

PRESIDENT OBAMA’S DAPA EXECUTIVE ACTION: EPHEMERAL OR ENDURING?

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On November 20, 2014, President Obama announced his executive order on immigration, Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”). Controversy immediately ensued. Never before has an executive action deferred deportation of up to five million people, nor has one received such public outrage. Since its announcement, there have been two primary judicial challenges to the executive action: United States v. Juarez-Escobar and Texas v. United States. The latter case investigates whether DAPA’s broad executive discretion is consistent with the congressional intent of various immigration statutes. While the district court in Texas v. United States granted a preliminary injunction on Administrative Procedure Act grounds, the court has not yet addressed whether DAPA violates the Constitution. The weight of the court’s forthcoming decision is undeniable. Given the widespread reach of DAPA and the public controversy surrounding it, the executive action warrants a detailed exploration of its substance and its precarious future.

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INTRODUCTION

On November 20, 2014, President Obama announced a landmark executive action on immigration that would prioritize the removal of certain categories of aliens while deferring deportation for others.¹ Other presidents have similarly acted to defer deportation of non-citizens. Over the last 35 years, Presidents Carter, Reagan, George H.W. Bush, and Clinton have issued wide-reaching executive orders of their own.² This latest policy, however, known as Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), would affect the greatest number of people yet, and has garnered the most antagonism from states, the media, and Congress.³ In total, DAPA would defer the deportation of up to five million undocumented immigrants.⁴ Since its announcement, there have been two primary judicial challenges to DAPA: *United States v. Juarez-Escobar*⁵ and *Texas v. United States*.⁶ The former case reads as an advisory opinion, making it non-justiciable.⁷ Thus it falls short of invalidating President Obama’s executive action. The latter case focuses on whether DAPA’s broad executive discretion is consistent with congressional intent in various immigration statutes. While the district court in *Texas v. United States* granted a preliminary injunction on Administrative Procedure Act (“APA”) grounds,⁸ the court has not yet addressed the plaintiffs’ argument that the executive action violates the Constitution’s Take Care Clause.⁹ Plaintiffs argued that because the Take Care Clause stipulates that the President shall “take care that the laws be

1. See generally Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs., et al. 3–5 (Nov. 20, 2014) [hereinafter DAPA Memo], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., Immigration & Customs Enforcement, et al. (Nov. 20, 2014) [hereinafter Enforcement Memo], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (outlining revised enforcement priorities); see also Karl S. Thompson, *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* (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (providing a legal framework to underpin the executive action).

2. See *infra* Part I (highlighting some of the more salient ones).

3. See AM. IMMIGRATION COUNCIL, EXECUTIVE GRANTS OF TEMPORARY IMMIGRATION RELIEF, 1956–PRESENT (2014), available at http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf; see also *infra* Part III (detailing a key state challenge to DAPA).

4. Ilya Somin, *Obama, Immigration, and the Rule of Law [Updated with Additional Material on Precedents for Obama’s Action, and a Response to Timothy Sandefur]*, VOLOKH CONSPIRACY (Nov. 20, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/>.

5. 25 F. Supp. 3d 774 (W.D. Pa. 2014).

6. No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. Dec. 3, 2014).

7. See *infra* Part II.

8. See *Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015), appeal docketed, No. 15-40238 (5th Cir. Feb. 23, 2015).

9. *Id.* at *61.

faithfully executed,”¹⁰ DAPA is unconstitutional in that it effectively abdicates the role of the Executive.¹¹

Even if DAPA does survive *Texas v. United States* and other judicial challenges, it could face continued roadblocks from the legislative branch. In early 2015, House Republicans unsuccessfully tried to block the executive action by stripping funding from the Department of Homeland Security (“DHS”).¹² Due to DAPA’s wide-reaching effect and the controversy over DAPA’s constitutionality, future congressional impediments to DAPA’s implementation will likely arise in the coming months and years.

This Note will explore the substance of DAPA and its precarious future. Part I reviews past executive actions on immigration from the 1980s to today, and discusses DAPA’s specific provisions. Part II analyzes how the first judicial attempt to invalidate the executive action—*United States v. Juarez-Escobar*—failed. Part III will discuss the preliminary injunction order in *Texas v. United States* and its implications for DAPA’s future. The Conclusion describes continuing obstacles to the executive action, and summarizes DAPA’s current legal posture.

I. EXECUTIVE ACTIONS ON IMMIGRATION, THEN AND NOW

In order to fully understand DAPA, it must first be placed in its historical context. For several decades, the executive branch has exercised prosecutorial discretion in the form of deferred action in immigration enforcement.¹³ In 1980, President Carter paroled 123,000 Haitians and Cubans into the United States during a period known as the Mariel Boatlift.¹⁴ President Reagan’s signing of the Immigration Reform and Control Act (“IRCA”) in 1986 provided a pathway to citizenship for up to three million unauthorized immigrants, but excluded spouses and children who did not qualify.¹⁵ Reagan’s 1987 executive order provided a route to citizenship for 100,000 noncitizen children of such immigrants,¹⁶ demonstrating the Executive’s focus on avoiding “split-eligibility” families.¹⁷ In 1990, President George H.W. Bush issued an executive action deferring deportation of up to 1.5 million unauthorized spouses and children of individuals

10. U.S. CONST., art. II, sec. 3.

11. See *Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579, at *61 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

12. See, e.g., Alex Rogers, *How House Conservatives Lost the Homeland Security Fight*, TIME (Mar. 3, 2015), <http://time.com/3730810/homeland-security-funding/>.

13. Daniel Arellano, Note, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 ARIZ. L. REV. 1139, 1146 (2012).

14. AM. IMMIGRATION COUNCIL, *supra* note 3, at 5.

15. *Id.* at 1.

16. *Id.* at 1, 6.

17. Today, such families are called “mixed-status families.” See, e.g., AM. IMMIGRATION COUNCIL, A GUIDE TO THE IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION 11 (2014), *available at* http://www.immigrationpolicy.org/sites/default/files/do_cs/a_guide_to_the_immigration_accountability_executive_action_final.pdf.

legalized under IRCA.¹⁸ Bush's executive action thus ensured the cohesion of immigrant families.¹⁹ And prior to DAPA, President Obama signed an executive order known as Deferred Action for Childhood Arrivals, granting two-year renewable reprieves from deportation, and work authorizations, to certain undocumented individuals who came to the United States at a young age.²⁰

In 2014, President Obama announced an executive action on immigration affecting more people than ever before²¹ with DAPA as its centerpiece.²² The President's program prioritizes the removal of aliens who present threats to national security, public safety, or border security,²³ and, conversely, grants low-priority undocumented immigrants a three-year reprieve from deportation.²⁴ The sweeping action may be partially explained by the DHS's estimate that of the approximately 11.3 million undocumented aliens present in the United States, the agency only has the resources to remove fewer than 400,000 per year.²⁵

To qualify for DAPA, an individual must: (1) have continuously resided in the United States since January 1, 2010; (2) have been physically present in the United States on November 20, 2014, and at the time of making his or her request for consideration of DAPA with U.S. Citizenship and Immigration Services; (3) have had *no* lawful status on November 20, 2014; (4) have had a U.S.-citizen or Lawful Permanent Resident ("LPR") son or daughter on November 20, 2014; and (5) not be a removal "enforcement priority."²⁶ Further, each applicant must undergo a comprehensive background check of all relevant national security and criminal databases, including those of the DHS.²⁷ The DHS will permit qualifying individuals to apply for work authorization, enabling them to work in the United States for a three-year period.²⁸ Individuals who receive such work authorization

18. AM. IMMIGRATION COUNCIL, *supra* note 3, at 7. These latter two executive actions were known collectively as the "Family Fairness" policy. *Id.* at 1–2.

19. *See id.*

20. *See id.* at 10.

21. *Compare* AM. IMMIGRATION COUNCIL, *supra* note 3, at 3–10 (the 2012 Deferred Action for Childhood Arrivals executive order affected up to 1.8 million people), *with* Somin, *supra* note 4 (up to five million could qualify for DAPA).

22. *See generally* *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 3, 2015), <http://www.uscis.gov/immigrationaction>.

23. *See* Enforcement Memo, *supra* note 1, at 3–5 (outlining revised enforcement priorities).

24. *See* DAPA Memo, *supra* note 1, at 4–5 (outlining DAPA eligibility).

25. Thompson, *supra* note 1, at 1.

26. *See* DAPA Memo, *supra* note 1, at 4; *see also* Enforcement Memo, *supra* note 1, at 3–5 (defining who is an "enforcement priority"). The individual must also merit a favorable exercise of discretion to be granted DAPA relief. *Id.* That is, the executive action does not bar the executive branch from denying deferred action in individual cases. *See id.*

27. *See* DAPA Memo, *supra* note 1, at 4; *Fixing Our Broken Immigration System Through Executive Action—Key Facts*, DEP'T OF HOMELAND SEC. (Jan. 5, 2015), <http://www.dhs.gov/immigration-action#> [hereinafter DHS Fact Sheet].

28. *See* DAPA Memo, *supra* note 1, at 4–5 (construing Section 274A(h)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(h)(3), as providing authority to the DHS to grant work authorization).

must pay taxes.²⁹ The executive action claims that it does not create any substantive rights against future action (a claim that, as discussed in Part III, at least one court has rejected).³⁰

For unauthorized immigrants who have long-established residency in the United States and have U.S.-citizen or LPR sons or daughters, deportation threatens immigrant family stability.³¹ For fiscal years 2013 and 2014, Immigration and Customs Enforcement (“ICE”) removed nearly 368,000 and 441,000 persons, respectively, making the total removed over the course of Obama’s presidency approximately two million.³² President Obama’s DAPA emphasizes family cohesion, like other executive actions before it, such as those of the Reagan and Bush eras.³³ President Reagan’s 1987 executive order paved the way for legal status for 100,000 noncitizen children; and President’s George H.W. Bush’s 1990 executive action deferred deportation of up to 1.5 million unauthorized spouses and children of legalized individuals.³⁴ All three actions display the Executive’s policy emphasis on preserving the cohesion of immigrant families.³⁵ Despite the immigration policy similarities among the Reagan, Bush, and Obama eras, the political reactions to the past and current executive actions contrast sharply.³⁶ For example, before Reagan issued the 1987 executive order, faith groups lobbied him fiercely, urging that the 1986 IRCA was insufficient on its own to preserve immigrant families.³⁷ Neither Reagan’s nor Bush’s executive actions in the 1980s and 1990s were met with claims of presidential overreach,

29. DHS Fact Sheet, *supra* note 27.

30. DAPA Memo, *supra* note 1, at 5. *But cf.* Texas v. United States, No. 1:14-CV-00254, 2015 WL 648579, at *37–56 (S.D. Tex. Feb. 16, 2015) (accepting the states’ argument that the executive action is a “substantive” or “legislative” rule made without the requisite notice and comment rulemaking procedures), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

31. *See, e.g.*, NAT’L IMMIGRATION FORUM, KEEPING FAMILIES TOGETHER: THE PRESIDENT’S EXECUTIVE ACTION ON IMMIGRATION AND THE NEED TO PASS COMPREHENSIVE REFORM 1–2 (2014), *available at* <http://immigrationforum.org/wp-content/uploads/2014/12/120914-National-Immigration-Forum-Statement-for-Record-Final-Corrected.pdf>.

32. *Id.* at 1.

33. *See* AM. IMMIGRATION COUNCIL, *supra* note 3, at 1–2.

34. *See, e.g.*, Max Ehrenfreund, *Your Complete Guide to Obama’s Immigration Executive Action*, WASH. POST (Nov. 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/> (“President Reagan and later President George H.W. Bush relied on [prosecutorial discretion] when they unilaterally exempted roughly 1.5 million undocumented immigrants from deportation after passing a law granting amnesty to millions more. The action was not especially controversial at the time.”).

35. *See* AM. IMMIGRATION COUNCIL, *supra* note 3, at 1–2; *cf.* NAT’L IMMIGRATION FORUM, *supra* note 31, at 1–2.

36. *See* Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, THE HILL (Oct. 2, 2014, 12:00 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on>.

37. *See, e.g., id.* (“U.S. Catholic bishops criticized the government’s ‘separation of families,’ especially given Reagan’s other pro-family stances.”).

threats of impeachment, lawsuits, or government shutdowns.³⁸ DAPA is a very different story—it has set off a firestorm of controversy.³⁹

II. *JUAREZ-ESCOBAR*: AN EARLY AND INEFFECTUAL ATTEMPT TO DECLARE DAPA UNCONSTITUTIONAL

The political backlash to DAPA was not isolated to Congress and the public—at least one court reviewed the constitutionality of DAPA *sua sponte*. A 2014 opinion from the U.S. District Court for the Western District of Pennsylvania—*United States v. Juarez-Escobar*⁴⁰—was the first to rule on President Obama’s 2014 executive action. But because issues not before the court raised *sua sponte* are generally not justiciable, the case reads as an advisory opinion, and falls short of invalidating the executive action.⁴¹ Still, the case warrants discussion because it demonstrates the controversy surrounding DAPA and highlights potential challenges to its constitutionality.

The separation of powers doctrine precludes federal courts from issuing advisory opinions.⁴² In order for a case to be justiciable and not result in an advisory opinion, two criteria must be met. First, there must be an actual dispute between adverse litigants—that is, a “case” or “controversy.”⁴³ Second, there must be a substantial likelihood that a federal court decision in favor of the claimant will produce a change or have an effect.⁴⁴ Advisory opinions thus closely align with disfavored dicta. In *Juarez-Escobar*, given that the court raised the issue of DAPA and its constitutionality *sua sponte*, and did not set DAPA aside despite declaring it unconstitutional,⁴⁵ neither criterion was met.⁴⁶

Juarez-Escobar was a criminal prosecution of an individual who reentered the United States illegally after the DHS deported him.⁴⁷ During the sentencing phase of the trial, the court, on its own motion, sought supplemental briefing on the applicability of President Obama’s executive action to the

38. See, e.g., *id.* (“If voters thought Bush overstepped his authority, the [1990] midterm elections didn’t show it.”).

39. See *infra* notes 92–96 and accompanying text.

40. 25 F. Supp. 3d 774, 775 (W.D. Pa. 2014).

41. See Jonathan H. Adler, *District Court Declares Obama Immigration Action Unconstitutional (Updated)*, VOLOKH CONSPIRACY (Dec. 16, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/16/district-court-declares-obama-immigration-action-unconstitutional/>.

42. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

43. U.S. CONST., art. III, sec. 2, cl. 1; see also *United States v. Johnson*, 319 U.S. 302, 304 (1943) (“[T]he absence of a genuine adversary issue between parties” makes a case non-justiciable, “especially when [a court] assumes the grave responsibility of passing upon the constitutional validity of legislative action.”).

44. For example, in *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), the Supreme Court said that federal courts could not review Civil Aeronautics Board decisions awarding international air routes because the President could simply disregard or modify such a judicial ruling under § 801 of the Civil Aeronautics Act.

45. See *Juarez-Escobar*, 25 F. Supp. 3d at 788.

46. See Adler, *supra* note 41.

47. *Juarez-Escobar*, 25 F. Supp. 3d at 777.

defendant's situation.⁴⁸ Given that President Obama issued DAPA while *Juarez-Escobar* was pending, the court thought it appropriate to request briefing on the issue from the parties.⁴⁹

The court's opinion maintained that DAPA was unconstitutional because it eclipsed prosecutorial discretion and constructed an inflexible framework for considering deferred action applications.⁵⁰ The court reasoned that whereas prosecutorial discretion requires a case-by-case determination, DAPA rigidly grants "quasi-United States citizen[]" status to an entire class of individuals and thus constitutes unconstitutional "unilateral legislative action."⁵¹

It is not apparent why it was necessary for the court to request the supplemental briefing and reach the constitutional question regarding the executive action with regard to the defendant's sentence. The defendant did not raise DAPA as a defense or open the door for the court to consider the constitutionality of the executive action. There was no case or controversy as to the executive action's lawfulness, and the *Juarez-Escobar* opinion did not invalidate DAPA.⁵² Thus, it is an advisory opinion.⁵³

Although *Juarez-Escobar* did not effectively invalidate the executive action, in a future similar case in which a defendant actually asserts DAPA as a defense, a judge could reexamine the constitutionality of President Obama's executive action without running afoul of established advisory opinion doctrine.

III. TEXAS V. UNITED STATES AND THE FUTURE OF DAPA

A. Preliminary Issues and the APA Claim

More promising for DAPA opponents is the ongoing case of *Texas v. United States*.⁵⁴ In this case, 26 states⁵⁵ including Arizona, sued the DHS on two central grounds: (1) failure to follow notice and comment rulemaking procedures they allege were required by the APA in promulgating DAPA, and (2) violation of the Constitution's Take Care Clause.⁵⁶ In their complaint, the states claimed that the executive action threatens "the rule of law, presidential power, and the

48. *Id.* at 779.

49. *See id.*; Adler, *supra* note 41.

50. *Juarez-Escobar*, 25 F. Supp. 3d at 786–88.

51. *Id.* at 787–88.

52. Adler, *supra* note 41; *see Juarez-Escobar*, 25 F. Supp. 3d at 779–80.

53. *See* Adler, *supra* note 41 (arguing that the bizarre procedural posture of the case shows that it is merely an advisory opinion).

54. No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. Dec. 3, 2014).

55. The plaintiffs are: Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin; the Governors of Idaho, Maine, Mississippi, and North Carolina; and the Attorney General of Michigan. *See Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579, at *1 n.1 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

56. Amended Complaint for Declaratory and Injunctive Relief at 26–29, *Texas v. United States*, No. 1:14-CV-00254 (S.D. Tex. Dec. 9, 2014). Plaintiffs also alleged a separate APA violation under 5 U.S.C. § 706. *Id.* at 29.

structural limits of the U.S. Constitution.”⁵⁷ The states added that “the unilateral suspension of the Nation’s immigration laws is unlawful” and demanded the court’s “immediate intervention.”⁵⁸ The states sought a preliminary injunction,⁵⁹ which was granted on February 16, 2015.⁶⁰ The court agreed to block implementation of DAPA while litigation continues.⁶¹

Unlike in *Juarez-Escobar*, a final merits decision in *Texas v. United States* will not be an advisory opinion.⁶² The states can demonstrate that the case is an actual dispute between adverse litigants and that the federal court decision will bring about some change or have some effect.⁶³ In its preliminary injunction order, the court adopted the plaintiffs’ argument that they had standing.⁶⁴ The court concluded that inasmuch as the executive action generated a new class of individuals eligible to apply for driver’s licenses, DAPA will cause substantial costs for states.⁶⁵

In looking ahead to the merits,⁶⁶ the court in *Texas v. United States* maintained that Congress “knows how to delegate discretionary authority,” yet expressly limited the discretion given to the DHS.⁶⁷ The court rejected the DHS’s claim that § 103 of the Immigration and Nationality Act⁶⁸ and § 402 of the Homeland Security Act of 2002,⁶⁹ combined with inherent executive discretion, provide the kind of broad agency discretion required to sustain DAPA.⁷⁰ The court concluded that, as a general matter of statutory interpretation, if Congress had intended to empower the DHS to defer deportation of up to five million

57. *Id.* at 3.

58. *Id.* at 4.

59. Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support, *Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579 (S.D. Tex. 2015).

60. *Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

61. *Id.*

62. *See supra* notes 42–44 and accompanying text.

63. *Id.*; *see also Texas*, 2015 WL 648579, at *9–34 (finding that plaintiffs have standing). The states initially raise the issue of the lawfulness of the executive action, signaling that there is a case or controversy. *See Amended Complaint for Declaratory and Injunctive Relief* at 26–29, *Texas v. United States*, No. 1:14-CV-00254 (S.D. Tex. Dec. 9, 2014). Also, if the court were to declare the executive action unconstitutional, the plaintiffs would find redress in that they would not have to use their resources to issue DAPA recipients certain “licenses and benefits.” *Id.* at 26; *see also infra* note 65 and accompanying text.

64. *Texas*, 2015 WL 648579, at *9–34; *see also Mass. v. EPA*, 549 U.S. 497, 520 (2007) (noting that states receive “special solicitude” in the standing analysis).

65. *Texas*, 2015 WL 648579, at *11–17. Nor was the states’ injury a mere generalized grievance. *See id.* at *14 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992); *Sch. Dist. of City of Pontiac v. Sec’y of U.S. Dep’t of Educ.*, 584 F.3d 253, 261–62 (6th Cir. 2009)).

66. A court ruling on a motion for a preliminary injunction will consider, among other factors, the plaintiffs’ likelihood of success on the merits. *See, e.g., id.* at *37.

67. *Id.* at *47.

68. 8 U.S.C. § 1103(a)(3) (2012).

69. 6 U.S.C. § 202.

70. *Texas*, 2015 WL 648579, at *46–48.

undocumented immigrants through such statutes, it would have done so more explicitly.⁷¹

Nor was the court persuaded by the DHS's argument that the plaintiffs' claim is not subject to judicial review because an agency's non-enforcement decisions are presumptively unreviewable under the APA.⁷² The court noted that where an agency goes beyond mere prosecutorial discretion and adopts a policy so extreme that it amounts to an "abdication of its statutory responsibilities," the presumption of unreviewability is rebutted.⁷³ The court admitted that a "[r]eal or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty."⁷⁴ Nevertheless, the court found that DAPA surpasses mere inadequate enforcement and amounts to "an announced program of non-enforcement of the law that contradicts Congress' statutory goals"—in short, a "complete abdication."⁷⁵ The court wrote that an agency "cannot enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them."⁷⁶ The court concluded that the presumption of unreviewability was either inapplicable or rebutted in the case, and went on to rule that, at least as a preliminary matter, DAPA appears to be a legislative rule promulgated without the requisite notice and comment procedures.⁷⁷

B. The Looming Constitutional Debate at Trial

Because the court's decision rested on APA grounds, it did not reach the plaintiffs' argument that the executive action violates the Take Care Clause.⁷⁸ Even while declining to rule on the constitutional question at the preliminary injunction stage, however, the court left open the possibility of ruling on the Take Care Clause issue at trial when it has a full factual record before it.⁷⁹

The parties' arguments in their preliminary injunction briefs foreshadow the coming fight. The plaintiffs argued that historical evidence⁸⁰ and Supreme Court precedent⁸¹ supported the use of the Take Care Clause to enjoin the government's action. The plaintiffs contended that the Founding Fathers devised the Take Care Clause expressly to preclude the President from being able to

71. *See id.* at *48.

72. *Id.* at *50; *see also* *Heckler v. Chaney*, 470 U.S. 821, 830–35 (1985) (construing 5 U.S.C. § 701(a)(2) and the presumption of unreviewability of agency non-enforcement).

73. *Texas*, 2015 WL 648579, at *50 (quoting *Heckler*, 470 U.S. at 833 n.4).

74. *Id.* (quoting *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997)).

75. *Id.*

76. *Id.*

77. *Id.* at *51–56.

78. *Id.* at *61–62.

79. *Id.* at *61–62, n.110.

80. Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support at 7–8, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254) (discussing the power of English kings in the late seventeenth century effectively to nullify laws of Parliament, and arguing that the Take Care Clause was primarily an effort to ensure that the President would not have similar power).

81. *Id.* at 8–9.

suspend or dispense with congressional acts.⁸² The government could not cloak such extreme activities under the disguise of prosecutorial discretion.⁸³ In contrast, the government argued that precedent precluded the plaintiffs from stating a separate cause of action under the Take Care Clause not tied to an APA claim.⁸⁴ The government stated that none of the cases the plaintiffs cited⁸⁵ offered a judicially cognizable basis to contest the executive action by using the Take Care Clause as a cause of action.⁸⁶ The government emphasized that where the Take Care Clause did surface in the cases the plaintiffs cited,⁸⁷ “it was in the context of an affirmative defense.”⁸⁸

In sum, unlike in *Juarez-Escobar*, DAPA is fully justiciable in *Texas v. United States*, and a final merits decision in the case will not be an advisory opinion. As of this writing, the plaintiff-states have sought and received a preliminary injunction based on their APA claim, and an appeal of that order is pending.⁸⁹ But at trial, the court may rule on the constitutional question of whether

82. *Id.* at 7–8.

83. *See id.* at 9.

84. Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 30–31, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

85. *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Medellin v. Texas*, 552 U.S. 491 (2008); *Angelus Milling Co. v. Comm’r of Internal Revenue*, 325 U.S. 293 (1945); *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y. 1972); *Catano v. Local Bd. No. 94 Selective Serv. Sys.*, 298 F. Supp. 1183 (E.D. Pa. 1969).

86. Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 30 n.25, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

87. The government reasoned that the plaintiffs relied in error on *Heckler v. Chaney*, 470 U.S. 821 (1985), to bring an independent cause of action under the Take Care Clause. While the Supreme Court in *Heckler* did refer to the Take Care Clause in its opinion, the government emphasized that the Court ultimately limited its analysis to the issue of non-enforcement under the APA. Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 31, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254).

88. Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 30 n.25, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254); *see also* Defendants’ Sur-Reply In Opposition to Plaintiffs’ Motion for Preliminary Injunction at 18–20, *Texas v. United States*, 2015 WL 648579 (S.D. Tex. 2015) (No. 1:14-CV-00254) (disapproving of plaintiffs’ contention that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) establishes the availability of a separate cause of action under the Take Care Clause); *id.* at 19 (quoting *Dalton v. Specter*, 511 U.S. 462, 473 (1994)) (*Youngstown* “involved the conceded *absence* of any statutory authority, not a claim that the President acted in excess of such authority”; unlike in *Youngstown*, “claims simply alleging that the President has exceeded his statutory authority” are not constitutional claims subject to judicial review”).

89. *See Texas v. United States*, No. 15-40238 (5th Cir. Feb. 23, 2015). Oral argument on the motion to stay the preliminary injunction will take place on April 17, 2015. *DOJ Files Fifth Circuit Merits Brief in Texas v. United States*, IMMIGRATIONPROF BLOG (Mar. 31, 2015), <http://lawprofessors.typepad.com/immigration/2015/03/doj-files-fifth-circuit-brief-in-texas-v-united-states.html>.

DAPA violates the Take Care Clause.⁹⁰ *Texas v. United States* thus may be able to accomplish what *Juarez-Escobar* was unable to do and defeat DAPA via a constitutional argument.

CONCLUSION

DAPA faces challenges from all angles. The merits decision in *Texas v. United States* is still forthcoming, and an appeal of the preliminary injunction order before the Fifth Circuit is underway.⁹¹ DAPA could also be undermined by a Republican-led Congress that passes a new immigration law or a budgetary measure designed to block or defund executive action. Congress has already attempted this—it tried to impede all funding for Obama’s executive action.⁹² During a recent congressional vote regarding the DHS’s funding, Republican opponents including Speaker John Boehner (R-OH) and Representative Mick Mulvaney (R-SC) vociferously expressed their disapproval of what they see as the exponential growth of executive power at the expense of Congress.⁹³ The GOP lost the funding fight⁹⁴ (for now⁹⁵). But Congress has the authority to block the executive order by statute—the question is whether it has the political wherewithal to do so. President Obama has promised that, if a bill defunding the DHS were ever to pass out of Congress, he would veto it.⁹⁶ But who knows what the new President in 2016 would do in that situation?

The future survival of the executive action remains uncertain. Two legal challenges to the executive action—*United States v. Juarez-Escobar* and *Texas v.*

90. See *Texas v. United States*, No. 1:14-CV-00254, 2015 WL 648579, at *61–62, n.110 (S.D. Tex. Feb. 16, 2015), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

91. See *Texas v. United States*, No. 15-40238 (5th Cir. Feb. 23, 2015).

92. See Rogers, *supra* note 12.

93. Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama’s Immigration Orders*, THE HILL (Jan. 14, 2015, 12:06 PM), <http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders>. Boehner made a rare speech on the House floor, arguing that President Obama contradicted his own previous public opposition to such an executive action. *Id.* Boehner quoted over 20 separate statements made by President Obama where he had said he lacked authority to pursue broad executive action on immigration without Congress. *Id.* “We are dealing with a president who has ignored the people, ignored the Constitution, and even his own past statements,” said Boehner. *Id.*

94. See Raul Labrador, *Labrador on Homeland Security Funding: ‘We Lost Because’ Democrats, White House ‘Outsmarted Ineffective GOP Leadership’*, DAILY SIGNAL (Mar. 6, 2015), <http://dailysignal.com/2015/03/06/labrador-homeland-security-funding-lost-democrats-white-house-outsmarted-ineffective-gop-leadership/>. Seventy-five Republicans in the House joined 182 Democrats to overcome a provision that would have blocked DAPA in the Fiscal 2015 DHS spending bill. *Id.*

95. It is probable that this debate will resurface the next time DHS funding comes up for renewal. See Elise Foley, *Senate Democrats Put DHS Funding Pressure Back On John Boehner*, HUFFINGTON POST (March 2, 2015, 5:59 PM), http://www.huffingtonpost.com/2015/03/02/dhs-funding-boehner_n_6785210.html.

96. See, e.g., Lauren French, *Barack Obama Threatens to Veto Attacks On His Immigration Policy*, POLITICO (Jan. 29, 2015, 8:50 PM), <http://www.politico.com/story/2015/01/barack-obama-immigration-114752.html>.

United States—have posed the greatest threat to the action’s survival. Whereas the former fails to invalidate President Obama’s executive action because it is within advisory opinion, the latter case offers a bold ruling, detailing how the DHS’s executive discretion used to issue the executive action conflicts with congressional intent. While *Texas v. United States* does not address the plaintiffs’ argument that the executive action violated the Take Care Clause, the preliminary injunction halts the implementation of the executive order until the issue is further litigated. All that aside, the future of DAPA may well rest not in the courts, but in the legislative and executive branches.