

Written Statement
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“The Unconstitutionality of DAPA: Failing To Faithfully Execute The Laws”

Committee on the Judiciary
U.S. House of Representatives

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Chairman Goodlatte, Ranking Member Conyers, and members of the Judiciary Committee, my name is Josh Blackman, and I am a constitutional law professor at the South Texas College of Law in Houston. I am honored to have the opportunity to testify about why DAPA violates the Constitution and poses a severe threat to the separation of powers.¹

In my brief time, I will make three points. First, DAPA is an unprecedented exercise of presidential lawmaking power, and is not consonant with previous exercises of deferred action.² Second, DAPA violates the President’s duty to take care that the laws are faithfully executed, as the Executive must enforce the laws in good faith.³ Third, I will sound an alarm—non-enforcement poses an encroaching threat to the separation of powers and the rule of law, that Congress, not just the courts, must take steps to halt.

¹ I joined an amicus brief on behalf of the Cato Institute in support of Texas’s constitutional challenge to DAPA. Brief for the Cato Institute and Law Professors as Amici Curiae Supporting Plaintiffs in Texas v. United States, before the Southern District of Texas (1:14-cv-245) (1/7/15), available at <https://www.scribd.com/doc/251997148/Texas-v-U-S-Amicus-Brief-of-Cato-Institute-Josh-Blackman-and-Jeremy-A-Rabkin>. I have included a copy of this brief with my testimony.

² I offer a detailed analysis of past instances of deferred action, and how Congress has not acquiesced to a practice as broad as DAPA, in my forthcoming article in the GEORGETOWN LAW JOURNAL ONLINE. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 Georgetown Law Journal Online __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545544. I have included a draft of the article with my testimony.

³ I develop an originalist and textualist analysis of the Take Care clause, to show that DAPA is inconsistent with the President’s constitutional duty in a forthcoming article in the TEXAS REVIEW OF LAW & POLITICS. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEXAS REVIEW OF LAW & POLITICS __ (Forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545558. I have included a draft of the article with my testimony.

I. Congress has not acquiesced, or given the President the authority to implement DAPA

The Justice Department’s Office of Legal Counsel claimed that four previous instances of deferred action justify DAPA, and its antecedent, DACA, through express or implicit Congressional approval.⁴ These claims are demonstrably false.

1. In 1997, deferred action was granted for battered aliens under the Violence Against Women Act (“VAWA”)⁵ where a petition had *already* been approved but a visa was not immediately available.⁶ Here, the deferred action served as a temporary bridge for those who would soon receive permanent status according to the laws of Congress.
2. In 2001, deferred action was granted for aliens who were *already* deemed to be *bona fide* under the Victims of Trafficking and Violence Protection Act (“VTVPA”).⁷ Here too, the deferred action served as a bridge—lawful status was immediately available on the other side of the deferral.⁸
3. In 2005, deferred action was granted for foreign students who lost their visas when Gulf Coast schools were closed following Hurricane Katrina.⁹ The deferred action bridged the gap, and gave the students four months to enroll at another College in order to regain the status they previously held.
4. In 2009, deferred action was granted for aliens that were widowed by the untimely death of their citizen spouse before the minimum two-year period.¹⁰ Deferred action was granted where visa petitions had been filed, but not completely adjudicated because of administrative delays prior to the death. Again, a visa awaited shortly after the deferral.

Historically, deferred action acted as a *temporary bridge* from one status to another, where benefits were construed as *immediately* arising post-deferred action. In contrast, with DAPA deferred action serves not as a bridge for beneficiaries to a visa, but as a tunnel to dig under and through the INA. There is no visa—the proverbial pot of gold—waiting on the other side of this deferred action rainbow.

⁴ Jeh Charles Johnson, *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*, U.S. DEP’T. OF HOMELAND SECURITY (Nov. 20, 2014), www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

⁵ Under VAWA, battered women were allowed to petition for a visa on their own, without having to rely on abusive family members to petition for them. *See, e.g.*, 8 U.S.C. 1154(a)(1)(iii) (an alien can file his or her own petition if “during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien’s spouse”).

⁶ *See* 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii).

⁷ Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—“T” and “U” Nonimmigrant Visas at 2 (Aug. 30, 2001), available at <https://www.scribd.com/doc/251877266/Memo-INS-VTVPA>.

⁸ These visas are intended for victims of human trafficking, named after their section in the U.S. code. *See* 8 U.S.C. 1101(a)(15)(T), (U).

⁹ *See* Press Release, USCIS, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1_Student_11_25_05_PR.pdf.

¹⁰ Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (Sept. 4, 2009)

II. DAPA violates the President’s Duty To “Take Care That The Laws Be Faithfully Executed.”

Article II imposes a duty on the President unlike any other in the Constitution: he “shall take Care that the Laws be faithfully executed.”¹¹ DAPA violates this duty for three reasons:

1. With DACA, the blueprint for DAPA,¹² the administration limited officers to turn discretion into a rubber stamp. This did not reallocate resources to further congressional policy on a case-by-case basis, but was rather a transparent effort to bypass it.
2. Because DAPA is not consonant with congressional policy, according to Justice Jackson’s decision in *The Steel Seizure Case*, presidential power is at its “lowest ebb.”¹³
3. Like the mythical phoenix, DACA and DAPA arose from the ashes of congressional defeat. 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. His actions and statements create the *prima facie* case of bad faith, and point towards a violation of the “Take Care” clause.

III. Non-enforcement Poses A Threat To Separation of Powers and Rule of Law

While I support comprehensive immigration reform, the President’s unconstitutional actions cannot be sanctioned. I hasten to add, that if this practice is upheld, Democrats have much more to fear from this dangerous precedent. Generally, Democrats like when the federal government takes *more* action, and Republicans prefer when the government takes *less* action. Today, Democrats may approve of the President’s decision to halt deportations, or delay unpopular provisions of Obamacare, or not prosecute marijuana crimes. However, the situation would be very different if a Republican President declined to enforce provisions of the tax code, waived mandates under environmental laws, or declined to implement Obamacare altogether.

In the words of James Madison, the only way to keep the separation of powers in place is for “ambition . . . to counteract ambition.”¹⁴ Although the Courts play an essential role to serve as the “bulwarks of a limited Constitution,”¹⁵ our Republic cannot leave the all-important task of safeguarding freedom to the judiciary. To eliminate the dangers of non-enforcement, the Congress must counteract the President’s ambition.¹⁶ The failure to do so here will continue the one-way ratchet towards executive supremacy, and a dilution of the powers of the Congress, and the sovereignty of the people.

¹¹ U.S. CONST. art. III, § 3.

¹² 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.” Johnson, *supra* note 3, at 4. Secretary Johnson’s memorandum mirrors his predecessor, Secretary Janet Napolitano’s invocation of discretion. It begins that “DHS must exercise *prosecutorial discretion* in the enforcement of the law.” *Id.* at 1 (emphasis added). While DAPA has not yet gone into effect, it is safe to assume that it will adopt priorities and guidelines “similar” to those of DACA, except on a much larger scale.

¹³ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

¹⁴ Federalist No. 51 (J. Madison).

¹⁵ Federalist No. 78 (A. Hamilton).

¹⁶ Josh Blackman, “Obama’s overreach? Look in the mirror, Congress,” *Los Angeles Times*, November 22, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-blackman-obama-immigration-20141123-story.html>.

The rule of law, and the Constitution itself, are destined to fail if the separation of powers turn into mere “parchment barriers”¹⁷ that can be disregarded when any President deems the law “broken.”

Thank you, and I welcome your questions.

¹⁷ Federalist No. 48 (J. Madison).