S. v. Texas*, a perplexed Chief Justice Roberts asked Solicitor General Donald Verrilli this question: Is it the government's position that "lawfully present does not mean you're legally present"? Verrilli responded, "Correct." A stunned Justice Alito stated that he didn't "understand" how that was possible in light of the "English language."

Anticipating that the granting of lawful presence may be problematic, Verrilli made a critical concession in his final brief to the Court: "'*Lawful* presence' thus might be better called '*tolerated* presence.'" (Emphasis added.) In other words, pretend the phrase "lawfully present"

wasn't there, and substitute a synonym — "tolerated" — that doesn't raise any doubts. As I noted on my blog at the time, Verrilli was asking the Court for a "savings construction": He wanted the justices to eliminate the problem by rewriting a problematic provision, thereby saving DAPA. Of course, that is not the language the government chose — indeed the phrase "lawfully present" did not appear in President Obama's 2012 executive action on immigration known as Deferred Action for Childhood Arrivals (DACA). DAPA added this additional language deliberately. Now under judicial scrutiny, the government is running away from it.

This saving-strategy became apparent early during oral arguments. Recognizing resistance from the justices, Verrilli said, "If the Court thinks it's a problem and wants to put a red pencil through ['lawfully present'], it's totally fine." He expressly asked the justices to rewrite the Obama administration's own policy, as if the justices were the president's copy editor.

Several other justices picked up on the suggestion. Justice Kagan told Texas Solicitor General Scott Keller, "You could strike that phrase today if you wanted to; that phrase really has no legal consequence whatsoever." Justice Ginsburg added: "The government has said, take out that word. It was unfortunate that we used it. What we mean is tolerated presence." Stated otherwise, the Obama administration was asking for a mulligan for its "unfortunate" decision.

But this argument doesn't work. Even if the Court struck out "lawfully present" with an imaginary red pencil, it would not alter DAPA's unprecedented transformation of immigration policy. Erin Murphy, arguing on behalf of the U.S. House of Representatives, concisely explained why red-lining the memo doesn't fix the situation. Even "if you cross it out," she explained, "lawful presence" is "still part of the regulatory scheme." DAPA is not merely about choosing not to remove an alien at a particular time. The action also "changes eligibility for work authorization and benefits in this country." When the executive branch takes that step, Murphy concluded, "we are far outside the notion of mere enforcement discretion." Justice Kennedy picked up on this theme during arguments and described President Obama's view of prosecutorial discretion as "backwards" and "upside down." The separation-of-powers stalwart said DAPA was akin to a "legislative, not an executive act."

Further, the rationales underlying the Court's twistifications to save Obamacare in 2012 and 2015 are simply not present here. The Affordable Care Act was a statute enacted by Congress, the democratically elected branch that the Constitution vests with the power to write laws. The Court's duty to avoid invalidating acts of Congress is premised on the legislature's role in our separation-of-powers system, and on its democratic accountability to the voters. None of these factors compel the Supreme Court to rewrite DAPA.

Five months after Congress rejected the president's preferred immigration laws, and two weeks after the 2014 midterm election, President Obama announced DAPA from the White House. The policy was not even first submitted for public comment; it was decreed by posting a PDF on the Department of Homeland Security blog (what I call "government by blog post"). Every step was

taken to avoid electoral accountability and to quickly grant lawful presence to millions in order to make it difficult for the next president to rescind their lawful presence. In the face of express congressional opposition — the House of Representatives passed a bill in December 2014 resolving that DAPA was "without any constitutional or statutory basis" — this is not behavior that warrants the Court's obeisance.

Finally, if the DAPA memorandum is so problematic, and it should not have awarded "lawful presence," absolutely nothing is stopping the president from issuing a *new* policy. During oral arguments, Justice Kagan stated, "It's [the government's] memorandum." That's exactly right. The government gets to interpret it or rewrite it whenever they wish. The Department of Homeland Security could have issued a new policy — minus "lawful presence" — in February 2015 after a federal court put DAPA on hold. Or they can do so now. Absolutely nothing prevents them from doing so. Secretary Johnson — who was sitting in the first row of the Court's gallery — could have signed a new memorandum on the spot, deleting the "lawfully present" language.

The executive branch does not need the Court to do its dirty work. Or maybe the government is telegraphing what it will do if it loses this case — simply reissue the exact same memorandum, absent the phrase "lawfully present" — so it can implement the policy before the election. If this is indeed the plan, the Supreme Court should make clear that this further evasion of the separation of powers won't work.

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