President Obama's DAPA Order Oversteps His Immigration Powers

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One test of the integrity of legal scholars is when they can cite an example of a good policy they find illegal or unconstitutional. An example of that for me is President Obama's Deferred Action for Parents of Citizens and Lawful Permanent Residents (DAPA).

Immigration is quite possibly the most feckless part of the federal government. More than advancing bad policy, our immigration system consists of schizophrenic laws that don't advance any particular goal. If you tried to draw up rules for how foreigners enter a country, how long they can stay, and what they can do here, you'd be hard-pressed to come up with anything worse than our hodge-podge of conflicting regulations.

This immigration non-policy serves nobody's interest, except perhaps lawyers and bureaucrats. And yet Congress has shamelessly refused to fix it.

This unfortunate circumstance, however, doesn't give the executive branch the power to rewrite the law itself. Yet in November 2014, President Obama did exactly that when he unveiled DAPA, which officially defers deportations and grants temporary legal status to more than four million illegal aliens, entitling them to work authorizations and other benefits.

In what has become a routine occurrence, 26 states sued the government in response to this executive action and a federal district court enjoined DAPA in February 2015. Cato filed amicus briefs supporting the Texas-led lawsuit at every stage of the legal proceedings, which we've done only in the most extraordinary cases. Before the Supreme Court, our brief was joined by libertarian legal luminary Randy Barnett.

I've written before that this unilateral action is good policy, bad law, and terrible precedent. To be clear, Cato scholars have long supported immigration reform that would provide relief to the

aliens protected by DAPA—among many other classes of people—but it's not for the president to make such legislative changes alone.

Now, the injunction that the Supreme Court is reviewing is based on the Administrative Procedure Act (APA), which sets out the process that federal agencies must follow to issue new regulations. DAPA was styled as "guidance"—in a memo from the Secretary of Homeland Security to his underlings—so the administration argues that it need not go through the APA's official "notice and comment" channels. This technical issue, along with the arcane matter of whether the states have "standing" to sue, may be the key to the high court's ruling (or, post-Scalia, if the justices split 4-4, they'll leave the injunction in place without further opinion). But the underlying question of whether DAPA complies with the relevant immigration laws and constitutional provisions is much more interesting.

President Obama defends his action by citing past deferrals for: battered and abused aliens; aliens involved in human trafficking; foreign students affected by Hurricane Katrina; widows of U.S. citizens; and spouses and children of people who had been granted legal status. But these deferred actions served as temporary *bridges* from one legal status to another, not *tunnels* that undermine legislative structure or *detours* around the law. They were also all approved by Congress.

None of these apply here. The administration itself stated the applicable test in the Justice Department memorandum setting out DAPA's legal justification: "an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering." This executive action represents a fundamental rewrite of the laws that is inconsistent with the Immigration and Naturalization Act (INA)—a "policy" that, again, I by no means endorse.

But don't take it from me. Here are arguments from a more prominent constitutional lawyer:

- "America is a nation of laws, which means [the president is] obligated to enforce the law…With respect to the notion that [the president] can just suspend deportations through executive order, that's just not the case…There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for [the president] to simply through executive order ignore those congressional mandates would not conform with [his] appropriate role as President." (March 28, 2011)
- "If this was an issue that [the president] could do unilaterally, [Obama] would have done it a long time ago…The way our system works is Congress has to pass legislation. [The president] then get[s] an opportunity to sign it and implement it." (Jan. 30, 2013)

These are but some examples of the *22* times that this executive-power expert has argued that DAPA wouldn't fly. Who is this person that felt the need to opine so many times? Barack Obama, who boasted after announcing the program that he "took an action to change the law."

As law professors Peter Margulies (a progressive) and Josh Blackman (a libertarian) explain in recent law review articles, DAPA contradicts the INA, implementing under the guise of executive discretion wholesale waivers and suspensions that swallow the enforcement rule. Indeed, Congress rejected or failed to pass bills reflecting this policy several times, so

executive power here is "at its lowest ebb," to use Justice Robert Jackson's famous formulation from the 1952 Steel Seizure Case.

In our constitutional architecture, executive action based on Congress's resistance to the president's agenda has no place. Countermanding congressional enactments is the epitome of a violation of the president's constitutional duty to "take care that the laws be faithfully executed."

While I strongly believe that immigration law needs to be overhauled, the path designed by the Framers for implementing such reforms goes through the halls of Congress. Unilateral exercises of power such as DAPA undermine the separation of powers and thus the rule of law.

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