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## Immigration at the high court: The coming decision

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This spring, in *United States v. Texas*, the Supreme Court will decide the legality of President Obama's executive action on immigration, known as Deferred Action for Parents of Americans (DAPA). Critically, the court ordered the Obama administration to answer a pivotal question:

Whether DAPA "violates the take-care clause of the Constitution."

In 225 years, the Supreme Court has never had occasion to ask the president whether he has reneged on his oath to take care that the laws are faithfully executed. In June, the Supreme Court may provide an answer to this foundational question.

On Nov. 20, 2014, the president announced DAPA, an executive action purported to rely on "prosecutorial discretion" to defer the deportations of up to five million aliens and grant them work authorization. Two weeks later, Texas Attorney General Greg Abbott challenged DAPA in federal court in Brownsville. Two months after that, and two days before the Department of Homeland Security would have begun accepting new applicants for DAPA, U.S. District Judge Andrew Hanen put DAPA on hold nationwide. The case was then appealed to the Fifth Circuit Court of Appeals in New Orleans. In July, a divided court affirmed Hanen's ruling.

Both federal courts found that DAPA failed to comply with the requirements of the Administrative Procedures Act. However, neither reached the underlying constitutional question.

In November, the United States appealed the case to the Supreme Court and asked the justices to consider two questions: first, whether Texas had suffered a sufficient injury to have standing to challenge DAPA in federal court, and second, whether DAPA complies with the Procedures Act.

The government implored the court to stay away from the constitutional question. In a footnote, the Justice Department wrote that "neither court below addressed" the "constitutional question," which had "no independent content" - that is, the constitutional claim had no merit and was not even worthy of consideration. The Supreme Court had a different plan. In January, it ordered that "the parties are directed to brief and argue the following question: 'Whether the guidance violates the take-care clause of the Constitution.' "

With this decision, the justices directed the president to justify DAPA and prove that his executive action on immigration is consistent with congressional design, and not an effort to

rewrite the law. Based on my initial research, this is the first time the Supreme Court has ever asked a president to state this constitutional case.

On this front, the Obama administration faces a difficult challenge. DAPA does not operate to enforce the laws of Congress but to exempt nearly 40 percent of undocumented aliens in the United States - even those who were not previously subject to any enforcement action - from the threat of removal and to provide them with work authorization. This policy is not consistent with previous exercises of deferred action and constitutes an attempt to navigate around an uncooperative legislature. This pattern of behavior amounts to a deliberate decision not to act in good faith but to undermine the laws of Congress.

The fact that the court asked the government to brief this question in no way suggests how it will rule. But at a minimum, the justices recognized that the resolution of this foundational case requires a full accounting of the separation of powers - including the president's own testament.

However the Supreme Court rules in this case, it will set a powerful precedent for any president, regardless of party, who seeks to rewrite the law without Congress.

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