THE CONSTITUTIONALITY OF DAPA PART II: FAITHFULLY EXECUTING THE LAW

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I. INTRODUCTION

Article II imposes a duty on the President unlike any other in the Constitution: he "shall take Care that the Laws be faithfully executed."[1] More precisely, it imposes four distinct but interconnected duties. First, the imperative "shall" commands the President to execute the laws. Second, in doing so, the President must act with "care." Third, the object of that duty is "the Laws" enacted by Congress. Fourth, in executing the laws with care, the President must act "faithfully." A careful examination of the four elements of the Take Care Clause provides a comprehensive framework to determine whether the executive has complied with his constitutional duty. This article assesses the constitutionality of President Obama's executive actions on immigration through the lens of the Take Care Clause.

Part II provides a textual exegesis of the Take Care Clause. Through references to common law doctrines, as well as background principles of the Supreme Court's separation-of-powers jurisprudence, I analyze the text and history of these four critical elements and the scope of the duty they impose on the President.

Part III introduces President Obama's two primary executive actions on immigration. First, Deferred Action for Childhood Arrivals (DACA) was a 2012 policy that suspended the deportations of roughly one million "Dreamers"—those who were brought to this country unlawfully as minors.[2] Second, Deferred Action for Parental Accountability (DAPA) was a 2014 policy that suspended the deportations of more than four million alien parents of minor U.S. citizens and lawful permanent residents.[3] Both policies, occasioned by the defeat of

1. U.S. CONST. art. II, § 3.

2. JANET NAPOLITANO, U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN 1–3 (2012), *available at* http://1.usa.gov/1HhLmMa [perma.cc/4LUE-9QMK]; Miriam Jordan, *'Dreamers' Vow to Fight On for Their Illegal-Immigrant Parents*, WALL ST. J., Nov. 20, 2014, http://on.wsj.com/1cXJStJ [perma.cc/3DAJ-R2G9].

3. JEH CHARLES JOHNSON, U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS 4 (2014), *available at* http://bit.ly/1IESyiH [perma.cc/7TJ2-38JW]; *Executive Actions on Immigration*, USCIS, http://bit.ly/1HsiaR2 [perma.cc/G2R8-XCLK] (last updated Mar. 3, 2015) (estimating roughly 4.9 million individuals may be eligible for DAPA, but expecting fewer to come forward); Erica Werner & Jim Kuhnhenn, *White House Puts Immigration Plans on Hold After Ruling*, YAHOO!

legislation in Congress, were announced through executive memoranda.[4] The Office of Legal Counsel (OLC) issued an opinion justifying the legality of both policies, explaining that deferrals are presumptively lawful if made on a "case-by-case" basis and based on a policy that is "consonant" with congressional policy.[5] The remainder of the article demonstrates why neither of these principles holds true: DAPA neither employs an individualized, case-by-case analysis, nor is consonant with long-standing congressional policy.

Part IV turns to the imperative of the Take Care Clause: the President "shall" execute the laws. Although the Supreme Court has not directly addressed when this command is violated, it has held in the administrative-law context that an executive policy would be reviewable if an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[6] This test, though framed in terms of reviewability, at its core parallels the failure of the Executive Branch to execute the laws. With respect to DAPA, the government adopted an extremely broad policy that restricts the ability of officers to enforce the immigration laws.[7] DAPA was not consciously and expressly adopted as a means to enforce the laws of Congress or to conserve limited resources. Instead, it was adopted to exempt nearly forty percent of all 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.[8] While the policy is based on the selective enforcement of the immigration laws, it is unprecedented to excuse over four million people—a class Congress did not deem worthy of preferential treatment—from the scope of the naturalization power.[9]

Part V considers whether the implementation of DACA was

NEWS, Feb. 17, 2015, http://yhoo.it/1DAahmQ [perma.cc/M2SZ-J9GQ] (estimating four million individuals would be eligible for DAPA).

4. *See* JOHNSON, *supra* note 3; NAPOLITANO, *supra* note 2.

5. *See* KARL R. THOMPSON, OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, 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 6–7 (2014), *available at* http://bit.ly/1Qh5mRF [perma.cc/NDX3-55G5].

6. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

7. *See* JOHNSON, *supra* note 3, at 4–5.

8. *See id.*; Werner & Kuhnhenn, *supra* note 3.

9. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . . .").

done with "care." Like the common law of torts, the Constitution imposes a particular standard of care. The President cannot act negligently or recklessly, but must act with caution toward the laws of Congress. DACA was designed with a disregard for the Immigration and Nationality Act[10] in at least three ways. First, the case-by-case discretion at the heart of all aspects of prosecution was supplanted by the Secretary's blanket policy. No deviations were allowed for individualized judgment. Second, through the so-called "lean and lite" review, the Department of Homeland Security (DHS) limited the depth of investigation that officers could employ to dig into an application.[11] In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief.[12] Third, DHS weakened the scope of officer discretion by restricting officers' duty to checking boxes on a template.[13] Substantively, the Secretary's preferences prevailed, displacing any meaningful case-by-case review. A veteran United States Citizenship and Immigration Services (USCIS) officer declared that the Administration "has taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than thorough investigations."[14] As the limitations on the officer's individual discretion show, and behind the pretense of conserving resources, DACA was not designed with "care" for the laws, but as a deliberate means to bypass them.

In part VI, I will employ Justice Jackson's tripartite prism in *Youngstown Sheet & Tube Co. v. Sawyer*[15] to shine some light on the legitimacy (or illegitimacy) of DAPA. DAPA is a perfect storm of executive lawmaking, and deflects the analysis to the bottom tier. First, the President is not acting in concert with Congress; Congress either rejected or failed to pass immigration reform

10. 8 U.S.C. §§ 1101–1537 (2013).

11. *Deferred Action on Immigration: Implications & Unanswered Questions: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 9 (2015) (statement of Luke Peter Bellocchi, Former Deputy Ombudsman for Citizenship & Immigration Services) [hereinafter *Bellocchi Testimony*], *available at* http://1.usa.gov/1bhjmdM [perma.cc/FB9X-KHGM].

12. *Id.*

13. *See* JOHNSON, *supra* note 3, at 4–5.

14. Plaintiffs' Reply in Support of Motion for Preliminary Injunction, at Exh. 23, at app. 0854, Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015) [hereinafter Plaintiffs' Reply] (emphasis added), *available at* http://bit.ly/1yNoEs9 [perma.cc/QX5N-ZRDP]. All exhibits are attached to Texas's Reply in Support of Motion for Preliminary Injunction and are available at http://bit.ly/1EcEyNp [perma.cc/5UUS-588K].

15. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

bills reflecting his policy preferences numerous times. Second, Congress has not acquiesced in a pattern of analogous executive actions; previous uses were typically ancillary to statutory grants of lawful status or responsive to extraordinary inequities on a very limited scale.[16] Third, there is no murky "twilight" about congressional intent; both houses of Congress proactively sought to defund DAPA, as the President threatened to veto the appropriations bill.[17] In this bottom rung of authority, presidential power is at its "lowest ebb," without any presumption of constitutionality.[18]

Part VII completes the clause. If the President has disregarded the laws without care, the Constitution imposes one final hurdle: the President's mistakes must have been in good faith, not as pretext for unlawful actions. The former is regrettable, yet acceptable. The latter is unconstitutional. To assess the motives of the Executive in failing to comply with the law, this part first considers how, like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. Implementing executive action to achieve several of the key statutory goals that Congress voted *against* reflects a deliberate attempt to circumvent an uncooperative Legislature. This conclusion is bolstered by the fact that prior to the defeats of DACA and DAPA, President Obama—the "sole organ" of the Executive Branch—consistently stated that he lacked the power to defer the deportations of millions by himself.[19] Once the bills were voted down, however, he conveniently discovered new fonts of authority.

While flip-flops are par for the course in politics and usually warrant no mention in constitutional discourse, they are salient for the Take Care Clause. They establish a prima facie case of bad faith. The revised rationales speak directly to the Executive's motives and whether he mistakenly failed to comply with his constitutional duty or deliberately bypassed the Congress. All signs point toward the latter.

16. *See* Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015) [hereinafter *Constitutionality of DAPA Part I*], *available at* http://bit.ly/1brKPdo [perma.cc/E9EN-ZMCE].

17. Conn Carroll, *House Passes Spending Bill Defunding Obama's Amnesty*, TOWNHALL.COM, Jan. 14, 2015, http://bit.ly/1K3ghtN [perma.cc/3Y4G-7XBU].

18. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

19. Leigh Ann Caldwell, *Obama Said He Can't Stop Deportations of Immigrants, But Maybe He Can*, CNN, Nov. 26, 2013, http://cnn.it/1ODI1FY [perma.cc/B5HJ-BG6W].

While no single factor renders DAPA unconstitutional, when viewed in its entirety, DAPA flouts the duties imposed by the Take Care Clause. Once antecedent legislation had been defeated, the President deliberately aimed to transform discretion into a rubber stamp—even though he previously disclaimed the authority to act unilaterally. This pattern of behavior amounts to a deliberate effort to undermine the laws of Congress, not to act in good faith. The President's duty under Article II has been violated, dislodging Article II's fulcrum, and knocking out of orbit this fixed star in our constitutional constellation.

II. FAITHFULLY EXECUTING THE LAW

Article II, Section III of the Constitution provides that the President "shall take Care that the Laws be faithfully executed."[20] A textual examination of the clause reveals that this constitutional duty entails four distinct but interconnected components. First, has the President conflicted with the "shall" command by declining to execute the law? If the President abdicates the duty entirely, there is a clear case of a constitutional violation. But typically the failure to execute the law falls along a spectrum. Second, is the President acting with "care" or "regard" for his duty? The more flagrant the lack of regard—evidenced by the scope of the deviation from the laws of Congress—the stronger the case that the actions were unconstitutional. Here, the statutes and policies of Congress determine the disjunction between the Legislative and Executive Branches. Third, do the laws of Congress vest the Executive with discretion to decline to enforce the statute, or has the Legislature given him an unambiguous directive? If the President violated an unambiguous directive, then the action is not entitled to a presumption of deference. Fourth and most importantly, the clause requires an investigation into whether the President executed the laws in good faith. Only when the first three factors point toward a constitutional violation should the President's motivations be brought into question. But at this

20. U.S. CONST. art II, § 3. For an analysis of the text, history, and structure of the Take Care Clause, see generally Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688–715 (2014); for an analysis of the constitutionality of DACA, see generally 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).

stage, it becomes the cornerstone of the Take Care Clause.

A. "Shall" Imposes an Imperative on the Executive

Our Constitution strikes a stark asymmetry with respect to the duties and obligations of Congress and the President. In Article I, Congress bears *no* affirmative duties.[21] "Congress shall have Power" to make a number of laws,[22] but need not do so. The only duties Congress owes to the other branches concern compensation for the President and federal judges—these commands appear in Article II[23] and Article III,[24] not in Article I.[25] This structure reflects the framers' design that the Congress need not, and indeed cannot, act unless majorities of the House and Senate agree.

Article II operates in a diametrically opposite manner on the unitary executive. While congressional power is bound in discretion and agreement, the Executive power bears heavy responsibilities. This philosophy is embodied in the constitutional duty to "take Care that the Laws be faithfully executed."[26] Section I vests the office of the Presidency and determines how he is elected.[27] Section II grants the President a number of authorities.[28] Virtually all of these duties are prefaced by *shall*: "shall be Commander-in-Chief" and "shall have Power to grant Reprieves and Pardons."[29] Several of the key "shall" duties may only be exercised "by and with the Advice and Consent of the Senate," such as the power to "make Treaties," and "nominate" ambassadors, ministers, judges, and officers of the United States.[30]

The Constitution does not simply vest the President with powers concerning his own office, but imposes a duty on the

21. *See* Josh Blackman, Gridlock and Executive Power 17 (Jul. 15, 2014) [hereinafter Gridlock and Executive Power] (unpublished manuscript), *available at* http://bit.ly/1yNp3uN [perma.cc/7JPW-2E3A].

22. U.S. CONST. art. I, § 8.

23. U.S. CONST. art. II, § 1, cl. 7.

24. U.S. CONST. art. III, § 1.

25. Notably, the Guarantee Clause does impose some duties on Congress. U.S. CONST. art. IV, § 4; *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) ("Under [art. IV, § 4] it rests with Congress to decide what government is the established one in a State.").

26. U.S. CONST. art. II, § 3.

27. U.S. CONST. art. II, § 1.

28. U.S. CONST. art. II, § 2.

29. *Id.*

30. *Id.*

President to *execute* the laws of Congress with those powers.[31] Specifically, Article II, Section III defines the scope of the President's affirmative obligations toward Congress. First, the President "shall from time to time give to the Congress Information of the State of the Union."[32] This is a duty the President cannot shirk; Congress must be apprised of the state of the nation to inform its governance.[33] Second, the President "shall receive Ambassadors and other public Ministers."[34] He must engage with this aspect of foreign diplomacy, which limits what is sometimes viewed as an unfettered power over foreign affairs. Third, the President "shall Commission all the Officers of the United States."[35] The President has an obligation to commission officers for whatever positions Congress creates. Fourth, "on extraordinary Occasions," the President "may"—not must—"adjourn" or "convene" Congress.[36] Indeed, so as not to unduly infringe on the separation of powers, the Framers limited that responsibility to circumstances where the President "shall think [it] proper," rather than at his whim.[37]

This background brings us to the all-important Take Care Clause. First, this is a duty the President *shall*—not may—perform or decline as he thinks proper. President George Washington wrote to Alexander Hamilton concerning the enforcement of unpopular tax laws that it was his "duty to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to it."[38] There is no other command in the Constitution that mandates that any branch execute a delegated power in a specific manner.

31. U.S. CONST. art. II, § 3.

32. *Id.*

33. Arguably, the Constitution also imposes on Congress the duty to receive the President's State of the Union, as the President could not discharge his duties unless it was accepted. *See id.* ("He shall . . . give to the Congress Information of the State of the Union.").

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id. But see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (construing the word "proper" in the Necessary and Proper Clause to mean "convenient").

38. Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), *available at* http://1.usa.gov/1Fczt8A [perma.cc/H9PE-8DX8]. The Solicitor General has recently affirmed to the Supreme Court that the Take Care Clause imposes a "duty" on the President. *See* Brief for the Petitioner at 63, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281) ("That result would directly undermine the President's *duty* to 'take Care that the Laws be faithfully executed' . . . .") (emphasis added).

As the Framers' progenitors recognized over three centuries ago, "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal."[39] The Virginia Declaration of Rights, authored by George Mason a month before American independence was declared, prohibited suspension of law as a "basis and foundation of government." Virginia declared that "all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and ought not to be exercised."[40] This history contributed to the development of the Take Care Clause.[41]

During the Constitutional Convention, on Monday, June 4, Pierce Butler of South Carolina proposed a resolution "that the National Executive have a power to suspend any legislative act."[42] Benjamin Franklin seconded the motion.[43] Elbridge Gerry retorted that "a power of suspending might do all the mischief dreaded from the negative [veto] of useful laws; without answering the salutary purpose of checking unjust or unwise ones."[44] On the question of "giving this suspending power," all states voted *no*.[45] The ability to dispense this power would throw a wrench in the interlocking gears that power our republic.

B. The Executive Must Act with "Care"

Second, the Constitution prescribes the manner in which the execution must be performed: the President shall "take care." Professor Natelson explains that the phrase "take care" was employed in "power-conferring documents" in which an official assigned a task to an agent, in both the Colonial Era and the Continental Congress.[46] Delahunty and Yoo reach a similar

39. ENGLISH BILL OF RIGHTS, 1 W. & M., 2d sess., c. 2 (1689) *available at* http://bit.ly/1aTHZMX [perma.cc/PNU2-2KX6]; *see also* Delahunty & Yoo, *supra* note 20, at 803 ("[S]cholars have argued that the Take Care Clause . . . is closely related to the English Bill of Rights of 1689.").

40. VIRGINIA DECLARATION OF RIGHTS § 7 (1776), *available at* http://1.usa.gov/1yPZMjW [perma.cc/T374-QUZZ].

41. Delahunty & Yoo, *supra* note 20, at 803; *see also* Price, *supra* note 20, at 692–93.

42. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS, VOL. 1], *available at* http://bit.ly/1PdMjX1 [perma.cc/D9HD-WSRU].

43. *Id.*

44. *Id.* at 104.

45. *Id.*; *see also* Price, *supra* note 20, at 693.

46. Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting*

conclusion, finding that the clause "charge[s] the President with the duty or responsibility of executing the laws, or at least of supervising the performance of those who do execute them."[47] The use of the passive voice supports the conclusion that the President need not execute all the laws personally.[48]

Today, "care" means something very similar to what it meant two centuries ago. Dr. Samuel Johnson's 1755 *Dictionary of the English Language* provides five definitions of "care," including "concern," "caution," "regard," "attention," and "object of care."[49] In several of the examples, the word "care" is prefaced with "take," as it is in the Constitution.[50] Noah Webster's 1828 *American Dictionary of the English Language* similarly defines the noun "care" as including "[c]aution; a looking to; regard; attention, or heed, with a view to safety or protection, as in the phrase, *take care* of yourself."[51] Webster, like Johnson, explained how the verb "care" could be prefaced by "to," as in "[t]o *take care*, to be careful; to be solicitous for" and "[t]o *take care* of, to superintend or oversee; to have the charge of keeping or securing."[52]

Read against this background, the Constitution imposes a presidential standard of care when the President executes his duties.[53] Providing meaning to the text of the Take Care Clause by reference to common law doctrines is consistent with originalist construction,[54] and reflects the "unwritten practices that shape interbranch struggle more generally."[55] Applying this

Clause"—Evidence from Eighteenth-Century Drafting Practice, 31 WHITTIER L. REV. 1, 14 & n.59 (2009).

47. Delahunty & Yoo, *supra* note 20, at 799.

48. *Id.* at 800.

49. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 328 (1755) [hereinafter JOHNSON'S DICTIONARY], *available at* http://bit.ly/1HSpS7x [perma.cc/9ZDN-SNQC].

50. *Id.*

51. 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [hereinafter WEBSTER'S DICTIONARY] (emphasis added), *available at* http://bit.ly/1GgqAJz [perma.cc/2SLF-N4HS].

52. WEBSTER'S DICTIONARY, *supra* note 51 (emphasis added), *available at* http://bit.ly/1aQj90l [perma.cc/N4GE-4SEU].

53. RESTATEMENT (FIRST) OF TORTS § 283 (1934) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

54. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 504 (2013) ("But suppose that 'due process of law' was a term of art that was understood by the linguistic subcommunity of persons learned in the law to refer to relatively specific features of the system of *procedure provided by common law and equity in the late eighteenth century*.") (emphasis added).

55. *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4 (2014)

approach yields a requirement that the President supervise his subordinates, ensuring that they enforce the law with "caution" or "regard to the law." This is a common feature of the law of agency,[56] whereby a "principal who authorizes his agent to so act 'on his behalf' consensually empowers the agent to exercise certain rights that the principal alone would normally exercise."[57] The officers of the United States—whom the President appoints and the Senate confirms—can complete these tasks. But the President's supervisory role is to ensure that the laws are "executed," and that he or his agents do so with "care."

C. The President Executes "The Laws" of Congress

Third, the President's duty extends not to his own powers or preferences, but to the "Laws." What are these laws that he is supposed to "execute"? Read in the context of Article II, Section III, which reflects the relationship between Congress and the Presidency, this phrase is most naturally read to refer to the "supreme Law of the Land."[58] Among these supreme laws are the laws of Congress, which the President must execute.[59] In this sense, "Congress is the first mover in the mechanism of United States law."[60] The President can only execute laws that Congress passed.[61]

Johnson's dictionary defines the verb "execute" with a direct reference to the principles of agency: "To put in act; to do what is planned or determined."[62] Planned by whom? Johnson explains with a theologically apt example from Richard Hooker's *Laws of the Ecclesiastical Polity*: "Men may not devi[s]e laws, but are bound for ever to u[s]e and execute tho[s]e which God hath delivered."[63] In other words, the agent, man, puts into effect the

(suggesting that private law and doctrines of public international law can inform our understanding of how the separation of powers has developed).

56. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1038 (2011).

57. Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969, 1981 (1987).

58. *See* U.S. CONST. art. II, § 3; U.S. CONST. art. VI.

59. Natelson, *supra* note 46, at 31; Price, *supra* note 20, at 688.

60. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1895 (2005).

61. *Id.*

62. JOHNSON'S DICTIONARY, *supra* note 49, at 736, *available at* http://bit.ly/1GhbFSt [perma.cc/ZLS6-DUF8].

63. *Id.* (quoting Hooker) (emphasis removed); *see also* Delahunty & Yoo, *supra* note

laws of the principal, God. In *The Federalist*, Hamilton similarly viewed the relationship between the branches in terms of agency: "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master . . . ."[64]

In this sense, and akin to the law of agency,[65] the President serves as a faithful agent to Congress and to the people—the ultimate sovereigns and the residual of all legitimate governance.[66] The people elect Congress to write the laws and choose the President to enforce the laws on their behalf. The scope of this duty would "depend on an implicit understanding of the principal's expectations as much as on any explicit directives."[67] Specifically, "[w]hat exactly would Congress, or the public, consider a faithful performance of the President's duties?"[68]

Viewed this way, the Take Care Clause is the fulcrum that holds our entire system of governance together. The President always has an independent constitutional duty to not obey unconstitutional laws,[69] as well as the prerogative "to violate statutory law on the grounds of compelling public necessity."[70] But, he must remain a *faithful* steward of the laws of Congress, and cannot shirk that duty when he disagrees with them.[71]

20, at 799.

64. THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (Benjamin Fletcher Wright, ed., Barnes & Noble, Inc. 1996) (1961).

65. RESTATEMENT (FIRST) OF AGENCY § 20 (1933) ("A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person.").

66. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 186–87 (1st ed. 2004).

67. Price, s*upra* note 20, at 698.

68. *Id.*

69. To continue the analogies to the law of agency, the Constitution presents a superior interest, to which the agent is bound, above the principal's interests. The President cannot violate the Constitution, even if the Congress and the sovereign people instruct him to (at least absent a constitutional amendment). RESTATEMENT (FIRST) OF AGENCY § 383 (1933) ("Except when he is privileged to protect his own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent.").

70. Delahunty & Yoo, *supra* note 20, at 808.

71. *See* RESTATEMENT (FIRST) OF AGENCY § 23 (1933) ("One whose interests are adverse to those of another may be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.").

D. Executing the Laws in Good "Faith"

Fourth and most importantly, after imposing the imperative with the appropriate standard of care and specifying the subject of the action, the Constitution defines how the President's duty should be executed: "faithfully." This part of the article provides an in-depth examination of the text and history of the Take Care Clause, and its relationship to long-standing common-law notions of good faith.

1. The Faithful History of the Take Care Clause

The Take Care Clause draws from a rich pedigree of colonial-era constitutions limiting state executives from suspending the law. The post-revolutionary Constitutions of New York,[72] Pennsylvania,[73] and Vermont[74] employed similar standards to define the role of the Executive—all requiring faithful execution. By 1787, six states "had constitutional clauses restricting the power to suspend or dispense with laws to the [L]egislature."[75]

During the Constitutional Convention, the President's duty to execute the laws went through several evolutions. These changes highlight the importance the framers placed on the duty of faithfulness. An early version of the Take Care Clause appeared in the Virginia Plan on May 29, 1787. It vested the "National Executive" with the "general authority to execute the National laws."[76] On June 1, the Convention adopted a revised version of the clause: the executive was "with power to carry into execution the national laws."[77] At this point there were no qualifications for faithfulness. A proposal to give the President the power "to carry into execution the nationl. [sic] laws" was agreed to unanimously on July 17th.[78]

72. N.Y. CONST. OF 1777, art. XIX.

73. PA. CONST. OF 1776, § 20.

74. VT. CONST. OF 1777, ch. 2, § XVIII.

75. Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534 (2012) (citing early constitutions of Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia).

76. FARRAND'S RECORDS, VOL. 1, *supra* note 42, at 21; *see also* Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1001–02 (1993) (analyzing the history of the Take Care Clause).

77. FARRAND'S RECORDS, VOL. 1, *supra* note 42, at 63.

78. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 32 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS, VOL. 2], *available at* http://bit.ly/1yNpFk7 [perma.cc/LW8A-9GYJ].

On July 26, this provision was sent to the Committee of Detail.[79] The Committee of Detail considered two different formulations: First, "He shall take Care to the best of his Ability."[80] Second, John Rutledge suggested an alternate: "It shall be his duty to provide for the due & faithful exec[ution] of the Laws."[81] The final version, reported out by the Committee on August 6, hewed closer to Rutledge's proposal: "He shall take care that the laws of the United States be duly and faithfully executed."[82] The Committee of Detail rejected a provision that would have been linked to the "best of" the President's "ability," which the Oath of Office ultimately adopted.[83] Rather, the Committee focused on "due" and "faithful" execution.

On September 8, the Committee of Style and Arrangement[84] received a draft that included the term "duly."[85] By September 12, however, the Committee had dropped the term "duly."[86] The final version read, "he shall take care that the laws be faithfully executed."[87] There is no recorded account of why "duly" was dropped, and the focus was placed solely on "faithfully."

The progression over the summer of 1787 speaks to the designs of the framers. The initial draft from the Virginia Plan imposed no qualifications. The President was simply to "execute the National laws."[88] The Committee of Detail considered

79. *See id.* at 115–16. The August Committee of Detail was chaired by John Rutledge (second Chief Justice of the United States), and included as members Edmund Randolph (first Attorney General of the United States), Oliver Ellsworth (third Chief Justice of the United States), James Wilson (one of the six original justices appointed to the Supreme Court), and Nathaniel Gorham (former President of the Continental Congress). Oak Hill Publ'g Co., *The Constitutional Convention*, CONSTITUTIONFACTS.COM, http://bit.ly/1yNpMvX [perma.cc/Z8NT-QG9P] (last visited Apr. 11, 2015); *America's Founding Fathers: Delegates to the Constitutional Convention*, THE CHARTERS OF FREEDOM, http://1.usa.gov/1yNpOE1 [perma.cc/X2JX-2T54].

80. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 137 n.6, 171.

81. *Id.*

82. *Id.* at 185. This resembles phrasing in the Charter of Massachusetts Bay, which required the Governor and his officers to "undertake the Execucon of their saide Offices and Places respectivelie, [and] take their Corporal Oathes for the due and faithfull Performance of their Duties in their severall Offices and Places." CHARTER OF MASS. BAY of 1629, *available at* http://bit.ly/1ODJsnP [perma.cc/8HVE-6CMF].

83. U.S. CONST. art. II, § 1, cl. 8.

84. The Committee of Style and Arrangement included Alexander Hamilton, William Johnson, Rufus King, James Madison, and Gouvernour Morris. *Committees at the Constitutional Convention*, U.S. CONST. ONLINE, http://bit.ly/1K3gMnJ [perma.cc/Q438-V9SE] (last updated Jan. 24, 2010).

85. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 554, 574.

86. *See id.* at 589–603.

87. *Id.* at 600.

88. FARRAND'S RECORDS, VOL. 1, *supra* note 42, at 21; *see also* Prakash, *supra* note 76, at 1000–02 (analyzing the history of the Take Care Clause).

proposals that would restrict the duty to either (a) "the best of his Ability" or (b) "the due & faithful exec[ution] of the Laws."[89] The Committee chose the latter. Finally, the Committee of Style—staffed by Madison and Hamilton, two-thirds of Publius—narrowed the duty to focus only on "faithfully."[90] This account is confirmed by the Hamilton Plan, which though "not formally before the Convention in any way," was read on June 18 and proved to be influential.[91] His plan eliminated the word "duly" and only focused on "faithfully": that "He shall take care that the laws be faithfully executed."[92] A year later, Hamilton echoed this phrasing in Federalist No. 77, where he wrote about the President "faithfully executing the laws."[93]

What is the difference between "duly" and "faithfully"? Johnson's Dictionary defines "due" as "that which any one has a right to demand in con[s]equence of a compact."[94] Johnson defines duly with a reference to "due," as "properly, fitly, in the due manner."[95] The omission of "duly" and focus on "faithfully" suggests a shift away from mechanical legal obligations to a duty of faithfulness on the part of the President.

This construction was confirmed by the Oath Clause of Article II: "I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States, and will to the *best of my Ability*, preserve, protect and defend the Constitution of the United States."[96] Again, the framers required the President to swear that he would "faithfully execute" those duties charged to him. But unlike the Take Care Clause, which is imposed without qualification, the Oath only binds the President "to the *best of [his] Ability*." In this sense, the command to "preserve, protect and defend the Constitution of the United States" exists to a lesser degree than the command to "faithfully execute the Office of President of the United States."[97] In contrast, the New York Constitution of 1777 required the governor "to take care that the

89. FARRAND'S RECORDS, VOL. 2, *supra* note 78, at 171.

90. *Id.* at 574.

91. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 617 (Max Farrand ed., 1911), *available at* http://bit.ly/1JrYeMR [perma.cc/5NSE-ASYK].

92. *Id.* at 624.

93. THE FEDERALIST NO. 77, *supra* note 64, at 488 (Alexander Hamilton).

94. JOHNSON'S DICTIONARY, *supra* note 49, at 659, *available at* http://bit.ly/1HsjhAg [perma.cc/WGE2-S4VE].

95. JOHNSON'S DICTIONARY, *supra* note 49, at 661, *available at* http://bit.ly/1bhjWrS [perma.cc/MTB6-DDYN].

96. U.S. CONST. art. II, § 1, cl. 8 (emphasis added).

97. *See* Delahunty & Yoo, *supra* note 20, at 801.

laws are faithfully executed to the best of his ability."[98] The federal formulation gives the Executive even less wiggle room. Further, unlike the Adjournment Clause, the Take Care Clause did not include discretionary language such as "shall think proper."[99] The duty is one of good faith. This understanding was further confirmed in the ratification conventions.

At the Pennsylvania Ratification Convention, James Wilson—a member of the Constitutional Convention and a future Supreme Court Justice—explained the relationship between the President and Congress: "It is not meant here that the laws shall be a dead letter; it is meant, that they shall be carefully and duly considered, before they are enacted; and that then they shall be *honestly and faithfully* executed."[100] Ten days later, Wilson stressed that the Take Care Clause was "another power of no small magnitude entrusted to [the President]."[101] A decade earlier, Wilson's native Pennsylvania had equated the duty of faithfulness with that of honesty.[102]

During the North Carolina Ratification Convention, delegate Archibald Maclaine stressed the importance of the Take Care Clause:

> One of the best provisions contained in it is, that he shall commission all officers of the United States, and *shall take care that the laws be faithfully executed*. If [he] takes care to see the laws faithfully executed, it will be more than is done in any government on the continent, for I will venture to say that our government, and those of the other states, are, with respect to the execution of the laws, in many respects, mere cyphers.[103]

The history of the Take Care Clause reveals a focused execution based on faith and honesty. As Prakash explains, "If

98. N.Y. CONST. OF 1777, art. XIX.

99. U.S. CONST. art. II, § 3; *see also* NLRB v. Noel Canning, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., concurring).

100. Thomas Lloyd, Notes of the Pennsylvania Ratification Convention (Dec. 1, 1787) (emphasis added), *available at* http://bit.ly/1ODJQmr [perma.cc/2YVG-DUCT].

101. Thomas Lloyd, Notes of the Pennsylvania Ratification Convention (Dec. 11, 1787), *available at* http://bit.ly/1E98Osg [perma.cc/P4P3-JQ3B].

102. *See* PA. CONST. OF 1776, § 10 ("I do swear (or affirm) that . . . [I] will in all things conduct myself as a *faithful honest* representative and guardian of the people, according to the best of only judgment and abilities.") (emphasis added). The oath of office for a member of the assembly in Pennsylvania thus directly tied the notion of "faithful" execution of an oath to one of "honesty." *Id.*

103. North Carolina Ratification Convention Debates (July 28, 1788) (emphasis added), *available at* http://bit.ly/1bhjZE3 [perma.cc/5WRT-M5A3]; Jessica Lee Thompson, *Archiabld Maclaine (1728–1790)*, N.C. HIST. PROJECT, http://bit.ly/1JrYUBS [perma.cc/G42D-N753] (last visited Apr. 11, 2015).

the officer performed his duties honestly, adequately, and within the boundaries of his statutory discretion, the presidential inquiry would end, for the President would have taken care that the laws were faithfully executed."[104]

2. The Duty of Good Faith

By embracing the term "faithfully," the framers seem to have adopted a standard stretching back to the times of Herodotus,[105] Roman law,[106] and Canon law.[107] The concept of good faith[108] was well-known in the seventeenth-[109] and eighteenth-century[110] English common law of contracts.[111] Johnson's dictionary defines "faithfully" as imposing a very precise standard: acting with "*[s]trict adherence* to duty and allegiance;" "*[w]ithout failure of performance*; hone[s]tly; exactly;" and "without fraud, trick or ambiguity."[112] Webster's offers a similar explanation: "In a faithful manner; with *good faith*."[113] The second definition imposes an even higher standard: "With *strict adherence* to

104. Prakash, *supra* note 76, at 1000–01.

105. Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 80 & n.26 (1993) ("*Good faith* in dealings and negotiation practices was the element of binding value in these ancestral societies, and served as the religious basis for maintaining the word given.") (emphasis added).

106. Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1319 (1994) ("The essence of a duty of *good faith* existed at least two thousand years ago in the law of the Romans.") (emphasis added).

107. *Id.* at 1324 ("Under the influence of the Church, the ceremony of *fides facta* was transformed into the pledge of faith. In effect, the gage provided by the debtor was the debtor's Christian *faith* and his hope of salvation.") (emphasis added).

108. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.").

109. Jerry, *supra* note 106, at 1327 ("[B]ut with ever-increasing monotony the plea is that the debtor has acted 'against good faith and conscience' or the petitioner prays that the debtor shall be compelled to do 'what *good faith* and conscience require.'") (emphasis added) (quoting Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16, 22 (1956)).

110. Carter v. Boehm, (1766) 97 Eng. Rep. 1162 (K.B.) 1164; 3 Burr. 1905, 1909 ("*Good faith* forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.") (emphasis added).

111. Palmieri, *supra* note 105, at 84 ("*[G]ood faith* and fair dealing increasingly became a part of the common law of contract performance and enforcement.") (emphasis added).

112. JOHNSON'S DICTIONARY, *supra* note 49, at 763 (emphasis added), *available at* http://bit.ly/1JrZ2Bq [perma.cc/JY24-MGVY].

113. WEBSTER'S DICTIONARY, *supra* note 51 (emphasis added), *available at* http://bit.ly/1zJ5DCh [perma.cc/L3RM-BLVR].

allegiance and duty."[114] Webster even offers an example with the same language as the Constitution: "The treaty or contract was *faithfully* executed."[115] Professor Price observes that "the term 'faithfully,' particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in *good faith*."[116] Acting in good faith, however, does not require one-hundred-percent compliance with all legal duties.

Steven J. Burton's canonical work on the common-law duty to perform in good faith is consistent with the text and history of the Take Care Clause.[117] Burton sketches two views of failing to comply with a contract. First, a party may deviate from the terms of the contract, resulting in the deprivation of "anticipated benefits" based on a "legitimate" or "good faith" reason.[118] Here, there is no breach of contract, even though the party did not strictly comply with the contract. Second, however, the "same act will be a breach of the contract if undertaken for an illegitimate (or bad faith) reason."[119] How should we distinguish between the former, which is lawful, and the latter, which is not? It is not enough to focus on the contractual duties owed to the promisee, and what benefits he is due. Rather, to determine "good faith," an inquiry must be made into the *motivations* of the promisor's actions.

Burton explains that good faith performance "occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract."[120] To put this in constitutional terms, we would ask whether the President is acting within the realm of possible discretion contemplated when Congress enacted a statute. If the answer is yes, the deviation from the law is in good faith, and thus is permissible. However, if the departure from the law is "used to recapture opportunities forgone upon contracting," then the action is not in good faith.[121] As Randy

114. *Id.* (emphasis added).
115. *Id.*
116. Price, *supra* note 20, at 698 (emphasis added).
117. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

Barnett explains, "According to Burton, when a contract allows one party some discretion in its performance, it is bad faith for that party to use that discretion to get out of the commitment to which he consented."[122] To put this dynamic in constitutional terms, when the President bypasses a statute by relying on a claim to authority Congress withheld from him, the action is in bad faith—and is therefore unlawful.

Under this theory, what "matters is the purpose or motive for the exercise of discretion."[123] Good faith deviations that "honor the spirit" of the law or rely on "scarcity of enforcement resources" are valid motives for discretion.[124] But the same action is unlawful when it is "intended to evade the commitment" and based on a "disagreement with the law being enforced."[125] It is not the case that any deliberate deviation is presumptively forbidden. Rather, the deviation must be done in bad faith, as an intentional means to bypass the Legislature.

Burton's conclusion provides further insights into the Committee of Style's decision to amend the Take Care Clause. First, by eliminating the reference to "duly," the framers moved away from focusing on which formalistic obligations the President owes Congress. Instead, they focused on "faithfully" alone. This inquiry directs attention to the President's motivations, rather than his legal duties to Congress in the abstract. The important qualification "faithfully" vests the President with additional discretion, so long as he acts with good faith.

A careful examination of the four elements of the Take Care Clause provides a comprehensive framework to determine whether the President has complied with his constitutional duty. I should stress that looking to the President's state of mind is a last resort in this balancing test. Only after the President (1) fails to comply with the "shall" command, (2) does not act with "care," and (3) disregards "the Laws," should we inquire into his motivations for acting contrary to the Constitution.

122. Randy Barnett, *The President's Duty of Good Faith Performance*, WASH. POST, Jan. 12, 2015, http://bit.ly/1zJ5LSf [perma.cc/MK6E-2KTJ].

123. *Id.*; Delahunty & Yoo, *supra* note 20, at 847 (noting that the "motivation and intent behind nonperformance may also be relevant to its evaluation").

124. Barnett, *supra* note 122.

125. *Id.*

III. DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY (DAPA)

On November 20, 2014, the Department of Homeland Security (DHS), through an executive memorandum by Secretary Jeh Johnson, announced a policy that came to be known as Deferred Action for Parental Accountability (DAPA).[126] DAPA was built on DHS's 2012 Deferred Action for Childhood Arrivals (DACA) initiative.[127] DAPA established a new class of eligible beneficiaries for deferred action. DACA was limited to certain minors who entered the country without authorization—Dreamers—regardless of whether the children were related to a citizen.[128] DAPA continued this policy by covering the parents of U.S. citizens and lawful, permanent residents, who would be eligible for deferred action, work authorization, and other benefits such as social security.[129] The memorandum indicated that local Immigration and Customs Enforcement (ICE) officers had discretion to grant deferred action upon consideration of all relevant factors, including the eligibility criteria.[130]

Before announcing DAPA, the Obama Administration made public a legal opinion from the Office of Legal Counsel, opining that "DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws."[131] Extrapolating from Supreme Court and court of appeals precedent about the scope of enforcement discretion the Take Care Clause permits, the opinion established a four-factor inquiry to determine the legality and constitutionality of any particular discretionary initiative.[132] "First, enforcement decisions should reflect 'factors which are peculiarly within [the enforcing agency's] expertise.'"[133] Second, the exercise of discretion cannot

126. *See* JOHNSON, *supra* note 3.

127. DACA was an initiative of DHS, not of the whole federal government. *But cf.* Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1057 (9th Cir. 2014) (misleadingly referring to DACA as a program enacted by the federal government, though only one federal agency actually instituted this policy).

128. JOHNSON, *supra* note 3, at 3.

129. *Id.* at 3–4.

130. *Id.* at 5 ("Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.").

131. THOMPSON, *supra* note 5, at 2.

132. *Id.* at 5–7.

133. *Id.* at 6 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

constitute an effective rewrite of the law so as to "match [the executive's] policy preferences."[134] Practically, this means that "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."[135] Third, and as an effective corollary to the second factor, the executive cannot "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an *abdication of its statutory responsibilities*."[136] Fourth, nonenforcement decisions are most comfortably characterized as proper "exercises of enforcement discretion when they are made on a case-by-case basis."[137] I previously addressed the second factor in Part I of this series.[138] This article's analysis will focus on the third and fourth factors. (The first factor is not in dispute).

IV. FAILING TO ENFORCE THE LAWS

The first step in the Take Care Clause analysis is to determine whether the President is complying with the Article II "shall" imperative. Is he executing the laws or suspending them? In most cases, nonenforcement falls along a spectrum from a categorical refusal to enforce the law[139] to a perfect enforcement—which is impossible because of time and resource constraints. While the line is invariably fuzzy,[140] this inquiry can and should be completed to determine whether the President has complied with his constitutional duty.[141]

The federal courts have addressed this separation-of-powers conflict through the framework in the Administrative Procedures Act (APA) for the nonenforcement of agency action.[142] In this arena, the Supreme Court has stated that an executive policy would be reviewable in federal court if "the agency has 'consciously and expressly adopted a general policy' that is so

134. *Id.*
135. *Id.* (emphasis added).
136. *Id.* at 7 (quoting *Heckler*, 470 U.S. at 833 n.4) (emphasis added).
137. *Id.*
138. *Constitutionality of DAPA Part I*, *supra* note 16.
139. Price, *supra* note 20, at 705.
140. *Id.* at 706.
141. *Id.* at 677–79.
142. *See* 5 U.S.C. § 701 (2013) (establishing presumption of judicial review except where statute precludes it); *see also* 5 U.S.C. § 706(2)(B) (2013) ("[T]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity.").

extreme as to amount to an *abdication of its statutory responsibilities*."[143] If reviewable, nonenforcement would be contrary to law if it is "arbitrary, capricious, or an abuse of discretion."[144] The D.C. Circuit's decision in *Crowley Caribbean Transport, Inc. v. Peña*[145]—favorably cited by the OLC opinion—added some flesh to the bones of *Heckler*'s footnote. The court held that a "broad policy against enforcement poses *special risks* that [the agency] 'has consciously and expressly adopted a general policy that is so extreme as to amount to an *abdication* of its statutory responsibilities.'"[146]

The APA is not the Take Care Clause, and vice versa. This test, though framed in terms of reviewability, at its core parallels the failure of the Executive Branch to execute the laws. In such a case, the courts have a role to set aside the unlawful agency actions. The President's duty here, as always, derives from the Take Care Clause. The agency "*shall* take Care that the Laws be faithfully executed."[147] With this understanding, *Heckler* is the closest facsimile we have in the Court's jurisprudence to determine whether DAPA is lawful. In the OLC opinion, the Obama Administration seemingly agreed.

As the following analysis in Parts V–VII demonstrates, DHS has adopted an extremely broad policy that restricts the ability of officers to enforce the immigration laws. The policy cabins their discretion both procedurally (requiring less thorough review of applications) and substantively (eliminating grounds for denial beyond the Secretary's preferences).[148] Second, the policy was deliberately crafted in this manner. It was "consciously and expressly adopted" to exempt nearly forty percent of all undocumented aliens in the United States—even those who were not previously subject to any enforcement action—from the threat of removal.[149]

Third, the decision to defer deportations by itself is not enough to "amount to an abdication of its statutory

143. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (emphasis added) (citations omitted).

144. *Id.* at 826 (citing 5 U.S.C. § 706(2)(A) (2013)) (further citations omitted).

145. 37 F.3d 671 (D.C. Cir. 1994).

146. *Id.* at 677 (citing *Heckler*, 470 U.S. at 833 n.4) (emphasis added).

147. U.S. CONST. art. II, § 3 (emphasis added).

148. Bellocchi Testimony, *supra* note 11, at 9; THOMPSON, *supra* note 5, at 11; *see* discussion *infra* Part V.A.

149. *Heckler*, 470 U.S. at 833 n.4; THOMPSON, *supra* note 5, at 30–31.

responsibilities."[150] In all likelihood, the overwhelming majority of the four million aliens exempted would not have been removed anyway. Rather, the decision to establish a program to solicit registrations for deferrals as a means to provide work authorization to bring these aliens "out of the shadows" elevates the policy to the level of disregarding the law.[151] Exacerbating this policy is the fact that the aliens selected by the President—parents of minor U.S. citizens and lawful permanent residents—were never deemed by Congress to be worthy of such relief.[152]

Fourth, the size and scope of those exempted from the laws greatly exceeds any previous class-wide deferrals by several orders of magnitude.[153] While the policy is based on the selective enforcement of the immigration laws, it is entirely without precedent to excuse a class of over four million people from the scope of the naturalization power. Professor Zachary Price observed that DACA—DAPA's progenitor—"amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization."[154] By waiving myriad legal requirements, the "action thus is presumptively beyond the scope of executive authority: to be valid, it requires a delegation from Congress."[155] The OLC opinion acknowledged that "deferred action programs depart in certain respects from more familiar and widespread

150. *Heckler*, 470 U.S. at 833 n.4.

151. JOHNSON, *supra* note 3, at 3.

152. *Constitutionality of DAPA Part I*, *supra* note 16.

153. The OLC opinion repeated an oft-cited, but incorrect statistic that President George H.W. Bush's "Family Fairness" program deferred the deportation of 1.5 million aliens. *See* THOMPSON, *supra* note 5, at 14. This statistic has been repeated by the President. *'This Week' Transcript: President Obama*, ABCNEWS, Nov. 23, 2014, http://abcn.ws/1yNqAkj [perma.cc/BN4G-KYAW] ("If you look, every [P]resident—Democrat and Republican—over decades has done the same thing. George H.[]W. Bush—about 40 percent of the undocumented persons, at the time, were provided a similar kind of relief as a consequence of executive action."). The actual estimate was roughly 100,000. Glenn Kessler, *Fact Checker: Obama's Claim that George H. W. Bush Gave Relief to '40 Percent' of Undocumented Immigrants*, WASH. POST, Nov. 24, 2014, http://wapo.st/1JrZM9Q [perma.cc/B99Z-KMSL]. The origin of this false number is subject to some dispute, and seems to be based on an error in congressional testimony. *Id.* INS Commissioner Gene McNary himself told the *Washington Post*, "I was surprised it was 1.5 million when I read that . . . . I would take issue with that. I don't think that's factual." *Id.* Ultimately, by October 1 of 1990, INS had received *only 46,821 applications*. *Id.* The next month, President Bush signed the Immigration Act of 1990, which ended the temporary Family Fairness program. *Id.*

154. Price, *supra* note 20, at 760.

155. *Id.*

exercises of enforcement discretion."[156] In a word, this action is *unprecedented*.

Finally, the presumption of reviewability should be strongest when the nonenforcement of the law amounts not only to a disagreement about policy, but also to a violation of the Constitution. In his concurring opinion in *Heckler v. Chaney*, Justice Marshall elaborated on the Court's framework concerning the "complete abdication of statutory responsibilities."[157] He wrote:

> If inaction can be reviewed to assure that it does not result from improper abnegation of jurisdiction, from complete abdication of statutory responsibilities, from *violation of constitutional rights*, or from factors that offend principles of rational and fair administrative process, it would seem that a court must always inquire into the *reasons for the agency's action* before deciding whether the presumption applies.[158]

According to this view, courts have a role to determine if the rationales behind the inaction are pretextual. The violation of the structure of the Constitution is of equal or greater magnitude to the violation of constitutional rights.

At issue with DAPA is not a mere disagreement about how an agency enforces its priorities, but a knowing disregard for the limits imposed by Congress. While the D.C. Circuit decision reversed by *Heckler* was a "clear intrusion upon powers that belong to Congress, the Executive Branch and the states,"[159] the review of DAPA would serve to reinforce the powers of Congress to limit the President's power.[160]

V. DAPA WAS NOT DESIGNED WITH "CARE" TO THE LAWS

Second, our inquiry turns to whether the President's agencies have executed the law with "care." With respect to DAPA, the case-by-case discretion at the heart of all aspects of prosecution

156. THOMPSON, *supra* note 5, at 24.

157. Heckler v. Chaney, 470 U.S. 821, 853 (1985) (Marshall, J., concurring).

158. *Id.* (emphasis added).

159. Chaney v. Heckler, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd*, 470 U.S. 821 (1985).

160. Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part) ("But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that *does not want to enforce the immigration laws as written*, and leaves the States' borders unprotected against immigrants whom those laws would exclude.") (emphasis added).

was supplanted by the Secretary's priorities.[161] No deviations were allowed for individualized judgment, despite the OLC's assurances to the contrary.[162] These policies represent a deliberate effort to undermine the discretion of officers, both procedurally and substantively. By restricting the scope of their reviews of applicants and limiting the grounds for denial to those identified by the Secretary, DAPA deliberately hobbles immigration law enforcement. These steps are taken not to conserve resources (they actually increase the agency's workload and budget), but as a means to bypass the laws of Congress.

A. The Secretary's Policy Displaces Individualized Officer Discretion

To analyze the constitutionality of DAPA, we must first address its progenitor: DACA. Secretary Johnson, in establishing DAPA, "direct[ed] USCIS to establish a process, *similar to DACA*, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis."[163] Secretary Johnson's memorandum mirrors that of his predecessor, Secretary Janet Napolitano, and her invocation of discretion. It begins: "DHS must exercise *prosecutorial discretion* in the enforcement of the law."[164] Further, the OLC opinion bases the legality for DAPA in large part on the legality of DACA. By the government's own arguments, both in the OLC opinion and during the course of litigation, DACA is the touchstone for DAPA. There are certainly differences between DACA and DAPA, namely the category of aliens who will apply. But on the whole, DAPA was designed to mirror the implementation strategies of DACA. While DAPA has not yet gone into effect (as of the date of publication), it is safe to assume that it will adopt priorities and guidelines similar to those of DACA—but on a much larger scale. This section will determine the degree of discretion inherent in DACA, draw parallels to how the government has described DAPA, and discuss how DAPA will likely be implemented.[165]

161. JOHNSON, *supra* note 3, at 3–4.

162. *See* THOMPSON, *supra* note 5, at 11 (claiming the policy uses "a broad standard that leaves *ample room* for the exercise of individualized discretion by responsible officials") (emphasis added).

163. JOHNSON, *supra* note 3, at 4 (emphasis added).

164. *Id.* at 1 (emphasis added).

165. While this article does not address whether DAPA is subject to the notice-and-comment procedures of the APA, allowing this policy to go through the notice-and-comment process would offer an opportunity to understand how it will be implemented. Because of the pre-enforcement challenge at hand, the closest analogue is DACA. *See*

Secretary Napolitano's memorandum announcing DACA employs an oxymoronic understanding of discretion. On the one hand, the memo directs USCIS to "establish a clear and efficient process for exercising *prosecutorial discretion*, on an *individual basis*, by deferring action against individuals who meet the above criteria."[166] The memo adds that all "requests for relief pursuant to this memorandum are to be decided on a case[-]by[-]case basis."[167]

However, it is the Secretary's discretion, not the discretion of officers, that determines who does and does not receive deferred action. The very first sentence gives away the whole game: "By this memorandum, *I* am setting forth how, in the exercise of *our* prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws . . . ."[168] There is no room for "discretion, on an individual basis" outside the Secretary's broad criteria. The final sentences of the memorandum drive the point home. It is not discretion for the officers to exercise, but for the Secretary to impose: "It remains for the [E]xecutive [B]ranch, however, to set forth policy for the exercise of discretion within the framework of the existing law. *I have done so here*."[169]

This process amounts to discretion in name only—or more precisely, discretion in the Secretary's name only. This philosophy is encapsulated in Slide 31 of a training presentation provided to agents, released through FOIA.[170] "Deferred action," it begins, "is discretionary."[171] But this is not the case-by-case discretion in the hands of the officer that the Secretary described in her memorandum.[172] Rather, this discretion comes from the Secretary herself. "In setting the guidelines, *the Secretary* has determined how this discretion is to be applied for individuals

Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). For purposes of full disclosure, I joined an amicus brief on behalf of the Cato Institute in support of Texas's constitutional challenge to DAPA. Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors at 12, Texas v. United States, No. 1:14-CV-254 (S.D. Tex. Feb. 16, 2015).

166. NAPOLITANO, *supra* note 2, at 2–3 (emphasis added).

167. *Id.* at 2.

168. *Id.* at 1 (emphasis added).

169. *Id.* at 3 (emphasis added).

170. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444, *available at* http://bit.ly/1DbEGHF [perma.cc/V7K7-HN2Y].

171. *Id.*

172. *See* NAPOLITANO, *supra* note 2, at 2.

who arrived in the United States as children."[173] In case anyone did not get the memo, literally and figuratively, the slide states it clearly for the officers: "Although discretion to defer removal is applied on a case-by-case basis, according to the facts and circumstances of a particular case, *discretion should be applied consistently*."[174] *Consistent discretion* is oxymoronic and inconsistent with the individualized discretion extolled by the memorandum as the constitutional basis for DACA. There are no doubt countless other instances where prosecutors are instructed to apply discretion consistently, but in those cases, they are acting pursuant to clear delegations of power from Congress. DACA's saving grace, in light of the direct statutory authority, was that there was *actual* discretion employed on a case-by-case basis.

The slide explains further, "Absent unusual or extenuating circumstances, similar fact patterns should yield similar results."[175] That alone seems reasonable enough—if the policy actually granted the agents leeway to enforce the laws of Congress. But it does not. The policy guidelines *only* allow officers to deny deferred action in cases where the Secretary's guidelines are not met—so much so that "[t]o facilitate consistent review and adjudication, a series of . . . templates have been developed and *must* be used."[176] Specifically, a "standard denial template in checkbox format *will* be used by officers."[177] Again, there are countless other instances where heads of agencies offer checklists and other tools to ensure the consistent application of the laws. But in those cases, the Secretary is acting pursuant to clearly delegated powers, and does not need to worry about constitutional charges of "abdication." Here, the veneer of discretion is just that—a façade.[178]

Recently, at an immigration town hall meeting in Miami, Telemundo host José Díaz-Balart asked the President what would happen if a Dreamer were deported during the application process.[179] The President acknowledged that while "implementing a new prioritization . . . there may be individual

173. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444 (emphasis added).
174. *Id.* (emphasis added).
175. *Id.*
176. *Id.* (emphasis added).
177. *Id.* (emphasis added).
178. *See* Delahunty & Yoo, *supra* note 20, at 845.
179. Press Release, The White House Office of the Press Secretary, Remarks by the President in Immigration Town Hall—Miami, FL (Feb. 25, 2015) (emphasis added), *available at* http://1.usa.gov/1GnKfu7 [perma.cc/HNS2-BEXV].

ICE officials or Border Patrol who aren't paying attention to our new directives."[180] Contrary to the individualized assessment OLC extolled, the President countered that these officers are "going to be answerable to the head of the Department of Homeland Security, because he's been very clear about what our priorities should be. And I've been very clear about what our priorities should be."[181] Stated simply, the Secretary's priorities—not the determinations of individual officers—matter. Officers who attempt to exercise discretion will be subject to discipline. Díaz-Balart asked what the consequences are for "ICE agents or Border Patrol" who do not comply.[182] "The bottom line," the President answered, "is that if somebody is working for ICE and there is a policy and they don't follow the policy, there are going to be consequences to it."[183] The message could not be clearer. Rather than praising the discretion inherent in each officer, the President compares immigration officials to soldiers in the military: "In the U.S. military, when you get an order, you're expected to follow it. It doesn't mean that everybody follows the order. If they don't, they've got a problem. And the same is going to be true with respect to the policies that we're putting forward."[184]

A detailed study of how DACA has been implemented confirms the Secretary's admonition. DACA is a blanket policy, and a "broad policy against enforcement."[185] Individual officers cannot exercise judgment on a case-by-case basis beyond the Secretary's criteria. Although each case is analyzed individually, officers can only proceed along a predefined template where the only ground for denial is the failure to meet the Secretary's criteria. This schizophrenic approach to discretion reveals that individualized judgment is a mirage. It shows the "special risks" posed by a "general policy" that seeks an "abdication of [the agency's] statutory responsibilities."[186] As the D.C. Circuit warned, this "general policy" reflects a deliberate effort to disregard the law.[187] The Secretary no doubt crafted these

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994).
186. *Id.*
187. *Id.*

policies to ensure that the grant rate was as high as possible, and that there were minimal deviations from individualized assessments.

As the Supreme Court recognized two centuries ago, it is "the peculiar province of the [L]egislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[188] When the executive fails to apply the rules to individuals, his actions blur with those of the Legislature.

B. The USCIS Policy Undermines the Role of Officer Discretion

USCIS, the agency charged with administering DACA and DAPA for aliens not yet subject to enforcement actions, took the Secretary's lead in confining the inherent case-by-case discretion officers traditionally exercise. A series of FOIA requests forced USCIS to release internal policy documents, standard operating procedures, and training manuals.[189] These documents reveal how the government has restricted the scope of discretion both procedurally and substantively.[190] First, through the so-called "lean and lite" review, DHS limited the depth of investigation that officers could employ to dig into an application.[191] In this sense, the officers were procedurally constrained from investigating various indicia of fraud that would normally counsel against providing relief. Second, DHS weakened the scope of officer discretion by limiting the grounds for denial to checking boxes on a template.[192] These grounds were the exact criteria set by the Secretary's policy. Substantively, discretion was confined to the Secretary's preferences, displacing any meaningful case-by-case review. This discretion is nothing more than a veneer to justify awarding benefits to millions.

1. Transitioning to Lean and Lite Review Limits Discretion Procedurally

Procedurally, the DHS prevented its officers from conducting

188. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

189. *See Judicial Watch: Homeland Security Documents Reveal DHS Abandoned Required Illegal Alien Background Checks to Meet Flood of Amnesty Requests Following Obama's Deferred Action for Childhood Arrivals Directive*, YAHOO! FIN., Jun. 11, 2013, http://bit.ly/1bhkii4 [perma.cc/XU2K-4D5F].

190. *Id.*; *see also* Plaintiffs' Reply, *supra* note 14, at Exh. 23, at app. 0854.

191. Bellocchi Testimony, *supra* note 11, at 9.

192. Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444.

a thorough review of each DACA applicant. This was done by design; DACA was crafted as a means to provide relief to as many applicants as possible, not as a way to conserve resources. The decision to cast the criteria so widely, and not include any hardship requirement, is a testament to this desired outcome. Denials were meant to be the rare exception, rather than the rule. These priorities are reflected in a September 14, 2012 memorandum to field officers that explains the new lean and lite process of reviewing applicants.[193] Under this policy, the National Benefits Center (NBC) takes the lead in the preliminary step of reviewing all initial evidence, with field officers following up.[194]

The memo notes that certain "changes will occur in this process" that diminish the discretion of the individual officers in the field.[195] First, where before a "case might have gone to an officer for more detailed review and/or application of *officer discretion* (ORB) before RFE [Request for Evidence], instead the case will [now] go to the field for officer review and adjudication."[196] The primary review would now be conducted by the national office, removing individual officers from the process.[197] Second, where before a "case would have gone to an officer for further review, possible denial, or application of officer discretion (Failed Validation)," under the lean and lite process, "if the RFE is NOT sufficient," the case will instead "go to the field for officer review and adjudication."[198]

Third, NBC will "no longer have officers review cases where the applicant might currently be in proceedings to determine if USCIS has jurisdiction over their I-485."[199] Under the new streamlined approach, "these cases will go to the field for review and adjudication."[200] At every juncture, the USCIS guidelines diminished officer discretion in the field and consolidated the authority in the national office.

Chapter 8 of USCIS's National Standard Operating Procedures handbook for DACA provides guidance for the

193. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0189–91, *available at* http://bit.ly/1ODLAfz [perma.cc/KQ2G-5TBD].

194. *Id.*

195. *Id.* at Exh. 9.a, at app. 0191.

196. *Id.* (emphasis added).

197. *See id.* at Exh. 9.a, at app. 0190.

198. *Id.* at Exh. 9.a, at app. 0191.

199. *Id.*

200. *Id.*

adjudication of the DACA request.[201] The second paragraph makes clear the officer understands the thrust of the policy: "Officers will **NOT**"—the word **"**NOT**"** is capitalized and bolded in the original—"deny a DACA request solely because the DACA requestor failed to submit sufficient evidence with the request (unless there is sufficient evidence in our records to support a denial)."[202] The memo explains where the discretion lies—not with the officer, but with the agency: "As a matter of policy, officers will issue an RFE or a Notice of Intent to Deny (NOID)" prior to denying a DACA request.[203]

These standard operating procedures further minimize the scope of individual discretion. "When articulable fraud indicators exist," the guide provides, "the officer should refer the filing with a fraud referral sheet prior to taking any adjudication action."[204] This is so "even if there are other issues which *negate the exercise of prosecutorial discretion* to defer removal."[205] Further, if an application has "discrepancies [that] still don't add up," and the "DACA requestor's attempts to explain" fail, the officer is not to deny the request, but "refer the case to [the Center for Fraud Detection Operations] for further research."[206] Officers should take the hint that the answer should never be "deny."

Even when the officer determines that an applicant should be denied, she must "obtain supervisory review before issuing the denial" if the denial "involves" one of the five broad grounds covering the eligibility criteria for DACA.[207] A guidance PowerPoint slide reiterates that an "officer *must* obtain supervisory review before entering the final determination" of a denial.[208] Even where the officer determines the applicant committed an adult crime "before reaching age 18," has been "convicted of a 'significant misdemeanor,'" "poses a threat to national security or public safety," or has not "met the educational guideline[s]," the officer is not allowed to deny the

201. *Id.* at Exh. 10.c, at app. 0318, *available at* http://bit.ly/1Hsk2t3 [perma.cc/GT6V-35YR].

202. *Id.*

203. *Id.*

204. *Id.* at Exh. 10.e, at app. 0363, *available at* http://bit.ly/1Eqh5dr [perma.cc/GWK5-8LS2].

205. *Id.* (emphasis added).

206. *Id.* at Exh. 10.h, at app. 0426.

207. *Id.* at Exh. 10.e, at app. 0370.

208. *Id.* at Exh. 10.m, at app. 0596, *available at* http://bit.ly/1E9azpn [perma.cc/GN7A-8PJ5].

application on her own.[209] The application must be turned over to the supervisor.[210] Slide 208 of the training presentation poses what must be a rhetorical question: "When is supervisory review required before issuing a denial?"[211] The answer: virtually always.

These restrictions were not lost on the employees of USCIS. The field office director in St. Paul noted that applications generated under the lean and lite process are not "as complete and interview[-]ready as we are used to seeing."[212] Stressing that the DACA guidelines represented a departure from standard operating procedures, she added, "This is a temporary situation—I just can't tell you when things will revert back to the way they used to be."[213] Kenneth Palinkas, the president of the National Citizenship and Immigration Services Council (the USCIS union), and a decade-plus veteran at the agency, submitted a sworn declaration in Texas's lawsuit on behalf of twenty-six other states challenging the legality of DAPA.[214] Rather than allowing the officers to exercise independent judgment, Palinkas claimed that the Administration had "taken several steps to ensure that DACA applications receive *rubber-stamped approvals* rather than thorough investigations."[215] The system promulgated "is designed to automatically approve applications rather than adjudicate each application with all the tools necessary to reach a fair and equitable decision."[216]

Palinkas further observed that the Administration has taken away the key tools that officers have traditionally employed in enforcing the immigration laws through a case-by-case approach. For example, "USCIS management routes DACA applications to [national] service centers instead of field offices. But USCIS

209. *Id.* at Exh. 10.e, at app. 0370.

210. *Id.*

211. *Id.* at Exh. 10.m, at app. 0602.

212. *Id.* at Exh. 8, at app. 0129, *available at* http://bit.ly/1DfcPHZ [perma.cc/X8DE-DM8R].

213. *Id.*

214. *Id.* at Exh. 23, at app. 0853. As of the date of publication, the following states are parties to the case: State of Texas; State of Alabama; State of Georgia; State of Idaho; State of Indiana; State of Kansas; State of Louisiana; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Utah; State of West Virginia; State of Wisconsin; Paul R. LePage, Governor, State of Maine; Patrick L. McCrory, Governor, State of North Carolina; C.L. "Butch" Otter, Governor, State of Idaho; Phil Bryant, Governor, State of Mississippi; State of North Dakota; State of Ohio; State of Oklahoma; State of Florida; State of Arizona; State of Arkansas; Attorney General Bill Schuette [State of Michigan]; State of Nevada; and the State of Tennessee.

215. *Id.* at Exh. 23, at app. 0854 (emphasis added).

216. *Id.* at Exh. 23, at app. 0855.

officers in service centers (as opposed to those in field offices) do not interview applicants."[217] Palinkas stressed that "An interview is one of the most important tools in an officer's toolbox because it is one of the most effective ways to detect fraud and to identify national-security threats."[218] He adds that this process "further erodes and inhibits an officer's ability to root out fraud and screen out national security threats."[219] Logistically, it would have been impossible to interview one million people and grant them all benefits in a manner of months. The lean and lite process was necessary in order to push through as many grants as possible.

In addition, Palinkas stated that USCIS officials had discretion to waive the $465 application fee, which was required under DACA.[220] This was directly contrary to the public affairs guidance memo signed by Secretary Napolitano on July 25, 2012, which advised the media that fee waivers were not available.[221] This $465 barrier proved to be short-lived. The only exercise of "discretion" Palinkas identified was waiving the fees that DACA applicants were originally required to pay.[222] As a preview of things to come, Secretary Johnson's memo also claims that there "will be no fee waivers and, like DACA, very limited fee exemptions."[223] If the past is prologue, we should expect this barrier to also be significantly relaxed.

USCIS's external guidance reflects the nature of lean and lite review. On the USCIS's FAQ section explaining DACA, Question 21 asks: "Will USCIS verify documents or statements that I provide in support of a request for DACA?"[224] Rather than providing an unequivocal yes, the answer suggests that individual documents need not be verified to qualify for deferred action. "USCIS has the authority to verify documents, facts, and statements that are provided in support of requests for DACA. USCIS may contact education institutions, other government

217. *Id.*

218. *Id.* at Exh. 23, at app. 0854.

219. *Id.* at Exh. 23, at app. 0855.

220. *Id.*; *see also* Press Release, Am. Fed'n of Gov't Emps., USCIS Union President: Lawmakers Should Oppose Senate Immigration Bill, Support Immigration Service Officers (May 20, 2013), *available at* http://nyti.ms/1J8HDko [perma.cc/CT5V-XP2Z].

221. Plaintiffs' Reply, *supra* note 14, at Exh. 9.b, at app. 0222, *available at* http://bit.ly/1aQkDYL [perma.cc/69ZF-GS6H].

222. *Id.* at Exh. 23, at app. 0855.

223. JOHNSON, *supra* note 3, at 5.

224. *Frequently Asked Questions*, USCIS, http://1.usa.gov/1OczEGF [perma.cc/8AW6-PUQU] (last updated Oct. 23, 2014).

agencies, employers, or other entities in order to verify information."[225] The leading Republicans on the House and Senate Judiciary Committees, Senator Chuck Grassley and Representative Bob Goodlatte, were concerned about the message the government's answer to Question 21 sent to potential applicants. In a letter to DHS Secretary Jeh Johnson, they faulted the government for publicly "assuring potential DACA applicants that USCIS has no plans to actually verify the validity of any evidentiary documents submitted in support of an application."[226] In response, USCIS Director Leon Rodriguez replied, "USCIS immigration officers are trained to evaluate evidence submitted to satisfy the DACA guidelines on a case-by-case basis and to identify indicators of fraud."[227] This training did not matter, however, as the lean and lite approach cut out individual officers from the process of providing a comprehensive review and removed their tools to identify fraud.[228] Indeed, Congress's alarms were well-founded. Procedurally, officers were prohibited from conducting full investigations and exercising the type of discretion that would satisfy the concerns and laws of Congress.[229] These facts are sufficient to rebut the generally warranted presumption that "executive enforcement discretion extends only to case-specific considerations."[230]

2. Restricting Grounds for Denial Substantively Limits Discretion for DACA

In addition to procedurally preventing officers from conducting comprehensive reviews of applicants, the lean and lite policy also restricts their discretion substantively: the only grounds for denial are those selected by the Secretary. In the

225. *Id.*; *see also* Tex. Children's Hosp. v. Burwell, No. 14-2060 (EGS), 2014 WL 7373218, at *12 (D.D.C. Dec. 29, 2014) (holding that DHS had "likely" taken a final agency action through an FAQ without fulfilling the required notice-and-comment procedures). The court enjoined the agency from "enforcing, applying or implementing FAQ No. 33." *Id.* at *17.

226. Plaintiffs' Reply, *supra* note 14, at Exh. 17, at app. 0807, *available at* http://bit.ly/1PdQFNE [perma.cc/Z53E-XB6M].

227. *Id.* at Exh. 29, at app. 0985, *available at* http://bit.ly/1OczKhB [perma.cc/6GDM-3RBY].

228. *Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama's DACA*, JUD. WATCH, June 11, 2013, http://jwatch.us/5a [perma.cc/F4V9-VVCT].

229. *See* Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0189–91.

230. Price, *supra* note 20, at 705.

rare event that the "supervisor concurs with the issuance of a denial, the officer shall check the appropriate box on the denial template."[231] This "DACA denial template," as it is called, permits the agent to deny an application on eleven possible grounds, all of which repeat criteria established by the Secretary.[232]

Here, discretion would mean figuratively and literally thinking outside the [check]box. Under DACA, no such judgment is allowed. The only reason for denying an application is that an alien fails to meet the broad criteria selected by the Secretary. Any two agents would have to arrive at the exact same conclusion. Palinkas noted, "USCIS management, however, has undermined immigration officers' abilities to do their jobs."[233] The Secretary's policy was designed to exempt a very specific group of aliens—over one million Dreamers—from the scope of the immigration laws. Agents are only allowed to deny relief to those who fall outside that class. For everyone who fits the criteria, the officer must use a rubber stamp.

Director Rodriguez's letter to Congress reveals the grounds on which applications were "rejected" or "terminated," but unfortunately does not address the reasons why applications were "denied."[234] In explaining that 42,906 requests were rejected between August 15, 2012 and August 31, 2014, he cited

231. Plaintiffs' Reply, *supra* note 14, at Exh. 10.e, at app. 0370. Stephen H. Legomsky, Chief Counsel of USCIS from 2011–2013, testified before Congress in February 2015. He noted that the "DACA denial template has gone through several iterations," and "subsequent versions of the checkbox style template" have an "explicit inclusion of an option for discretionary denials." *Hearing Before the H. Comm. On the Judiciary*, 114th Cong. 13–14 (2015) (statement of Stephen H. Legomsky, The John S. Lehmann University Professor, Washington University School of Law), *available at* http://1.usa.gov/1E9boP9 [perma.cc/AZP7-ZDCZ]. In one example Legomsky located—after DHS released Exhibit 10.e through FOIA—a new checkbox read, "You have not established that you warrant a favorable exercise of prosecutorial discretion." DEP'T OF HOMELAND SEC., NATIONAL STANDARD OPERATING PROCEDURES: VERSION 2.0 (Apr. 4, 2013), *available at* http://bit.ly/1yNrAVB [perma.cc/BT8M-8UHV]. Legomsky added that at some point, USCIS had "switched from a checkbox format to a narrative format." Legomsky, *supra*, at 14. Notwithstanding the nature of the checkboxes or the narratives, there are no grounds for a "favorable exercise of prosecutorial discretion" beyond the Secretary's criteria.

232. Plaintiffs' Reply, *supra* note 14, at Exh. 10.m, at app. 0594–95. The grounds are that the applicant (1) is "under age 15," (2) "failed to establish [arrival before] the age of sixteen," (3) "failed to establish [being] under age [thirty-one] on June 15, 2012," (4) "failed to establish [continuous residence] since June 15, 2007," (5) had "one or more absences" during the "period of residence," (6) "failed to establish [unlawful presence] in the United States on June 15, 2012," (7) "failed to establish" educational criteria, (8) was "convicted of a felony or a significant misdemeanor," (9) "failed to pay the fee," (10) "failed to appear for the collection of biometrics," or (11) "failed to respond to a Request for Evidence."

233. *Id.* at Exh. 23, at app. 0854.

234. *Id.* at Exh. 29, at app. 0978–79.

the top four rejection reasons: (1) "Using an expired version of the Form I-821D," (2) "Failure to provide a valid signature," (3) "Failure to file the Form I-765," and (4) "Filing while under the age of 15."[235] None of these grounds for rejection would exhibit any actual discretion on the part of the agent. These are ministerial facts that can be checked fairly easily. Similarly, 113 cases were terminated based on purportedly non-exclusive factors—consistent with the Secretary's guidance.[236] It is difficult to determine that discretion was present in any of these decisions.

A training presentation given to officers explains that using "this denial template is *mandatory*. *Individualized*, locally created denials shall not be used."[237] This training should make abundantly clear to individual officers that they are not to deviate from the template. The guidance stresses: "When an officer encounters an issue for which there is no [checkbox] on the denial template, the officer must work through his/her supervisor to identify the issue for SCOPS [Service Center Operations] so that the template can be amended."[238] Palinkas speaks to this change: "Leadership has intentionally stopped proper screening and enforcement, and in so doing, it has guaranteed that applications will be *rubber-stamped* for approval, a practice that virtually guarantees widespread fraud and places public safety at risk."[239]

That these checkboxes mirror the Secretary's DACA memo is no accident. The Agency's guidance makes clear that it is the Secretary's discretion to set the policy, and not the officer's judgment, that drives the granting of DACA applications. The "Objectives and Key Elements" PowerPoint slide wants officers to understand "the Secretary's specific guidelines for DACA."[240] Additionally, while Agency guidance includes a reference to the

235. *Id.* at Exh. 29, at app. 0978.

236. *See id.* at Exh. 29, at app. 0979. Among the reasons listed are DUI convictions (eleven cases), felony convictions (five cases), drug-related convictions (three cases), aggravated assault conviction (one case), and gang membership (one case).

237. *Id.* at Exh. 10.m, at app. 0594 (emphasis added).

238. *Id.* To the extent that subsequent checklists had an "other" box, Legomsky cited this as evidence that officers were given discretion concerning the grounds to deny DACA benefits. But the only grounds for permissible discretion still existed within the Secretary's criteria.

239. *Id.* at Exh. 23, at app. 0855 (emphasis added).

240. *Id.* at Exh. 10.g, at app. 0415, *available at* http://bit.ly/1brQjow [perma.cc/DJ2X-QNEE].

authority for exercising discretion,[241] and cites the "discretionary nature of deferred action,"[242] every step of the tutorial is aimed at eliminating any deviation from the Secretary's specific guidelines.[243]

Secretary Napolitano's memo lists the five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion."[244] This isn't exactly right. First, they aren't just eligible—they will receive deferred action automatically. Second, if they receive deferred action automatically, the appearance of a case-by-case analysis is mere window dressing. There is no discretion of any sort. If the five criteria—selected solely by the Secretary without any reference to Congress's statutes—are present, then the officer cannot deny deferred action.

There is no evidence that *anyone* who met these criteria was denied deferred action. In a declaration, Donald Neufeld, the Associate Director for SCOPS for USCIS offered insights into the low denial rate for DACA. He explained that although determining "whether a requestor has been convicted of a felony is straightforward, determining whether a requestor 'poses a threat to national security or public safety' necessarily involves the exercise of the agency's discretion."[245] However, during the litigation in *Texas v. United States*, the government was unable to offer any evidence during the case that such discretion was employed. To demonstrate this discretion, the government introduced two Notices of Intent to Deny (NOIDs): In the first case, the applicant at age sixteen "committed Robbery and Grand Theft." In the second case, the applicant "committed multiple felonies as a juvenile and ha[s] been involved in the sale of illegal drugs."[246] Both instances involved felonies, were categorical violations of DACA, and would also violate DAPA.[247]

241. *See id.*

242. *Id.* at Exh. 10.h, at app. 0441.

243. *See id.* at Exh. 10.g, at app. 0415.

244. NAPOLITANO, *supra* note 2, at 1.

245. Defendants' Sur-Reply in Opposition to Plaintiffs' Motion for Preliminary Injunction, at Exh. 44, at 7, Texas v. United States, No. 1:14-CV-254, 2015 WL 648579 (S.D. Tex. Feb. 16, 2015) [hereinafter Neufeld Declaration], *available at* http://bit.ly/1aQl84P [perma.cc/VH48-Q7R6].

246. Josh Blackman, *Government Sur-Reply Part 9: The Case-By-Case Inquiry is a Façade*, JOSH BLACKMAN'S BLOG (Feb. 7, 2015), http://bit.ly/1HhVynQ [perma.cc/7G38-EBUJ].

247. JEH CHARLES JOHNSON, U.S. DEP'T OF HOMELAND SEC., POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS 3 (2014) [hereinafter JOHNSON-WINKOWSKI MEMO], *available at* http://1.usa.gov/1HskCXz

If this was the best the government could muster to show that agents exercised discretion beyond enforcing the categories, it failed to meet its burden.

Further, Neufeld also asserts that "USCIS has denied DACA even when all the DACA guidelines, including public safety considerations have been met," where the "DACA requestor is believed to have submitted false statements or attempted to commit fraud in a prior application or petition," and the "DACA requestor falsely claimed to be a U.S. citizen and had prior removals."[248] Submitting false statements on a federal application is a felony, rendering the applicant categorically ineligible.[249] The most charitable reading of the Neufeld Declaration is that the applicant was only "*believed* to have submitted false statements," and that the person was not convicted of this offense. If this and the juvenile offenses discussed earlier are the strongest instances of prosecutorial discretion the government can identify, then there isn't much discretion here. Agents are limited to denying DACA where the person engaged in felonies, or very likely committed fraud against the United States. In response to my testimony before the House Judiciary Committee,[250] Stephen Legomsky conceded that beyond discretion concerning "public safety and national security determinations," the DHS process "admittedly . . . didn't confirm that discretionary denials could also be based on other grounds."[251]

In a stunning declaration, Neufeld explained that "[u]ntil very recently, USCIS lacked any ability to automatically track and sort the reasons for DACA denials, and it still lacks the ability to do so for all DACA denials except for very recent ones."[252] (The two Notices of Intent to Deny were from June and September of

[perma.cc/5WMU-79Q5] (prioritizing prosecution against "aliens convicted of an offense classified as a felony in the convicting jurisdiction," that does not include immigration status as an essential element).

248. Neufeld Declaration, *supra* note 245, at 8.

249. 18 U.S.C. § 1001 (2013) (creating an offense when anyone, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," punishable by fine and up to five years imprisonment).

250. *Hearing Before the H. Comm. On the Judiciary*, 114th Cong. (2015) (statement of Josh Blackman, Assistant Professor of Law, South Texas College of Law), *available at* http://1.usa.gov/1brRofX [perma.cc/ZUJ5-4BCP].

251. Legomsky, *supra* note 231, at 13 n.11.

252. Neufeld Declaration, *supra* note 245, at 10–11.

2014, two years after DACA began). That USCIS didn't even bother to develop such a tracking feature offers further proof that they weren't particularly concerned with denials.

3. Restricting Grounds for Denial Substantively Limits Discretion for DAPA

With respect to DAPA, Secretary Johnson's memo says that applicants who meet the requirements are eligible for "deferred action, on a case-by-case basis," so long as the applicant "present[s] *no other factors* that, in the exercise of discretion, make[] the grant of deferred action inappropriate."[253] But if DAPA employs a similar denial template, there is no option for discretion. The template for denial makes clear that the only grounds for denial are those identified by the Secretary's policy—there are *no other factors* that an agent could rely on to exercise discretion.

The OLC opinion begrudgingly countenances this omission of individualized discretion, explaining that the "proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with *substantial discretion* to determine whether a grant of deferred action is warranted."[254] But, as DACA has demonstrated, individual USCIS officials have *virtually no* discretion to determine if deferred action is warranted. All of the heavy lifting is done by the Secretary with the policy memo, and everyone down the line merely picks up the rubber stamp and slams it down on the application.

In *Arpaio v. Obama*, a constitutional challenge to DACA, the district court explained that even though "the challenged deferred action programs represent a large class-based program, such breadth does not push the programs over the line from the faithful execution of the law to the unconstitutional rewriting of the law" because they "still retain provisions for meaningful case-by-case review."[255] This echoes Secretary Johnson's memo, which stated that as "an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis."[256] The memo reiterates that "the ultimate judgment as to

253. JOHNSON, *supra* note 3, at 4 (emphasis added).
254. THOMPSON, *supra* note 5, at 29 (emphasis added).
255. Arpaio v. Obama, 27 F. Supp. 3d 185, 209 (D.D.C. 2014).
256. JOHNSON, *supra* note 3, at 2.

whether an immigrant is granted deferred action will be determined on a case-by-case basis."[257] But this simply *isn't true* of DACA or DAPA. The entire scope of the case-by-case review *is* the criteria of the large class-based program.

Compare DACA with an earlier memorandum from ICE Director John Morton, explaining the exercise of "prosecutorial discretion" for officers.[258] Morton explains that when "weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to" nineteen different factors.[259] They range from "the agency's civil immigration enforcement priorities" to "the person's ties and contributions to the community" to "whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, [or] human trafficking."[260]

The memo further lists both "positive factors" and "negative factors" that "prompt particular care and consideration."[261] While the agency's priorities and policies are stated, ultimately the discretion inheres in the officer. Unlike the DACA memo, the factors in Morton's earlier memo are not "exhaustive," and they allow officers to "consider prosecutorial discretion on a case-by-case basis . . . based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities."[262] No two officers are likely to come to the same conclusion in considering these nineteen factors. The same cannot be said for DACA's formulaic approach. With DACA, the agency's priorities *are* the totality of the circumstances.

While the "categorical" enforcement of policies may indeed be salutary,[263] and "reasonable presumptions and generic rules" are generally considered valid, DACA fails to accord *any* "level of

257. *Id.* at 5.

258. JOHN MORTON, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), *available at* http://bit.ly/1J8Kn1g [perma.cc/9BB8-TFXU].

259. *Id.* at 4.

260. *Id.*

261. *Id.* at 5.

262. *Id.* at 4.

263. Gillian Metzger, *Must Enforcement Discretion be Exercised Case-by-Case?*, BALKINIZATION (Nov. 24, 2014, 1:30 PM), http://bit.ly/1Qh93qw [perma.cc/S9EA-78GH].

individualized determination" to officers.[264] Even the questions identified in *Reno v. Flores*, that the Supreme Court recognized as exhibiting sufficient "particularization and individuation"—such as whether there is "reason to believe the alien deportable" or if "the alien's case [is] exceptional"—entail judgment calls that could reasonably go either way.[265] Two officers may differ about what amounts to an "exceptional" case. But there can be no grounds for disagreement among officers implementing DACA: either the alien meets the criteria, or he does not. Even the examples identified by the government—juvenile felons and making false statements on government documents—seem pretty clear-cut. It is a binary choice between yes and no, and the answer is seldom the latter.

The policy seeks to impose the oxymoronic standard of consistent discretion.[266] With DACA, there is no "particularization and individuation" beyond checking the right boxes. The Court's decision in *Arizona v. United States* acknowledged that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns," but it stressed that the "equities of an *individual case* may turn on many factors."[267] Here, there is no analysis of the equities of an *individual case*. A clerk, with no discretionary duties, could make the same judgment calls as a trained immigration officer. Such a "categorical and prospective nonenforcement of statutes is impermissible without statutory authorization."[268] This blanket policy amounts to lawmaking in and of itself.

C. The Denial Rate Is Not an Accurate Measure of Prosecutorial Discretion

In a decision rejecting a constitutional challenge to DACA, the District Court for the District of Columbia praised the initiative because "[s]tatistics provided by the defendants reflect that such case-by-case review is in operation."[269] Specifically, as of "December 5, 2014, 36,860 requests for deferred action under DACA were denied and another 42,632 applicants were rejected

264. *See* Reno v. Flores, 507 U.S. 292, 313 (1993).
265. *Id.* at 313–14.
266. *See* Plaintiffs' Reply, *supra* note 14, at Exh. 10.h, at app. 0444.
267. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (emphasis added).
268. Price, *supra* note 20, at 746.
269. Arpaio v. Obama, 27 F. Supp. 3d 185, 209 n.13 (D.D.C. 2014).

as not eligible."[270] Out of the total 719,746 individuals who made initial requests for deferred action, this amounts to roughly a five percent denial rate.[271]

As far as exercises of discretion go, five percent is a fairly low denial rate for such a significant benefit. But this bottom line hardly tells the whole story. Focusing on a five percent denial rate as a measure of whether DACA amounts to a case-by-case review is the wrong inquiry. The staggeringly low denial rate is a function of the Secretary's blanket policy and the stripping of any discretion from individual agents to actually assess aliens on a case-by-case basis. Indeed, the OLC opinion acknowledged that DAPA offers absolutely no guidance about what the exercise of discretion should consist of, or what the grounds are for rejecting an application.[272]

Further, the applicant pool for DACA was self-selecting. Aliens who knew they would not qualify—either because they were felons, or were not present long enough—would not apply and pay the application fee. In this sense, the five percent denial rate is subject to a selection bias. However, that only tells half the story. The categories were set by the administration knowing that only those who would qualify would apply. In other words, DACA and now DAPA were structured to entice the very people who would otherwise meet the eligibility criteria, which are clearly publicized in advance. At the margins, there will be some aliens who may think they will be eligible, but do not meet the criteria. But these are the outliers. The five percent denial rate attests to this fact. In contrast, dangerous felons will be the *last* aliens to apply for DACA, because they know they will be identified and prioritized for removal. DACA and DAPA will do little to identify the most dangerous aliens, and will only make it easier to identify those who are on the lowest priority for removal.

Perversely, the Obama Administration has asserted that DAPA actually operates the other way around. The government argued that offering work authorization is a necessary "incentive" to

270. *Id.*

271. Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction at 29 n.23, *Arpaio*, 27 F. Supp. 3d 185 (No. 14–01966 (BAH)), *available at* http://bit.ly/1brSicp [perma.cc/ZHF5-8MX7].

272. THOMPSON, *supra* note 5, at 29 (The "proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted.").

encourage aliens to register for DAPA.[273] But this "incentive" makes little sense, because only those who are likely to qualify will apply. A convicted felon who comes "out of the shadows" and signs up will be added to the top deportation category. In reality, DACA and DAPA were created to identify those who were already the lowest priorities—and least likely to be removed—and grant them work authorization and other benefits.

Finally, it is not a reply to the "abdication" claim to assert that the President is still deporting roughly 400,000 aliens each year.[274] The policy being challenged is not the removal of 400,000, but the decision to prospectively license up to five million from that removal. To take this argument seriously, there would not be a complete abdication so long as the President deports one person, or so long as the President spends whatever money is appropriated for deportations—whether or not any aliens are actually deported. The abdication arises from the specific memorandum that grants deferred action to DAPA beneficiaries.

DAPA is a "general enforcement policy," with a very modest consideration of case-by-case factors. The eligibility criteria are extremely broad: entry into the U.S. by a certain date and children who are U.S. citizens.[275] Applicants are neither required to show an extreme hardship to become U.S. citizens, nor to show one of the other compelling circumstances that Congress has required to limit the availability of statutory relief, such as cancellation of removal or waivers of certain exclusion grounds.[276] The disqualifying criterion—criminal record—is narrow. While the OLC opinion casts DAPA as case-by-case decision-making, DAPA will operate as a general grant of immigration benefits.

273. Josh Blackman, *Obama: Giving Immigrants Work Permits is Vital for National Security*, NAT'L REV. ONLINE, Mar. 24, 2015, [hereinafter *Giving Work Permits*] http://bit.ly/1brSokb [perma.cc/S244-WL3Z] (quoting Obama Administration attorney Kathleen Hartnett) ("The president chose to offer work authorization to millions to 'provide an *incentive* for people to come out and identify themselves.' The lawyer repeated that 'work authorization is a large *incentive* for getting people to be able to come out of the shadows, as it said, and to identify themselves.' In other words, an assurance to not deport an immigrant who is here unlawfully was not a sufficient justification—it was necessary for the president to hand out 5 million new work authorizations.").

274. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CENTER FACT TANK, Oct. 2, 2014, http://pewrsr.ch/1yQ78ni [perma.cc/J8NE-YJAY].

275. *See* JOHNSON, *supra* note 3, at 4.

276. *See id.* at 2; *Constitutionality of DAPA Part I*, *supra* note 16, at 102–06.

D. DAPA Redirects Resources Away from Congress's Mandates and Toward the President's Policies

An oft-cited rationale for DACA, as well as DAPA, is that it amounts to a re-allocation of resources from low-priority to high-priority cases.[277] But this assertion is not supported by the impact of the policy.[278] Secretary Napolitano wrote in her memorandum that DACA was "necessary to ensure that our enforcement resources are not expended on these low priority cases[,] but are instead appropriately focused on people who meet our enforcement priorities."[279] DACA was not limited to conserving resources for already-existing cases. Rather, it required the government to expend new resources to provide benefits for its "customers."[280]

Secretary Napolitano's memorandum allows for three situations where the Dreamers will receive deferred action: (1) "individuals who are encountered by" immigration officials, (2) "individuals who are **in** removal proceedings but not yet subject to a final order of removal," and (3) "individuals who are **not** currently in removal proceedings."[281] Deferring the deportations of aliens in the first two categories would conserve resources, as these are people already in the removal pipeline. Failing to remove them could be conceived as mere prosecutorial discretion.

But the third category consists of aliens who remain in the proverbial "shadows," and are effectively unknown to the government. These are people who otherwise *would not and could not* be removed, because the government has not yet even "encountered" them. If this is not the case, they would be in either of the first two categories. By allowing those "customers" in the third category to register for DACA, the Administration is intentionally attempting to defer removal for over one million aliens.[282] Further, the act of registration, and its corresponding

277. Miriam Jordan, *Immigration-Policy Details Emerge*, WALL ST. J., Aug. 3, 2012, http://on.wsj.com/1DfeYDr [perma.cc/3ZM3-598N].

278. Delahunty & Yoo, *supra* note 20, at 848–49.

279. NAPOLITANO, *supra* note 2, at 1.

280. Plaintiffs' Reply, *supra* note 14, at Exh. 23, at app. 0854 ("Aliens seeking benefits are now referred to as 'customers.'").

281. NAPOLITANO, *supra* note 2, at 2.

282. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 520 (2009) ("For many years, for example, the INS and ICE initiated proceedings mostly against immigrants who had had a run-in with the criminal justice system. Unlawful entrants who managed to avoid criminal arrest or conviction were

receipt of benefits, results in immediate work authorization.[283] The size of the class of aliens in the first two categories, where there could be a plausible case made for prosecutorial discretion and conservation of resources, is dwarfed by the gigantic third class.[284] DACA brings aliens into the immigration system for the purpose of deferring nonexistent deportations and conferring the benefit of work authorization. A program limited to the first and second categories could stake a more plausible claim to conserving resources, because those aliens are already in the pipeline.[285] But the third category gives the game away.

Further, DACA's grant of benefits to the third category of aliens will require expending additional resources to process the two-year deferrals, which will soon have to be renewed. USCIS had to rearrange staffing to accommodate the influx of new applicants under DACA.[286] Gary Garman, the associate regional director of operations, observed that resources needed to shift because of DACA: "As you may recall, this work is transitioning from the Service Centers to the field as a result of the [D]eferred [A]ction for [C]hildhood [A]rrivals process."[287] Another officer stressed that the "process has changed recently to accom[m]odate the additional work coming in from DACA-related shifts of resources."[288] An assistant regional director for adjudications confirmed that the lean and lite NBC process was "due to the workload shift" concerning DACA.[289] The field office director for USCIS in St. Paul wrote that because of "the volume of DACA work at the Service Center, it has been determined that the field will be sent I-130 [forms] to adjudicate."[290] She added that there had been a "workload shift from the NBC to the field. NBC is seeking to bring on additional staff to assist with their

extremely unlikely to be deported.").

283. JOHNSON, *supra* note 3, at 4.

284. Cox & Rodriguez, *supra* note 282, at 520 (discussing pre-DACA rareness of deportation for individuals who had not encountered immigration officers).

285. *See* Delahunty & Yoo, *supra* note 20, at 848.

286. *See Executive Actions on Immigration*, *supra* note 3 ("USCIS will need to adjust its staffing to sufficiently address this new workload. Any hiring will be funded through application fees rather than appropriated funds.").

287. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0181–82.

288. *Id.* at Exh. 8, at app. 0129.

289. *Id.* at Exh. 9.a, at app. 0188.

290. *Id.* at Exh. 9.a, at app. 0180. Form I-130 is a form for a "citizen or lawful permanent resident of the United States to establish the relationship to certain alien relatives who wish to immigrate to the United States." *I-130, Petition for Alien Relative*, USCIS, www.uscis.gov/i-130 [perma.cc/W9J2-7F6K] (last updated July 5, 2013).

increased workload due to DACA."[291] A USCIS district director wrote that in order to prepare for DACA, "We have been challenged with doing everything we can to eliminate older cases and continued pending cases so that more time can be devoted to these petitions."[292] He explained that "additional overtime funds have been made available to USCIS staff, and there is a likelihood that more may be available" for DACA processing.[293] Specifically, Palinkas asserted that the "agency has been buried in hundreds of thousands of DACA applications since 2012."[294] DACA was not about re-organizing priorities to conserve resources. Additional resources were focused on processing the DACA applicants.

Secretary Johnson's DAPA memo makes a similar point: "in the exercise of that *discretion*,[]DHS can and should develop smart enforcement priorities, and ensure that use of its *limited resources* is devoted to the pursuit of those priorities."[295] But DAPA does no such thing. It requires DHS to use more resources. Nearly 1,000 new employees were hired in Crystal City, Virginia, to deal with the influx of four million new cases resulting from DAPA.[296] The policy states its ultimate goal directly: DAPA "encourage[s] these people to come out of the shadows."[297] While this is a laudable humanitarian goal, which I agree with as a matter of policy, the act of bringing them "out of the shadows" through deferring deportations and granting work authorizations is no longer an exercise of prosecutorial discretion and conserving resources. Rather, it requires expending new resources.

Finally, DAPA represents only a temporary reprieve from deportation, which can be renewed.[298] Of course, the unstated hope is that by deferring the deportations for two years, Congress will pass some sort of comprehensive legislative reform,

291. Plaintiffs' Reply, *supra* note 14, at Exh. 9.a, at app. 0188.
292. *Id.* at Exh. 9.a, at app. 0192.
293. *Id.* at Exh. 9.a, at app. 0193.
294. *Id.* at Exh. 23, at app. 0854.
295. JOHNSON-WINKOWSKI MEMO, *supra* note 247, at 2 (emphasis added).
296. Michael D. Shear, *U.S. Agency Hiring 1,000 After Obama's Immigration Order*, N.Y. TIMES, Dec. 25, 2014, http://nyti.ms/1Js4AvE [perma.cc/TRJ2-7SRT] ("In a crucial detail that Mr. Obama left out, the Citizenship and Immigration Services agency said it was immediately seeking 1,000 new employees to work in an office building to process 'cases filed as a result of the executive actions on immigration.' The likely cost: nearly $8 million a year in lease payments and more than $40 million for annual salaries.").
297. JOHNSON, *supra* note 3, at 3.
298. *Id.* at 3–4.

providing DAPA beneficiaries a permanent reprieve from removal. In the absence of legislation, deferred action merely kicks the can of removal costs down the road. It may be true that the aliens will pay a fine, work, pay taxes, and get right with the law. But in the interim two-year period, these four million people—who were previously not within the government's sights—represent an increased cost and drain on DHS's resources.

The aliens who would have most likely been deported before DACA, such as felons, will still be the bulk of aliens deported after DACA. And because felons will not come "out of the shadows" to register—knowing they will be denied and lumped into the top prioritization category—DACA does little to identify those who should be deported. In response to this argument, the government asserts that by applying, DACA and DAPA beneficiaries will receive a biometric identification card that will make it easier for immigration officials to identify them during an encounter. But providing these biometric identification cards can be done without granting work authorization to millions.[299] Whatever marginal benefit this expedited identification offers, this goal could be accomplished without such questionable means. As the tail wags the dog, this policy borders on pretext.

Justice Marshall explained in his concurring opinion in *Heckler* that when "an agency asserts that a refusal to enforce is based on enforcement priorities, it may be that, to survive summary judgment, a plaintiff must be able to offer some basis for calling this assertion into question or for justifying his inability to do so."[300] Six decades earlier, Justice Brandeis made a similar point about the interaction between inadequate funding and faithful execution: "The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his *best endeavors to secure the faithful execution* of the laws enacted."[301] Marshall and

299. *Giving Work Permits*, *supra* note 273 ("[Judge] Hanen parried with a devastatingly simple question: 'Why aren't you doing that now? I didn't enjoin you from doing that.' He noted that the government could offer some other form of identification that would allow aliens to prove they are not dangerous, but *without* granting them work authorization and myriad other benefits. 'There's nothing that's stopping the Department of Homeland Security from saying: All right . . . We're going to do a background check on you, and we'll give this card that says for three years we're not prosecuting you.'").

300. Heckler v. Chaney, 470 U.S. 821, 853 n.12 (1985) (Marshall, J., concurring).

301. Myers v. United States, 272 U.S. 52, 292 (1926), *overruled by* Free Enter. Fund v.

Brandeis agree that a president's failure to enforce the law is permitted only when there is a genuine lack of resources, he uses his "best endeavors to secure the faithful execution of the laws," and does not attempt to bypass Congress.[302] DHS's claim about conserving resources through rearranging priorities does not stand up to scrutiny: many more additional resources have to be added to provide deferred action for DACA and DAPA. As Professors Delahunty and Yoo observe, the "contours of [DACA] dovetailed so neatly with those of the DREAM Act . . . [t]hat [it] could hardly have been a pure coincidence; rather, it was proof by a kind of *res ipsa loquitur* that the Administration's true purpose was not that of economizing or prioritizing."[303]

The limitations on the individual officer's discretion show that behind the pretense of conserving resources, DAPA was not designed with "care" for the laws, but as a deliberate means to bypass them.

VI. PRESIDENTIAL POWER AT "LOWEST EBB" WHEN ACTING CONTRARY TO CONGRESS'S "LAWS"

DAPA conflicts with the express and implied will of Congress, placing the policy in Justice Jackson's bottom tier, and presidential power at its "lowest ebb." The axiomatic holding of *Youngstown* is that the Legislature writes the laws and the President must comply with them—not rewrite them to fit his policy preferences. Like President Truman before him, President Obama must comply with the laws of Congress, not create new fonts of his own authority.

A. Congressional Acquiescence and the Zone of Twilight

To assess the conjunction or disjunction between the Congress and the President, we turn to the cornerstone of the Court's separation-of-powers jurisprudence—*Youngstown Sheet & Tube Co. v. Sawyer*—and in particular, the tripartite framework advanced by Justice Robert H. Jackson.[304]

In a fractured opinion, a majority of the Court found that

Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2012) (Brandeis, J., dissenting) (emphasis added).

302. *Id.*

303. Delahunty & Yoo, *supra* note 20, at 848.

304. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

President Truman could not rely on his inherent powers to seize steel mills in the face of imminent labor strikes.[305] Justice Jackson concurred, finding the executive power is at its "lowest ebb" when the actions the President takes are "measures incompatible with the expressed or implied will of Congress."[306] In such cases, Jackson explained, the President "can rely *only* upon his own constitutional powers minus any constitutional powers of Congress over the matter."[307] With this limited Article II arsenal, the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[308] In this lowest zone, presidential power is "most vulnerable to attack and [is] in the least favorable of possible constitutional postures."[309] Jackson's framework has become the canonical holding of the case, and of separation-of-powers jurisprudence as a whole.

Justice Rehnquist—who clerked for Jackson the year *Youngstown* was decided[310]—applied this framework in *Dames & Moore v. Regan* to find that Congress had effectively authorized the President to nullify Iranian assets under the International Emergency Economic Powers Act (IEEPA).[311] In recent years, Chief Justice Roberts,[312] Justice Alito,[313] Justice Sotomayor,[314] and Justice Kagan[315] all reaffirmed the vitality of *Youngstown*, and in particular, Justice Jackson's concurring opinion.

305. *Id.* at 582–83, 588–89 (majority opinion).

306. *Id.* at 637 (Jackson, J., concurring).

307. *Id.* (emphasis added).

308. *Id.* at 638.

309. *Id.* at 640.

310. Josh Blackman, *From Jackson to Rehnquist to Roberts on* Youngstown Sheet & Tube *and* Dames & Moore v. Regan, JOSH BLACKMAN'S BLOG (Feb. 14, 2014), http://bit.ly/1IF2tEP [perma.cc/7BCQ-UDZU].

311. Dames & Moore v. Regan, 453 U.S. 654, 668–690 (1981).

312. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 152 (2005) (statement of John G. Roberts, Jr., Nominee), *available at* http://1.usa.gov/1J8LwpL.

313. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 323 (2006) (statement of Samuel A. Alito, Jr., Nominee), *available at* http://1.usa.gov/1HhXQDu.

314. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 353 (2009) (statement of Sonia Sotomayor, Nominee), *available at* http://1.usa.gov/1Hslsnj.

315. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 99 (2010) (statement of Elena Kagan, Nominee), *available at* http://1.usa.gov/1E9dBtI.

The OLC opinion justifying the legality of DAPA sounds in Justice Jackson's *Youngstown* decision, and roughly sketches the three zones of his opinion. First, deferred action programs cannot be deemed per se impermissible, because congressional authorization and recognition of such programs indicate *some* level of consistency with congressional immigration policy.[316] This is the first tier. If Congress has supported the President's actions, then the President is presumptively acting lawfully.

The OLC opinion explains that the Executive does not possess a blank check to promulgate deferred action initiatives, despite the permissibility of such programs at a certain level of generality.[317] This is the third tier. If Congress has not authorized the President to grant deferred action, then the President acts unlawfully because these actions amount to lawmaking. There is not an unconstitutional *delegation*, but an unconstitutional *usurpation* of power.

The OLC takes a very nuanced approach to the middle tier—the so-called "zone of twilight."[318] The opinion explains that a "particularly careful examination is needed to ensure that any proposed expansion of deferred action," beyond that which was done by previous executive actions, "complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it."[319] These "general principles" are not only congressional statutes, but include congressional acquiescence to or rejections of past actions. This inquiry is not as simple as parsing the plain text of the statute and determining whether the President has complied with the law. It is this sense of "the Laws" (which I will refer to as congressional policy) with which the President must comply.

B. Congress Has Not Acquiesced to DAPA

How does DAPA fare under this framework? The OLC opinion acknowledged that DAPA "depart[s] in certain respects from more familiar and widespread exercises of enforcement

316. THOMPSON, *supra* note 5, at 23.

317. *Id.* at 24 ("Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented.").

318. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

319. THOMPSON, *supra* note 5, at 24.

discretion."[320] But the opinion looked to consistency with congressional policy as a significant touchstone of the program's legality:

> [T]he proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.[321]

This admission, based on implicit rather than express approval, would seem to put the policy slightly below the first tier, rendering the policy presumptively lawful.

Based on these considerations, the OLC concluded that DAPA "is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process."[322] This conclusion, coupled with DHS's expertise in resource allocation, leads the OLC to opine that DAPA is "a permissible exercise of DHS's discretion to enforce the immigration laws."[323]

But the factual predicates of this "particularly careful examination" yield a very different result, dropping DAPA to the third tier. Determining "the degree of Congress's acquiescence in policy-based nonenforcement requires a sensitive examination of the particular statutory context."[324] The four programs the OLC opinion identifies as precedents for DAPA fail to justify this unprecedented expansion of executive power.[325]

First, DAPA does not "resemble" previous deferred actions "in material respects."[326] These previous programs acted as a *temporary bridge* from one status to another, where benefits were construed as arising immediately after deferred action. Second, Congress has not "implicitly approved" such deferred action in

320. *Id.*
321. *Id.* at 29.
322. *Id.* at 31.
323. *Id.* at 1.
324. Price, *supra* note 20, at 747.
325. Part I of this series explored these precedents at length. I have only included a summary here. See *Constitutionality of DAPA Part I*, *supra* note 16, for a full discussion.
326. *See* THOMPSON, *supra* note 5, at 29; *see also Constitutionality of DAPA Part I*, *supra* note 16, at 119–21.

the past.[327] This claim is demonstrably false because the programs cited all countenanced some form of immediate relief, with the deferred action serving as a temporary bridge to permanent residence or lawful presence.

Third, DAPA is not "consonant" with "interests reflected in immigration law as a general matter."[328] OLC's review of existing statutory law regarding the relief available to the parents of U.S. citizens and lawful permanent residents is superficial and ignores the very limited nature of any "family unity" policy present in the INA. Fourth and finally, DAPA is not consistent with "congressional understandings about the permissible uses of deferred action."[329] The scope of Congress's acquiescence in the Executive's use of deferred action is far more constrained than the OLC opinion suggests. Specifically, when not approved by Congress, the Executive Branch's discretion to cancel removals is capped at 4,000 annually.[330] This is several orders of magnitude smaller than the more than four million covered by DAPA. The closing argument for this case is that Congress took affirmative steps to defund DAPA because of the constitutional violations.[331] By every measure, DAPA flunks the very test the OLC offered.

Without Congressional acquiescence—by OLC's own standard—DAPA falls into Jackson's third tier, where the executive's power is at its "lowest ebb." First, the President is not acting in concert with Congress; Congress rejected or failed to pass immigration reform bills reflecting this policy numerous times.[332] Second, there is no murky "twilight" about congressional intent; the House of Representatives recently passed a resolution opposing the policy.[333] Third, Congress has not acquiesced in a pattern of analogous executive actions. Previous uses of deferred action were typically ancillary to statutory grants of lawful status or responsive to extraordinary

327. *See id.* at 111–19.

328. *See id.* at 102–10.

329. *See id.*

330. 8 U.S.C. § 1229b(e)(1) (2013) ("[T]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status . . . of a total of more than 4,000 aliens in any fiscal year.").

331. *See* Jennifer Rubin, *What Will be Plan B for Immigration?*, WASH. POST, Jan. 14, 2015, http://wapo.st/1ODPXXZ [perma.cc/VMX7-JKS3].

332. *See* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 631–38 (2011) (describing failed attempts to enact various versions of the DREAM Act between 2001 and 2010).

333. Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO, Dec. 4, 2014, http://bit.ly/1J8LUoc [perma.cc/LXX3-6U2W].

equities based on the extreme youth, age, or infirmity of the recipient.

Additionally, DAPA is even less related to foreign affairs than the actions at issue in *Youngstown*. Justice Black's majority opinion recognized that the domestic matter at the steel mills was outside the "theater of war," and was a "job for the Nation's lawmakers, not for its military authorities."[334] Justice Jackson observed that it was "sinister and alarming" to think "that a President whose conduct of foreign affairs is so largely uncontrolled . . . can vastly enlarge his mastery over the *internal affairs* of the country by his own commitment of the Nation's armed forces to some foreign venture."[335] In domestic matters, he cannot rely on his commander-in-chief powers.[336]

That DAPA applies equally to all nations makes it more difficult to square with the President's broad powers over foreign affairs.[337] Previous presidents have used deferred action for humanitarian purposes, targeting aliens from specific countries for specific foreign policy goals. For example, in 1990, following the Tiananmen Square massacre, President George H. W. Bush deferred the prosecution of Chinese nationals who were in the United States at the time of the massacre in Beijing.[338] Two years later, Congress ratified that order with the Chinese Student Protection Act of 1992.[339] These and other similar exercises of executive action are bolstered by the President's foreign affairs powers. In contrast, DAPA, which treats unlawful aliens from Mexico and Canada alike, makes no pretense of relying on the President's constitutional authority over foreign affairs. The entirety of the OLC memo is based on domestic authority.

These efforts to enact substantive policies in the face of congressional intransigence must be viewed skeptically. The President is sidestepping Congress because the Legislative

334. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587 (1952).

335. *Id.* at 642 (Jackson, J., concurring) (emphasis added).

336. *See* Delahunty & Yoo, *supra* note 20, at 826.

337. *See, e.g.*, U.S. Const. Art. II, § 2; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320–21 (1936) ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the *sole organ* of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

338. Exec. Order No. 12,711, 3 C.F.R. 283 (1991).

339. Pub. L. No. 102–404, 106 Stat. 1969.

Branch has refused to enact his preferred policies. But Justice Jackson's framework for the separation of powers has no place for unilateral executive action based solely on Congress's resistance to presidential preferences—even if those preferences reflect sound policy choices. The Constitution shows that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[340] Overall, DAPA is a perfect storm of executive lawmaking, descending to the lowest depths of *Youngstown,* beyond the "zone of twilight," and even below the "lowest ebb."[341]

VII. DELIBERATE EFFORT TO BYPASS CONGRESS IS NOT IN GOOD FAITH

The final element in the Take Care Clause is the most important. Has the President acted in good "faith" to execute the laws of Congress, or is he taking proactive steps to bypass laws he disfavors? This is by far the most difficult aspect of the Take Care Clause to judge, because presidential acts are usually presumed lawful. But if the Executive has turned away from his constitutional duty, as evidenced by the preceding three factors, his state of mind is the only way to separate a good-faith mistake from a bad-faith deliberate deviation. The former is regrettable, but acceptable. The latter is pretextual and unconstitutional.

A. DACA and DAPA Arose from the Ashes of Congressional Defeat

Like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. The DREAM Act would have provided a form of permanent residency and work permits for certain immigrants who were brought to the United States as minors.[342] Though the bill received bipartisan support in both houses, a Republican-led filibuster killed the bill in the Senate.[343] In response to this defeat, in June 2012, the President took matters into his own hands.[344]

340. *Youngstown,* 343 U.S. at 587.

341. I have previously argued that such actions fall into a fourth tier where the "Court must assess the limits of the President's unenumerated Article II authority" and declare whether the President is rightly acting within his own independent powers. *See* Elizabeth Bahr & Josh Blackman, *Youngstown's Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 544–45 (2010).

342. *See generally* DREAM Act of 2010, S. 3992, 111th Cong. (2010).

343. Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO, Dec. 18, 2010, http://politi.co/1IF375c [perma.cc/9R4T-PPY7].

344. *See* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES,

As part of his "We Can't Wait" campaign, the President announced the policy that came to be known as DACA.[345] His remarks directly linked the defeat of the DREAM Act to his new executive action: "Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it."[346] He made clear that in "the absence of any immigration action from Congress to fix our broken immigration system," he would act without Congress.[347] DACA accomplished several of the key statutory objectives of the DREAM Act—a law Congress expressly declined to enact—without bicameralism and presentment.[348] Deportations were deferred for the so-called Dreamers, and they were entitled to legal work authorization.[349]

This pattern would repeat itself over the next two years. On June 27, 2013, the Senate passed the "Border Security, Economic Opportunity, and Immigration Modernization Act," commonly known as "comprehensive immigration reform," by a bipartisan vote of 68–32.[350] Over the next year, the President lobbied House Republicans to take up the measure for a vote. But this effort proved unsuccessful. In June of 2014, after much debate within his caucus, House Speaker John Boehner announced that the House would not bring an immigration bill to a vote in 2014.[351]

That same day, in impromptu remarks delivered in the Rose Garden, the President explained why he would take unilateral executive action on immigration reform notwithstanding the House's decision. He said, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing. . . . [I will] fix as much of our immigration system as

Apr. 22, 2012, http://bit.ly/1cXQQPs [perma.cc/H52B-P2PE] ("The Obama administration started down this path [of unilateral executive action] soon after Republicans took over the House of Representatives.").

345. Frank James, *With DREAM Order, Obama Did What Presidents Do: Act Without Congress*, NPR IT'S ALL POLITICS, June 15, 2012, http://bit.ly/1Eqk85l [perma.cc/N8ZH-2CEN].

346. President Barack Obama, Remarks on Immigration (June 15, 2012), *available at* http://bit.ly/1aQmDAe [perma.cc/6ZZX-5S2C].

347. *Id.*

348. *Id.*

349. *Id.*

350. S. 744, 113th Cong. (2013).

351. Steven Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL, June 30, 2014, http://bit.ly/1OcChZ5 [perma.cc/5R7F-LRH8].

I can on my own, without Congress."[352] In earlier remarks, the President cited congressional gridlock as a reason why "[*w*]*e can't afford to wait* for Congress," and a justification for why he was "going ahead and moving ahead without them."[353] The President explained that "as long as they insist on [obstruction], *I'll keep taking actions on my own . . . . I'll do my job.*"[354] Five months later, after the midterm elections, the President announced DAPA.[355] In both cases, the laws were born despite express repudiations by Congress.

The pattern has become predictable: (1) Congress votes against granting the President new power; (2) the President explains he will exert power, even though Congress denied it to him; and (3) through an executive policy, the President exerts power that Congress denied him. Such behavior cannot be viewed as a good faith—just mistaken or misguided—effort to comply with the law. Rather, it amounts to an open and notorious decision to disregard the democratic process, based on pretextual legal justifications. Implementing DACA and DAPA after Congress voted down their antecedent bills is a bad-faith effort to comply with the Take Care Clause. As discussed in the next section, this conclusion is even stronger because the President repeatedly insisted that he lacked the authority to act alone—until Congress handed him a defeat. Then, he suddenly and unconvincingly discovered new fonts of power.

B. Dr. Jekyll and Mr. Hyde Approach to Executive Powers Reflects Bad Faith Motivation

To ascertain if the Executive's non-compliance with the law is still in good faith, we must look to the state of mind of the

352. President Barack Obama, Remarks on Immigration (June 30, 2014), *available at* http://wapo.st/1Eqkhpj [perma.cc/H49J-8N2L].

353. Jeffrey Sparshott, *Obama Blames Congress for Lack of Economic Progress*, WALL ST. J., June 27, 2014, http://bit.ly/1yQ8Q8l [perma.cc/XZD2-FMME] (emphasis added). Senate Democrats have voiced similar ideas. Mike Lillis, *Democrats: No Bluff, Obama Will Go it Alone on Immigration*, THE HILL, June 26, 2014, http://bit.ly/1FcC6Hn [perma.cc/DE72-6525].

354. President Barack Obama, Weekly Address: Focusing on the Economic Priorities for the Middle Class Nationwide (June 28, 2014) (emphasis added), *available at* http://1.usa.gov/1HslNGw [perma.cc/NWR4-G4XF]. The President's lack of respect for the separation of powers is striking, particularly because only two days earlier the Supreme Court made abundantly clear in *Noel Canning* that congressional intransigence does not strengthen executive powers or give the President a license to redefine his authority. NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014).

355. *Executive Actions on Immigration*, *supra* note 3.

President: the "sole organ" of the Executive Branch.[356] In contrast to that of Congress—which is a *they*, not an *it*[357]—the intent of the President can be more easily gleaned. A careful study should be made of all official and unofficial administration statements, particularly if they are against interest. The President speaks individually and releases OLC opinions and other memoranda so the American people understand why he is acting. Professors Delahunty and Yoo add that a careful study should be made of the Executive's "reasoned public explanation and defense" to determine "whether the excuse [for unlawful actions] is factually true or not."[358] Even if it is not true, the excuse need not be rejected after an examination of the "motivation and intent" behind the nonperformance.[359] A good faith mistake will be saved. An excuse that is not made in good faith is pretextual and must be rejected.

With respect to the scope of his executive powers, President Obama has been both Dr. Jekyll and Mr. Hyde. While congressional reform remained a viable option, the President repeated over and over again that he could not grant the scope of temporary relief that advocates sought. But this measured President vanished once Congress ultimately rebuffed his efforts. The transformed Mr. Hyde took matters into his own hands and granted the very relief Dr. Jekyll once claimed impossible.[360] These sudden position reversals attest to President Obama's bad faith.

1. The President Consistently Disclaimed Authority to Defer Deportations of Dreamers

Before the defeat of the DREAM Act, the President

356. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing the President as "the sole organ of the federal government" in international relations).

357. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful."); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930); Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. C.R. L.J. 351, 366–73 (2010).

358. Delahunty & Yoo, *supra* note 20, at 847.

359. *Id.*

360. This pattern of behavior is not limited to immigration. Brief of *Amici Curiae* Cato Institute & Professor Josh Blackman In Support of Petitioners at 26–34, King v. Burwell, No. 14-114 (U.S. Dec. 29, 2014) (discussing rule of law violations attending the implementation of the Affordable Care Act), *available at* http://bit.ly/1DKUUeC [perma.cc/4JBX-9JSM].

consistently explained that he lacked the power to unilaterally suspend deportations. "With respect to the notion that I can just suspend deportations through executive order," he said, "that's just not the case, because there are laws on the books that Congress has passed."[361] He repeated this point many times, almost verbatim.

At a Cinco De Mayo celebration, the President stressed that he could not fix the immigration laws himself. "Comprehensive reform, that's how we're going to solve this problem. . . . Anybody who tells you . . . that I can wave a magic wand and make it happen hasn't been paying attention to how this town works."[362] On Univision, he explained "I am [P]resident, I am not king. I can't do these things just by myself. . . . [T]here's a limit to the discretion that I can show because I am obliged to execute the law. . . . I can't just make the laws up by myself."[363] At a town hall meeting, he added, "I can't solve this problem by myself. . . . We're going to have to change the laws in Congress."[364] In El Paso, Texas, the President reminded the audience that "sometimes when I talk to immigration advocates, they wish I could just bypass Congress and change the law myself. But that's not how a democracy works."[365] To the National Council of La Raza, the President stated, "[B]elieve me, the idea of doing things on my own is very tempting. . . . But that's not how . . . our system works. . . . That's not how our Constitution is written."[366]

Finally, Gabriel Lerner from AOL Latino asked the President about "granting administrative relief for Dreamers."[367] The President clearly and directly replied that he could not grant such relief unilaterally:

361. President Barack Obama, Remarks at Univision Town Hall (Mar. 28, 2011), *available at* http://1.usa.gov/1yQ97YR [perma.cc/28QN-XKNK].

362. President Barack Obama, Remarks at a Cinco de Mayo Celebration (May 5, 2010), *available at* http://bit.ly/1OcCHOY [perma.cc/8GEV-34WQ].

363. Interview by Eddie "Piolin" Sotelo with President Barack Obama, in L.A., Cal. (Oct. 25, 2010), *available at* http://lat.ms/1DfgHZh [perma.cc/RE25-Y875].

364. President Barack Obama, Remarks at a Facebook Town Hall Meeting and a Question-and-Answer Session in Palo Alto, California (Apr. 20, 2011), *available at* http://bit.ly/1OcCL1j [perma.cc/QUR5-R734].

365. President Barack Obama, Remarks on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), *available at* http://1.usa.gov/1HSvv5H [perma.cc/DCK4-U8BV].

366. President Barack Obama, Remarks to the National Council of La Raza (July 25, 2011), *available at* http://1.usa.gov/1FcCiGu [perma.cc/FY8F-SSM7].

367. President Barack Obama, Remarks in an "Open for Questions" Roundtable (Sept. 28, 2011), *available at* http://1.usa.gov/1Dfh06r [perma.cc/X5AL-DUWX].

> I just have to continue to say this notion that somehow I can just change the laws unilaterally is just not true. We are doing everything we can administratively. But the fact of the matter is there are laws on the books that I have to enforce. And I think there's been a great disservice done to the cause of getting the DREAM Act passed and getting comprehensive immigration passed by perpetrating the notion that somehow, by myself, I can go and do these things. It's just not true.[368]

But after the DREAM Act was defeated, his thinking about the scope of his executive powers evolved. He implemented the very relief that he previously said he lacked the power to effect: suspending the deportation of the Dreamers. The President's statements about his power before and after the legislative defeat are diametrically opposed.

In one sense, the President's loquaciousness and repeated statements against interest weaken his claim to good faith execution. This framework may create a perverse incentive for presidents to quietly disregard the law. But nonenforcement cannot have its intended effect unless people know about it. If the President never announced DAPA or DACA, then the aliens who are protected by it would continue to live in the shadows. This would make them ineligible for work authorization unless they came forward. If the President never announced his myriad delays of the Affordable Care Act's deadlines, those subject to the mandates would have continued to comply with them, and the goal of exempting people from the mandates would be unfulfilled. If the President never announced that he was declining to enforce controlled substance laws in states that legalized marijuana, then people would continue to abstain from the drug for fear of prosecution. These ploys would have been ineffective if the President said nothing.

The essence of nonenforcement is to remove the threat of prosecution, and thus assure people that they can break the law with impunity.[369] With respect to Obamacare, immigration, or marijuana, so long as the threat remains, people will continue to modify their behavior at the margins. And this is exactly what Congress intended, even if it knew a law could not be fully enforced. The threat of enforcement nudges people to behave in

368. *Id.*
369. Price, *supra* note 20, at 705.

accordance with the law.[370] This realization further explains why nonenforcement cannot be consistent with congressional policy.

2. The President Consistently Disclaimed Authority to Defer Deportations of Parents of U.S. Citizens

DAPA bears a similar pedigree to DACA. From 2012 through 2014, while Congress considered comprehensive immigration reform, the President consistently stated that he lacked the authority to defer deportations of more aliens. Further, he reasserted that he pushed the boundaries as far as he could with DACA. His comments ranged from broad statements about executive power to very specific fact scenarios. First, he explained that the Constitution imposes limits on what he can do as President. He said that as the "head of the [E]xecutive [B]ranch, there's a limit to what I can do. . . . [U]ntil we have a law in place that provides a pathway for legalization and/or citizenship for the folks in question, we're going to . . . continue to be bound by the law."[371]

Second, during a Presidential debate, he said he could not stretch his executive powers any further than DACA: "[W]e're also a nation of laws. So what I've said is, we need to fix a broken immigration system. *And I've done everything that I can on my own.*"[372] Third, the President directly refuted the notion that he could defer removals to protect families. During a Google+ Hangout on immigration reform, a question was asked about whether the President could halt deportations to prevent family break-ups.[373] The President replied:

> [T]his is something that I've struggled with throughout my presidency. The problem is that, you know, I'm the [P]resident of the United States. I'm not the emperor of the United States. My job is to execute laws that are passed, and Congress right now has not changed what I consider to be a broken immigration system.
>
> And what that means is that we have certain obligations to

370. *Id.* at 761.

371. President Barack Obama, Remarks at Univision Town Hall (Sept. 20, 2011), *available at* http://bit.ly/1GhsjkO [perma.cc/P63V-U7GF].

372. President Barack Obama, Presidential Debate in Hempstead, New York (Oct. 16, 2012) (emphasis added), *available at* http://bit.ly/1yNHZtp [perma.cc/9G5A-L5YF].

373. President Barack Obama, Remarks at Google Hangout (Feb. 14, 2013), *available at* http://bit.ly/1aQygXT [perma.cc/679W-ES4Q].

> enforce the laws that are in place . . . .[374]

Again, the President stressed that with DACA, "we've kind of stretched our administrative flexibility as much as we can."[375]

Fourth, the President was asked in an interview if he would "consider [unilaterally] freezing deportations for parents of deferred-action kids."[376] The President replied that the DREAM Act could not be expanded beyond "young people who have basically grown up here . . . . [I]f we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally. So that's not an option."[377] While the OLC would ultimately find that deferred action for the parents of Dreamers was unconstitutional, the President did "freeze deportation" for groups beyond the Dreamers.

Fifth, during a town hall meeting, the President was asked whether he could do for an "undocumented mother of three" what he "did for the [D]reamers."[378] The President replied that he could not extend the relief given to the Dreamers to these parents:

> I'm not a king. . . . [W]e can't simply ignore the law.
>
> When it comes to the Dreamers—we were able to identify that group [as] generally not a risk. . . .
>
> But to sort through all the possible cases—of everybody who might have a sympathetic story to tell is very difficult to do. This is why we need comprehensive immigration reform.
>
> . . . .
>
> [If] this was an issue that I could do unilaterally I would have done it a long time ago. . . . The way our system works is Congress has to pass legislation. I then get an opportunity to sign and implement it.[379]

But DAPA accomplished exactly what the individual asking the question wanted: it deferred deportations for parents whose children are citizens. More directly, the President was asked

374. *Id.*

375. *Id.*

376. Steve Contorno, *Barack Obama: Position on Immigration Action Through Executive Orders 'Hasn't Changed,'* POLITIFACT, NOV. 20, 2014, http://bit.ly/1OEbmjE [perma.cc/KSN4-ZQUP] (quoting a September 2013 interview with Noticias Telemundo). Ultimately, the OLC opinion found the President could not do this. THOMPSON, *supra* note 5, at 33.

377. Contorno, *supra* note 376.

378. Interview by José Díaz-Balart with President Barack Obama, in Wash., D.C. (Jan. 30, 2013), *available at* http://on.nbclatino.co/1yQqtVw [perma.cc/L2NQ-QWX9].

379. *Id.*

whether he could halt deportations of non-criminals—another category of aliens protected by DAPA. He replied, "I'm not a king. I am the head of the executive branch of government. I'm required to follow the law."[380]

Sixth, during a speech on immigration reform in San Francisco, hecklers called out at least six times, "Stop deportations!"[381] The President replied:

> [I]f, in fact, I could solve all these problems without passing laws in Congress, then I would do so.
>
> But we're also a nation of laws. That's part of our tradition. And so the easy way out is to try to yell and pretend like I can do something by violating our laws. And what I'm proposing is the harder path, which is to use our democratic processes to achieve the same goal . . . .[382]

Seventh, the President's most pointed comments came on March 6, 2014, during an appearance on Univision.[383] The host asked him about "Guadalupe Stallone from California, [who] is undocumented. However, her sons are citizens."[384] She feared deportation, even though her children could remain in the country.[385] The President explained that he could not help Ms. Stallone: "[W]hat I've said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do."[386] DACA, he admitted, "already stretched my administrative capacity very far."[387] The President could go no further because "at a certain point the reason that these deportations are taking place is, Congress said, you have to enforce these laws."[388] Citing congressional power to distribute funding, the President reiterated, "I cannot ignore those laws any[]more than I could ignore, you know, any of the other laws that are on the books."[389] Under DAPA, Ms. Stallone's deportation would be deferred because her children are

380. President Barack Obama, Interview with Univision (Jan. 31, 2013), *available at* http://wapo.st/1K3sFdm [perma.cc/JWR4-DDZA].

381. President Barack Obama, Remarks on Immigration Reform—San Francisco, CA (Nov. 25, 2013), *available at* http://1.usa.gov/1DAaNBa [perma.cc/R27T-BXFK].

382. *Id.*

383. President Barack Obama, Interview with Univision (Mar. 5, 2014), *available at* http://bit.ly/1HSJokm [perma.cc/6RT7-RF9Q] (the interview aired on Mar. 6, 2014).

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

citizens—even though, as the President explained, Congress imposed laws and funded the agencies and he was required to enforce the law.

Leading up to November 2014, however, the President's position evolved from "impossible" to "absolutely." During this process, the President announced that "[i]n the face of that kind of dysfunction, what I can do is *scour our authorities* to try to make progress."[390] What limits exist on how far he can scour? The President explained the "temptation to want to go ahead and get stuff done," when "there's a lot of gridlock":

> What I've tried to do is to make sure that the Office of Legal Counsel, which weighs in on what we can and cannot do, is fiercely independent. They make decisions. We work well within the lines of that.[391]

While claims of a supine OLC are nothing new—as the President has disregarded OLC's opinion regarding "hostilities" in Libya[392]—this statement is particularly implausible because the President personally pushed his legal team to go further and exert even broader assertions of executive power. The *New York Times* reported that the Administration urged the legal team to use its "legal authorities to the fullest extent."[393] When they presented the President with a preliminary policy, it was a disappointment because it "did not go far enough."[394] Scouring the bottom of the presidential barrel for more power, Obama urged them to try again.[395] And they did just that. Politico reported that over the course of eight months, the White House reviewed "more than [sixty] iterations" of the executive action.[396] The final policy, which received the President's blessing, pushes presidential power beyond its fullest extent and embodies

390. Caitlin MacNeal, *Obama: When Congress Fails, I'll 'Scour' Authorities To 'Make Progress,'* TPM LIVEWIRE, Aug. 6, 2014, http://bit.ly/1E9rS9Z [perma.cc/4M9J-Y6R9] (emphasis added).

391. Interview by Stephen Colbert with President Barack Obama, in Wash., D.C. (Dec. 8, 2014), *available at* http://1.usa.gov/1GhtJMj [perma.cc/2RSR-849Q].

392. Jack Goldsmith, *President Obama Rejected DOJ and DOD Advice, and Sided with Harold Koh, on War Powers Resolution*, LAWFARE (June 17, 2011, 11:38 PM), http://bit.ly/1J9aXYi [perma.cc/K2YU-HSJP].

393. Michael D. Shear & Julia Preston, *Obama Pushed 'Fullest Extent' of His Powers on Immigration Plan*, N.Y. TIMES, Nov. 28, 2014, http://bit.ly/1aQyVsc [perma.cc/Z46D-GSBW].

394. *Id.*

395. *Id.*

396. Carrie Budoff Brown, Seung Min Kim & Anna Palmer, *How Obama Got Here*, POLITICO, Nov. 20, 2014, http://politi.co/1DAaNRV [perma.cc/BU4H-HS55].

discretion in name only. Further, the policy is in tension with numerous statements the President personally made explaining why he could not act alone. Here, the President alleging that the OLC is independent and detached is implausible.

3. Changed Justification After Defeat Amounts to Pretext

While flip-flops are par for the course in politics and usually warrant no mention in constitutional discourse, they are salient to ascertain pretext. In the context of the Establishment Clause, the Court has often looked past the stated purposes of a law to divine whether contemporaneous statements render the law "non-secular." For example, in *Wallace v. Jaffree*, Justice Stevens, writing for the majority, found that the secular purpose of permitting prayer in school was "dispositive," as the "record not only provides [the Court] with an unambiguous affirmative answer, but it also reveals that the enactment of [the statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."[397] For example, one state senator said he believed the statute was an "effort to return voluntary prayer" to the public schools.[398] As noted by Chief Justice Burger's dissent, the majority opinion "ignore[d] the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: 'To permit a period of silence to be observed for the purpose of meditation or voluntary prayer at the commencement of the first class of each day in all public schools.'"[399] In other words, Justice Stevens discounted the stated purpose of the law as pretext, and ascertained the true—and unlawful—motivation of the statute through statements from the legislators. The Court has recognized in many other contexts that malefactors cannot hide behind pretextual statements to justify unlawful acts.[400]

For the Take Care Clause, when the President repeats over and over again that he lacks the power to stop deportations, he is openly acknowledging the limitations of the separation of powers—something the President rarely does.[401] This is true for

397. Wallace v. Jaffree, 472 U.S. 38, 40–41, 56 (1985).

398. *Id.* at 56–57 & n.43 (emphasis removed).

399. *Id.* at 86 n.1 (Burger, J., dissenting) (citations omitted).

400. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 690–91 (1994) (Scalia, J., dissenting) (listing cases to show various areas in which the Court "considers 'pretext' analysis sufficient").

401. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO

Presidents "learned and unlearned in the law."[402]

When the President disclaims inherent executive power, it sends a signal to Congress: when deliberating, they can rest assured that if they vote the law down, that policy will not be put into action unilaterally. But when the President suddenly "discovers" authority to take action after Congress rebuffs his efforts, both the usual framework for the democratic process and the rule of law are turned upside down.

With DACA and DAPA, there is a prima facie case that the change in constitutional analysis was not done in good faith, but as pretext. I do not mean "good faith" in the sense that the President is acting in good faith to make a certain policy work.[403] Rather, by good faith I suggest the President knowingly disengaged from his constitutional duties to achieve just those policy objectives Congress rejected. The revised rationales speak directly to the motives of the Executive, and whether he mistakenly failed to comply with his constitutional duty or deliberately bypassed disfavored legislation. All signs point toward the latter. These facts rebut the presumption that the Executive faithfully executes the law.[404]

As a possible defense of DAPA, perhaps the President was dealing with the cards he was dealt by an intransigent and uncooperative Congress. Providing a "sympathetic reading [of] President Obama's maneuvers," could reflect a "species of *constitutional self-help*—attempts to remedy another party's prior wrong [Congress's failure to pass legislation], rather than to ignore inconvenient legal barriers."[405] Relying on inherent

OBAMACARE 135, 181 (2013).

402. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (describing actions taken by Presidents "learned and unlearned in the law"). President Obama has opined that his experience as an attorney makes his statements on executive power more authoritative than those who are not "constitutional lawyers." Interview by Jackie Calmes & Michael D. Shear with President Barack Obama, in Galesburg, Ill. (July 24, 2013) (alleging that Congress frequently accuses him of usurping authority for anything, even "by having the gall to win the presidency. . . . *But ultimately, I'm not concerned about their opinions—very few of them, by the way, are lawyers, much less constitutional lawyers.*") (emphasis added), *available at* http://nyti.ms/1J9bae3 [perma.cc/U5WV-L5QQ].

403. *See* Price, *supra* note 20, at 749.

404. *Id.* at 704.

405. Pozen, *supra* note 55, at 7; *see also* Price, *supra* note 20, at 674 (arguing that increasing executive reliance on nonenforcement is a structural problem arising from congressional gridlock); Cox & Rodriguez, *supra* note 282, at 532 (noting that the Executive Branch can respond faster to "changing needs and public opinion," and "sometimes help overcome counterproductive legislative deadlock").

executive powers, there is always room for some self-help within the realm of quasi-constitutional norms. But a touchstone of this inquiry is that it requires the President to still comply with his constitutional duties, specifically to "execute" the law "faithfully." Self-help reflected in efforts to "ignore inconvenient legal barriers," could still potentially fall within the range of permissible discretion.[406] This is true only so long as the President acts within his sphere of constitutional duties, as demonstrated by both text and tradition, and reflected in what Congress has acquiesced to. Self-help (effectuated by power not delegated by either the Constitution or Congress) can never license efforts to "remedy another party's prior wrong."[407] Gridlock does not license the President to transcend his Article II powers and subjugate congressional authority,[408] particularly where the President's justification for ignoring inconvenient barriers is extremely weak.[409] As Justice Kennedy recently testified before Congress, "gridlock" should not affect the way the Supreme Court "interprets" the law.[410] The President's action still must be defensible as a good-faith effort to comply with the statutes, and not a deliberate effort to bypass Congress. Bypassing Congress may be convenient, but it conflicts with the "supreme Law of the Land."

As the Supreme Court recently explained in a unanimous decision against the President's similar actions around Article I, "political opposition" in Congress does not "qualify as an unusual circumstance" to justify the unlawful exercise of presidential power.[411] Further, Justice Scalia concurred in rejecting the Solicitor General's invitation to "view the recess-appointment power as a 'safety valve' against Senatorial 'intransigence.'"[412] The separation of powers remains just as strong whether the relationship between Congress and the President is symbiotic or antagonistic. Where the people cannot agree, gridlock is the constitutionally ideal form of government—it means the process is working. As Madison wisely

406. Pozen, *supra* note 55, at 7.

407. *Id.*

408. *See* Gridlock and Executive Power, *supra* note 21, at 17.

409. Price, *supra* note 20, at 674–75.

410. Josh Blackman, *Justice Kennedy Discusses Gridlock During Hill Testimony. Yes, there is a* King v. Burwell *Connection*, JOSH BLACKMAN'S BLOG, (Mar. 23, 2015) http://bit.ly/1bhuV4H [perma.cc/A5RJ-GDYQ].

411. NLRB v. Noel Canning, 134 S.Ct. 2550, 2567 (2014).

412. *Id.* at 2599 (Scalia, J., concurring).

observed: "Ambition must be made to counteract ambition."[413]

President Obama himself made this point eloquently. On April 29, 2011, the President responded to calls for executive action on immigration, saying, "I know some here wish that I could just bypass Congress and change the law myself. But that's not how democracy works. See, democracy is hard. But it's right. Changing our laws means doing the hard work of changing minds and changing votes, one by one."[414] DACA came up one vote short in the Senate. DAPA never even came up for a vote in the House. Despite all of the hard work to change minds, not enough votes were changed. It is up to Congress, and not the President, to decide whether the INA needs to be changed. No self-help can fix this.

C. Youngstown Redux

To assess the faithfulness of the President's execution, consider a *Youngstown* counterfactual that is fairly close to reality. In the actual case, five years before the steel seizure crisis arose, Congress had considered the issue of labor strikes and deliberately chose not to give the President the power to seize mills unilaterally. As Justice Frankfurter explained in his concurring opinion, "By the Labor Management Relations Act of 1947, Congress said to the President, 'You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.'"[415] In the wake of World War II, "Congress was very familiar with Government seizure as a protective measure. On a balance of considerations Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile."[416] But relying on his inherent executive powers, President Truman did so anyway.[417]

After ordering Secretary of Commerce Charles Sawyer to take over the mills, the next morning the President addressed a message to Congress, notifying them about the seizure and indicating that Congress may "wish to pass legislation," or "deem

413. THE FEDERALIST NO. 51, *supra* note 64, at 356 (James Madison).

414. President Barack Obama, Remarks at Miami Dade College Commencement (Apr. 29, 2011), *available at* http://1.usa.gov/1bhuWp6 [perma.cc/FX2C-X3YK].

415. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 603 (1952) (Frankfurter, J., concurring).

416. *Id.* at 601.

417. *Id.* at 582 (majority opinion).

it [not] necessary to act at this time."[418] In either event, the President wrote, he would "continue to do all that is within [his] power to keep the steel industry operating and at the same time make every effort to bring about a settlement of the dispute."[419] On these facts, the Court found the President acted unconstitutionally.[420]

Let's change the facts. Suppose that leading up to the labor crisis, President Truman urges Congress to pass a statute giving him the sole authority to seize the steel mills in the event of a strike. As he lobbies for this legislation, Truman repeats over and over again that he does not have the authority to do so alone, and that Congress needs to fix the "broken" labor system. Congress refuses to pass this new bill, content to leave in place the 1947 Labor Management Relations Act—knowing that without further legislation, the President cannot act.[421] The President is furious at this defeat and announces, "I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing,"[422] as President Obama did.

When the labor crisis comes to a head, the President announces a newly discovered font of authority to control the mills. After seizing the mills, the President explains to Congress that in "the absence of any [labor] action from Congress to fix our broken" labor system, he will act alone.[423] In anticipation of Congress opposing his actions, the President explains that Congress cannot defund the seizure of his steel mills without shutting down the entire federal government during the ravages of the Korean War. The President urges Congress to "pass a bill" giving him the authority he seeks. Congress, however, has a different bill in mind. Both houses begin debate on the Steel Mill Restoration Act of 1952, which denies funding to any Executive Branch official who attempts to take control of a steel mill. The bill passes the House. Rather than treating that unicameral statement as an indication that he lacks the power to

418. *Id.* at 677 (Vinson, J., dissenting) (citation omitted).
419. *Id.*
420. *Id.* at 588–89 (majority opinion).
421. *Id.* at 588.
422. President Barack Obama, Remarks on Immigration (June 30, 2014), *available at* http://bit.ly/1bhv0oS [perma.cc/ZX5F-AB6M].
423. President Barack Obama, Remarks on Immigration (June 15, 2012), *available at* http://1.usa.gov/1aQmDAe [perma.cc/4TMY-KXCJ].

take the mills, President Truman threatens to veto the bill if it passes the Senate.[424] After the veto threat, the bill stalls in the Senate. With that altered background, the case is argued before the Supreme Court.

If Justice Jackson had any doubts about whether President Truman's actions fell within the second or third tier, two additional factors would render this case much, much easier. First, unlike the actual *Youngstown* case, Congress did not remain silent after the President seized the mills in our counterfactual. Rather, both houses debated how to halt the seizures, and one passed a bill to stop the President. Though short of bicameralism and presentment,[425] these actions express a congressional policy in opposition to the Executive's assertion of inherent power. Even more strikingly, the President threatened to veto the very bill that would have constrained his executive action. His brazen flouting of the separation of powers would make an easy case for unconstitutionality—despite the harm that such a decision could inflict on American war efforts. Second, the President's changed position on the scope of his executive powers after Congress rebuffed him further diminishes the usual presumption that the Executive executes the laws faithfully.

This counterfactual illustrates why DAPA cannot withstand *Youngstown* scrutiny. In both cases, Congress declined to create the Executive's desired policy. President Obama has called the INA "broken" and championed the DREAM Act in 2011 and comprehensive immigration reform in 2013–14. But for better or (mostly) worse, Congress left the immigration laws as they were. Despite the serious humanitarian concerns, the Dreamers and parents of U.S. citizens remain outside the category of favored aliens embodied in congressional policy. The President's concerns about the "broken immigration system" were well-founded, but, as he admitted, he lacked an executive remedy. His changed position, as convenient as it is, is not entitled to the normal presumption of good faith.

Second, unlike President Truman, who told Congress he would listen if they passed legislation, President Obama threatened to veto a bill that would defund his program.[426] His

424. Seung Min Kim, *White House Threatens to Veto House GOP's Immigration Gambit*, POLITICO, Jan. 12, 2015, http://politi.co/1JsfAJw [perma.cc/VE9M-ZCNW].

425. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

426. Lauren French, *Barack Obama Threatens to Veto Attacks on His Immigration Policy*,

oft-repeated imperative to "pass a bill"[427] uses the incorrect article. It should be "pass *my* bill." Anything short of that would be met with a veto. The veto remains the prerogative of the President, but it is unseemly for a President to wield it to stop Congress from checking his extraconstitutional assertions of power. Unlike the facts in *Youngstown*, Congress has not remained silent, but has opposed this action.

Third, and perhaps most importantly, the stakes of *Youngstown* were exponentially higher than those of DAPA.[428] If the steel seizure were halted, the American war effort could have been hampered, and the Commander in Chief would have been hamstrung. American soldiers could have died.[429] With DAPA, if Secretary Johnson's memo were enjoined, the *only* result would be to maintain the ex ante status quo. No one would be removed who would not have been removed under the law Congress passed. Justice Jackson would "indulge the widest latitude of interpretation to sustain [the Commander in Chief's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[430] But when this power "is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power . . . is subject to limitations consistent with a constitutional Republic whose law and policy-making br[a]nch is a representative Congress."[431] While halting DAPA would harm aliens, it is nowhere near the gravity of harm attending the facts of *Youngstown*.

Under any reading of *Youngstown*, DAPA flunks Justice Jackson's most charitable vision of executive power.[432] The President is not acting as a faithful agent of Congress and the sovereign people, but is implementing his own laws. As Justice Frankfurter recognized in *Youngstown*, "[a]bsence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the

POLITICO, Jan. 29, 2015, http://politi.co/1yNJfwo [perma.cc/DYN3-W958].

427. Justin Sink, *Obama to Congress: 'Pass a Bill,'* THE HILL, Nov. 20, 2014, http://bit.ly/1FcLsmn [perma.cc/5G94-XVYX].

428. *See* Delahunty & Yoo, *supra* note 20, at 829–30.

429. *See id.* at 827.

430. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

431. *Id.* at 645–46.

432. *See id.*

Government does not vest it in the President."[433] These are matters for Congress to decide, not the President alone.

VIII. CONCLUSION

In its full scope, DAPA stems from the President's interest in enacting his agenda. That agenda may well be appropriate as a policy matter, but the Framer's pathway for implementing that policy agenda is clear: it goes through Congress. Unilateral exercises of power such as DAPA undermine that procedure, as well as the Constitution's scheme.

The test to determine whether the Take Care Clause has been violated imposes a high burden. First, it is not enough to assert that the President has not enforced the law to the standards set by his political opponents. A careful study of the underlying congressional policy and the scope of the President's discretion shows only the most egregious exertions of lawmaking power may be challenged. As President Obama explained many times *before* he acted, he lacked the power to defer deportations unilaterally. This view was correct, and reflected longstanding Executive-Branch policy about the scope of authority. Historically, this background served as an important check.[434]

Second, it is not enough to claim that the Executive is prioritizing some cases over others because of limited resources. Agencies retain broad discretion to allocate resources to achieve their priorities, but allocation decisions must be judged on whether they promote or ignore congressional policy. Through DAPA, the Administration limited officers by turning discretion into a rubber stamp. Further, the policy added millions of new individuals to the system, thus imposing additional costs. Here, the tail wags the dog.

Third, it is very hard to make it into Justice Jackson's lowest tier. In the six decades since *Youngstown*, the Supreme Court has not found a single executive action that violated his test. Even Justice Rehnquist, who clerked for Justice Jackson that term, found a way to save the settlement program at issue in *Dames & Moore v. Regan* by identifying some tacit congressional approval.

433. *Id.* at 603–04 (Frankfurter, J., concurring).

434. As an aside, a renewed focus on the Take Care Clause would have the salutary effect of Congress placing *more* limitations on the President's discretion. *See* Josh Blackman, *Obama's Overreach? Look in the Mirror, Congress*, L.A. TIMES, Nov. 21, 2014, http://lat.ms/1E9sXP2 [perma.cc/9GD5-CM2W].

No such refuge can be found for DAPA, however, which ignores *past* and *present* congressional opposition.

In all but the most severe cases, these three hurdles will be insurmountable. Partisan politics may claim a violation of the Take Care Clause, but the facts will foreclose most challenges. If each of these factors points toward a President deliberately disregarding a law he disfavors, however, only the last resort of "good faith" can save the action.

With DACA and DAPA, the case for "bad faith" is palpable. The President instituted these policies after Congress voted down the legislation he wanted. Further, the President repeated over and over again that he could not act unilaterally. But this position changed almost overnight once he recognized that Congress would not give him what he wanted. His actions and statements create the prima facie case of bad faith, and point toward a violation of the Take Care Clause. The President has failed to take care that the laws are faithfully executed.