


3-18-2017

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### Recommended Citation

Robert H. Wood (2017) "The Crushing of a Dream: DACA, DAPA and the Politics of Immigration Law Under President Obama," *Barry Law Review*: Vol. 22 : Iss. 1 , Article 2.  
Available at: <http://lawpublications.barry.edu/barryrev/vol22/iss1/2>

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## THE CRUSHING OF A DREAM: DACA, DAPA AND THE POLITICS OF IMMIGRATION LAW UNDER PRESIDENT OBAMA

Robert H. Wood\*

“The happy and the powerful do not go into exile, and there are no surer guarantees of equality among men than poverty and misfortune.”<sup>1</sup>

—Alexis de Tocqueville

In its most recent decision on immigration law, the Supreme Court of the United States deadlocked, 4–4, leaving in place a Fifth Circuit decision (decided 2–1),<sup>2</sup> which upheld the granting of a preliminary injunction against the Obama Administration implementing its most recent immigration law policy on deferred action against illegal immigrants.<sup>3</sup> From the initial decision of the district court, through the Fifth Circuit, and in the Supreme Court, the decisions seemed flagrantly based on the political leanings of the judges or justices involved. The purpose of this article is to examine the issues in *United States v. Texas*, particularly the administrative law aspects of the case.

Part I provides the factual and political background that provoked the litigation. Part II examines the grant of the preliminary injunction by the United States District Court for the Southern District of Texas. Part III addresses the rulings by the United States Court of Appeals for the Fifth Circuit. Part IV describes the events that transpired at the Supreme Court. Part V examines a selected portion of the scholarly commentary generated by the case, and Part VI concludes that there is perhaps no other subject, other than abortion rights, that is so heavily impacted by the political perspectives of the jurists reviewing the challenges. As such, the judicial branch is probably not the most appropriate forum for the debates on these issues. They are best left to the political process.

### I. BACKGROUND

Immigration restrictions have been the subject of U.S. law since the early days of the republic. When the 1790 Naturalization Act was passed, it limited naturalization to “free white person[s].”<sup>4</sup> It was not until after the Civil War that this

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1. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 12 (Henry Reeve trans., New York, Craighead & Allen 1838).

2. See *United States v. Texas (Texas I)*, 136 S. Ct. 2271, 2272 (2016) (per curiam).

3. See *Texas v. United States (Texas II)*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d per curiam*, 136 S. Ct. 2271 (2016).

4. PEW RESEARCH CTR., *MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065: VIEWS OF IMMIGRATION’S IMPACT ON U.S. SOCIETY MIXED* (2015) at 114 app. B tbl.3 (Immigration Law Timeline), <http://www.pewhispanic.org/files/2015/09/2015-09->

ban was lifted for people of African descent.<sup>5</sup> However, the 1882 Chinese Exclusion Act “banned Chinese laborers from immigrating for the next ten years,” a prohibition that was extended for another ten years in 1892.<sup>6</sup> The ban on Asian immigrants was continued by the 1917 Immigration Act and the Emergency Quota Act of 1921.<sup>7</sup> This was the first time the United States imposed a numerical quota for immigration based on nationality:<sup>8</sup> only three percent of each foreign-born population of the United States was allowed to immigrate.<sup>9</sup> There were no exclusions for countries based in the Western Hemisphere.<sup>10</sup> These quotas were decreased to two percent of each foreign-born population in 1924.<sup>11</sup> Further restrictions made the law favor Europeans from northern and western European countries, which had longer migration histories in the United States, as opposed to persons from eastern and southern European countries, which were relatively recent in their immigration history.<sup>12</sup> Asians continued to be barred from immigration.<sup>13</sup>

The ban on Asians was not removed until 1943, but they were still subject to limited quotas.<sup>14</sup> In 1952, the national origins quotas were altered to be based on the immigrant populations of the census of 1920, which heavily favored immigrants from the United Kingdom, Germany, and Ireland.<sup>15</sup>

It was not until 1965 that the national origins system was finally abolished; instead, a seven-category preference system that emphasized family reunification and skilled labor was adopted.<sup>16</sup> Even so, immigrants from the Western Hemisphere were exempt from the preference system until 1976.<sup>17</sup> Further, the law did not impose any visa cap on family members of U.S. citizens.<sup>18</sup>

Throughout the 1970s, 1980s, and 1990s, immigration law primarily dealt with the floods of refugees from South Vietnam, Cambodia, Laos, China, Nicaragua, and Haiti who were exempted from the immigration preference system under the Refugee Act of 1980.<sup>19</sup> In 1986, President Reagan signed the Immigration Reform

28\_modern-immigration-wave\_REPORT.pdf. For a thorough discussion of immigration law history, see Hiroshi Motomura, *The Foulston Siefkin Lecture: The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015).

5. See PEW RESEARCH CTR., *supra* note 4, at 114 app. B tbl.3.

6. *Id.*

7. *See id.*

8. *Id.*

9. *See id.*

10. *See id.*

11. PEW RESEARCH CTR., *supra* note 4, at 115 app. B tbl.3 (citing Immigration Act of 1924, 43 Stat. 153 (1924) (repealed 1952)).

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.* (citing Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952)).

16. *See id.*

17. PEW RESEARCH CTR., *supra* note 4, at 115 app. B tbl.3 (citing Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965)).

18. *See id.*

19. *See id.* at 115–16 app. B tbl.3 (citing Refugee Act of 1980, Pub. L. No. 101-649, 104 Stat. 4978 (1990)).

and Control Act, which allowed unauthorized immigrant workers to gain a pathway to permanent residency.<sup>20</sup> This affected 2.7 million residents.<sup>21</sup>

However, by the mid-1990s, the focus changed to enforcement efforts against illegal immigration. The Illegal Immigration Reform and Immigrant Responsibility Act was passed in 1996 to increase enforcement activities, build fences along the Mexican border, and deport criminal aliens.<sup>22</sup> In 2006, the Secure Fence Act required the construction of a 700-mile double-layered fence as well.<sup>23</sup>

Since that time, little immigration legislation has garnered bipartisan support, causing immigration reform advocates to despair and President Obama to take executive action in the face of stalled legislative efforts.

In 2012, the President implemented the Deferred Action for Childhood Arrivals (“DACA”) policy, which allowed illegal immigrants who had been brought to the United States as children to obtain temporary deportation relief and obtain work permits.<sup>24</sup> In 2014, the President implemented the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) policy, which allowed illegal immigrants with U.S.-born children to apply for deportation relief and work permits.<sup>25</sup> It was this last piece of executive action that was challenged in federal court.<sup>26</sup>

## II. THE DISTRICT COURT LITIGATION

On February 16, 2015, United States District Court Judge Andrew S. Hanen granted a preliminary injunction sought by twenty-six states, including Texas, which filed an action for an injunction against the United States and the Department of Homeland Security (“DHS”) to prevent the implementation of DAPA.<sup>27</sup>

The court noted that DAPA was instituted as the result of a memorandum from Secretary Jeh Johnson to DHS officials instructing them to implement a new policy expanding the application of deferred action status to certain categories of illegal immigrants, particularly people with “a son or daughter who was a U.S. citizen or permanent resident” and who had “resided in the United States since before . . . 2010.”<sup>28</sup> The memorandum also expanded the 2012 DACA policy to apply to a larger pool of applicants.<sup>29</sup> Deferred action status is a practice where the Immigration and Naturalization Service (“INS”) can use the power of prosecutorial discretion to

20. *Id.* at 116 app. B tbl.3 (citing Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986)).

21. *Id.*

22. *Id.* (citing Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996)).

23. PEW RESEARCH CTR., *supra* note 4, at 117 app. B tbl.3 (citing Secure Fence Act, H.R. 6061, 109th Cong. (2006)).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See Texas v. United States (Texas IV)*, 86 F. Supp. 3d 591, 604, 677 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d per curiam*, 136 S. Ct. 2271 (2016).

28. *Id.* at 610–11.

29. *See id.* The DACA policy was expanded to remove the age cap on eligible immigrants, extend the renewal and work authorization from two to three years, and adjust the date-of-entry requirement from 2007 to 2010. *Id.*

decline to deport an illegal immigrant for humanitarian reasons.<sup>30</sup> It is not authorized by statute but has been utilized by many administrations going back to the 1960s.<sup>31</sup> Of the estimated “11.3 million illegal immigrants residing in the United States, [this program would] apply to approximately 4 million people.”<sup>32</sup> In addition to the removal of the threat of deportation, deferred status also permits illegal immigrants work authorization so they can obtain employment legally.<sup>33</sup>

The states contended that the DAPA program amounted to “a significant change in immigration law” unilaterally instituted by the executive branch in violation of the separation of powers doctrine and “the Take Care Clause of the Constitution.”<sup>34</sup>

The issues before the court were as follows: (1) whether the states had constitutional standing to sue the federal government; (2) whether the DHS had the discretionary power to implement a program such as DAPA; and (3) “whether the DAPA program [was] constitutional, comport[ed] with existing laws, and was legally adopted.”<sup>35</sup>

### A. Standing

The court concluded that Texas had standing under Article III on the grounds that the state would suffer a direct economic injury when DAPA beneficiaries applied for driver’s licenses.<sup>36</sup> Applicants for a Texas license paid a fee of twenty-four dollars, while the real cost to the state was \$198.73.<sup>37</sup> Based on the number of estimated DAPA beneficiaries residing in Texas, the total losses could exceed several million dollars.<sup>38</sup> The court relied on the Ninth Circuit’s holding in *Arizona Dream Act Coalition v. Brewer* for the proposition that if Texas denied driver’s license applications from DAPA, the state was likely to face a successful Equal Protection Clause claim, as had Arizona in denying DACA beneficiaries’ driver’s licenses.<sup>39</sup> This left Texas with no real choice in incurring the economic injury.<sup>40</sup>

Additionally, the district court found that Texas had satisfied the requirements of prudential standing because it had not asserted a mere “generalized grievance,” and the claims were within the “zone of interests” protected by the immigration statutes.<sup>41</sup> It was the duty of the federal government to protect Texas from economic

30. See *id.* at 612–13.

31. See *id.* at 612 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999)).

32. *Texas IV*, 86 F. Supp. 3d at 612. The figure is based on a 2009 study from the Pew Research Center. *Id.* at 678 n.11.

33. *Id.* at 611.

34. *Id.* at 613–14. The states argued that President Obama changed the law because Congress had not passed the DREAM Act. *Id.*

35. *Id.* at 607.

36. See *Texas IV*, 86 F. Supp. 3d at 623–24.

37. *Id.* at 617.

38. *Id.* The court also noted that federal law required states to determine the immigration status of applicants for state identification cards or licenses under the REAL ID Act of 2015. This cost the states approximately \$.75 per applicant because they were required to use the Systematic Alien Verification for Entitlements (SAVE) system as they were required to do under federal law. *Id.*

39. *Id.* at 620.

40. *Id.* at 618 (citing *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014)).

41. *Texas IV*, 86 F. Supp. 3d at 624.

harm through enforcement of the immigration laws.<sup>42</sup> The DAPA program, itself a violation of the immigration laws, placed Texas within the zone of interests at the very heart of the immigration laws.<sup>43</sup>

Interestingly, the district court found that the states did not have the special standing to protect their sovereign interests under *Massachusetts v. EPA* because the indirect damages of having to provide additional health care, education, and law enforcement were not only speculative but not directly tied to DAPA.<sup>44</sup> They were rather the result of lax enforcement policies in general.<sup>45</sup>

The district court held that the plaintiff states had “abdication standing” because the government was refusing to enforce immigration laws.<sup>46</sup> The court compared the case to *Adams v. Richardson*, where the 1964 D.C. Circuit found standing based on the refusal of the Secretary of Health, Education, and Welfare to enforce the Civil Rights Act by continuing to fund schools that were in non-compliance with racial integration laws.<sup>47</sup>

Finally, the district court found that the plaintiffs met the standing requirements of the Administrative Procedures Act (“APA”) because DAPA was “a clear departure from the agency’s statutory authority” of immigration law enforcement.<sup>48</sup>

Having found the requisite standing in favor of at least one of the plaintiffs, Texas, on several grounds, the district court proceeded to the merits of the states’ arguments.<sup>49</sup>

## B. Merits of the Claims

The court opened its evaluation of the legality and constitutionality of DAPA with a discourse on prosecutorial discretion, noting that agency decisions to act or not to act were almost exclusively within the discretion of the executive branch.<sup>50</sup> However, the court noted that the states were not complaining of discretionary powers, but rather that the executive branch was itself legislating, and therefore intruding into the domain of Congress.<sup>51</sup>

Following that preamble, the court addressed the first element of the test for issuance of a preliminary injunction: the likeliness of success on the merits.<sup>52</sup>

Turning to the APA, the court noted that Section 702 allowed anyone suffering a legal wrong through agency action to obtain judicial review.<sup>53</sup> However, courts are prevented from conducting such review when agency action is “committed to agency

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42. *See id.*

43. *See id.*

44. *Id.* at 625.

45. *Id.* at 632 (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

46. *Id.* at 643.

47. *Texas IV*, 86 F. Supp. 3d at 642 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1964)).

48. *Id.* at 643 (citing *Manges v. Camp*, 474 F.2d 97, 99 (5th Cir. 1973)).

49. *Id.* at 644.

50. *Id.*

51. *Id.* at 646.

52. *Id.*

53. *Texas IV*, 86 F. Supp. 3d at 647 (citing 5 U.S.C. § 702 (1976)).

discretion by law.”<sup>54</sup> The court recognized that the Supreme Court held in *Heckler v. Chaney* that non-enforcement decisions were presumptively unreviewable.<sup>55</sup> However, in this instance, DAPA was not inaction; it was affirmative action to award legal presence to people who were subject to deportation under immigration law.<sup>56</sup> Thus, the presumption of unreviewability imposed by *Heckler* was not applicable.<sup>57</sup>

Yet, even if the presumption applied, it was sufficiently rebutted because “the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”<sup>58</sup> The immigration statutes had specific criteria for those subject to deportation, and DAPA recipients were clearly within the deportable categories.<sup>59</sup> Despite that command, DAPA granted them lawful presence in the United States with the freedom of travel, work authorization, and Social Security benefits.<sup>60</sup> The court found that the immigration laws did not provide the DHS with unlimited discretion to refuse to follow the law; instead, the DHS created its own law “from scratch” that was contradictory to the goals set by Congress.<sup>61</sup>

Next, the court turned to the plaintiffs’ claim that the DAPA memorandum was actually an agency rule subject to the rulemaking requirements of the APA, which requires that a general notice be published in the Federal Register and that interested parties be able to participate and comment on the proposed rule.<sup>62</sup> This is known as notice-and-comment rulemaking.<sup>63</sup> An exception to the rulemaking requirement is for “general statements of policy.”<sup>64</sup> Thus, the issue was whether the DAPA memorandum was a substantive rule requiring notice-and-comment procedures or a statement of policy, which was exempt.<sup>65</sup> The court noted that substantive rules are those “that award rights, impose obligations, or have other significant effects on private interests . . . .”<sup>66</sup> The judge characterized the government’s argument as “disingenuous,” listing the various times the DHS had called it a “program” and an “initiative.”<sup>67</sup> Further, the court even referred to a White House press release in which President Obama called it a change in the law.<sup>68</sup>

The court held that the DAPA memorandum created a binding set of specific eligibility requirements that “virtually extinguished” case officers’ discretion to deny DAPA status.<sup>69</sup> Consequently, the memorandum was a substantive rule that should have gone through the APA’s notice-and-comment rulemaking procedure rather than

54. *Id.* at 652 (citing 5 U.S.C. § 701(a)(2) (2011)).

55. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

56. *Id.* at 654.

57. *Id.* at 656.

58. *Id.* (citing *Heckler*, 470 U.S. at 832–33).

59. *Texas IV*, 86 F. Supp. 3d at 657.

60. *Id.* at 654.

61. *Id.* at 645, 663.

62. *Id.* at 664–65.

63. *Id.* at 665 (citing 5 U.S.C. § 553(b) (1966)).

64. *Id.*

65. *Texas IV*, 86 F. Supp. 3d at 665 (citing 5 U.S.C. § 553(b)(3)(A) (1966)).

66. *Id.* at 666 (citing *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 n.19 (5th Cir. 1995)).

67. *Id.* at 667.

68. *Id.* at 668.

69. *Id.* at 670.

in a general policy statement.<sup>70</sup> The plaintiffs had therefore proven a reasonable likelihood of success on the merits.<sup>71</sup>

The court also found the plaintiffs likely to suffer irreparable harm if the preliminary injunction were denied due to the millions of dollars in unrecoverable direct costs for providing driver's licenses.<sup>72</sup> "This genie will be impossible to put back in the bottle."<sup>73</sup>

Finally, "additional considerations suggest" that the government would not be overly burdened by being temporarily kept from implementing the policy.<sup>74</sup> The court declined to address the constitutional claims at that time and awarded the preliminary injunction prohibiting the implementation of the DAPA program and the expansion of DACA pending trial on the merits.<sup>75</sup>

### III. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

#### A. Motion for Stay

The first foray into the Fifth Circuit was the government's motion for a stay of the preliminary injunction pending appeal.<sup>76</sup> The panel of judges voted 2–1 to deny the motion for a stay.<sup>77</sup> Judges Smith and Elrod held that the government was unlikely to succeed on the merits on appeal and left the injunction in place.<sup>78</sup>

After reciting the facts of the case, the majority noted that the burden on the government was to show that the district court abused its discretion in entering its order.<sup>79</sup>

The majority found that the district court did not err in its determination of standing because Texas was likely to meet its burden of proof that it would suffer a financial loss in the issuance of the additional driver's licenses to DAPA beneficiaries.<sup>80</sup> Although the government argued that DAPA did not require Texas either to issue licenses or to subsidize them, the court observed that Equal Protection Clause concerns could force Texas to issue the licenses anyway.<sup>81</sup> Further, Texas would have to change its laws in order stop the subsidy.<sup>82</sup> The court held that being pressured to change state law was itself an injury that conferred standing.<sup>83</sup>

70. *Id.* at 671.

71. *Texas IV*, 86 F. Supp. 3d at 671–72.

72. *Id.* at 674.

73. *Id.* at 673.

74. *Id.* at 675.

75. *Id.* at 676–77.

76. *See Texas v. United States (Texas III)*, 787 F.3d 733, 743 (5th Cir. 2015).

77. *See id.* at 743, 769.

78. *Id.* at 743.

79. *Id.* at 747 (citing *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014)).

80. *Id.* at 748 (first citing *Texas IV*, 86 F. Supp. 3d at 617; and then citing *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473–74 (5th Cir. 2013); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 699 (5th Cir. 2011)).

81. *See id.* at 748–49.

82. *Texas III*, 787 F.3d at 749.

83. *Id.*



The government also argued that the cost of issuing driver's licenses would be offset by economic benefits, such as increased tax revenue.<sup>84</sup> The court gave short shrift to that approach, holding that the economic benefits do not arise from the same transaction, so they could not be considered.<sup>85</sup>

Unlike the district court, the Fifth Circuit found standing under *Massachusetts v. EPA*, holding that Texas's injury was "fairly traceable to the challenged action."<sup>86</sup> The court held that, while not directly regulating Texas, DAPA would have a "direct and predictable effect" on its driver's license program.<sup>87</sup> The court held that Texas was entitled to the "special solicitude" the Supreme Court granted Massachusetts in that case.<sup>88</sup> Further, since the injury alleged was easily "redressable by a favorable ruling," Texas had satisfied the standing requirement and the government's position was meritless.<sup>89</sup>

Under the APA zone of interests test, the court was satisfied that the interests of the states were within the ambit of the Immigration and Naturalization Act, and that the test was "easily satisf[ie]d."<sup>90</sup>

Nor did the court believe that judicial review was precluded by statute or that the action was committed to agency discretion by law, the exceptions to APA reviewability.<sup>91</sup> The court recognized that the decision not to deport an alien is an exercise of discretion that is unreviewable.<sup>92</sup> However, DAPA was much more—a grant of lawful presence with accompanying benefits—and that turned it from an unreviewable discretionary action into a reviewable action.<sup>93</sup>

The majority also upheld the district court's finding that DAPA modified substantial rights and interests, triggering notice-and-comment rulemaking under the APA because it conferred lawful presence on 500,000 illegal aliens in Texas alone.<sup>94</sup> Thus, the government had not shown a strong likelihood of success on the merits.<sup>95</sup>

Neither had the government demonstrated the possibility of irreparable injury, as opposed to the states that had shown a direct financial injury should DAPA be implemented.<sup>96</sup> Finally, the court rejected the assertion that the nationwide scope of

84. *Id.* at 750.

85. *See id.*

86. *Id.* at 751 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)).

87. *Id.* at 752.

88. *Texas III*, 787 F.3d at 752.

89. *Id.* at 753 (quoting *Clapper*, 133 S. Ct. at 1147).

90. *Id.* at 754.

91. *Id.* at 755 (first quoting 5 U.S.C. § 701(a) (2011); then quoting 8 U.S.C. 1252(g) (2005); and then citing *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897 (1984); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

92. *Id.* at 756 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)).

93. *Id.* at 758 (first quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936, 947 (1999); then quoting Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al., at 2 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf); and then quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

94. *Texas III*, 787 F.3d at 766 (citing *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984); *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701–03 (5th Cir. 1979)).

95. *Id.* at 767.

96. *Id.* at 767–68 (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2015)).

the injunction was an abuse of discretion.<sup>97</sup> The government argued that it should be limited to Texas or the plaintiff states.<sup>98</sup> However, the court decided that uniformity in the application of immigration law was preferred.<sup>99</sup>

The dissent, written by Judge Stephen A. Higginson, would have held that Fifth Circuit and Supreme Court precedent foreclosed review of the states' complaint.<sup>100</sup> In a prior immigration case, *Texas v. United States*, the Fifth Circuit held that the argument that the government had failed to enforce immigration law and failed to pay for the states' costs was not a reviewable matter under the APA.<sup>101</sup> Nor was lack of immigration enforcement an abdication of duties reviewable by a court.<sup>102</sup> Further, in *Heckler v. Chaney*, the Supreme Court unanimously ruled that prosecutorial discretion was unreviewable.<sup>103</sup>

The judge criticized the lower court's opinion on the basis that it confused the distinction between "lawful status" and "lawful presence."<sup>104</sup> Lawful status is a right conferred by statute to stay in the United States, while lawful presence is a temporary classification given over to the discretion of the DHS and does not change the permanent status of the immigrant.<sup>105</sup>

Judge Higginson believed that the case was nonjusticiable, with immigration law and policy given over to the political branches of government.<sup>106</sup>

## B. On Appeal

On the panel hearing the full appeal, Judge Higginson was replaced by Judge King, who also dissented in response to the majority opinion written by Judge Smith and joined in by Judge Elrod, the two judges who formed the majority on the motions panel.<sup>107</sup> In its forty-three-page opinion, the majority denied the appeal, finding that the states had properly asserted standing, had demonstrated the likelihood of success on the merits on the APA claims, and had otherwise met the requirements for an injunction.<sup>108</sup>

The court reiterated its prior finding that the states were entitled to the "special solicitude" standing of *Massachusetts v. EPA*, and therefore did not address other bases for standing.<sup>109</sup> The majority noted that in *Massachusetts v. EPA*, the

97. See *id.* at 768–69 (first quoting U.S. CONST. art. I, § 8, cl. 4; then quoting Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384; and then quoting *Arizona*, 132 S. Ct. at 2502).

98. See *id.* at 769.

99. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4).

100. *Texas III*, 787 F.3d at 769–70.

101. *Id.* at 770 (quoting *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997)).

102. *Id.*

103. *Id.* at 771 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

104. *Id.* at 774.

105. *Id.* at 774–75 (first quoting *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013); then quoting 8 U.S.C. § 1182(a)(9)(B)(ii) (2013); and then citing *Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013)).

106. *Texas III*, 787 F.3d at 776, 784 (first citing 5 U.S.C. § 701(a) (2011); *Perales v. Casillas*, 903 F.2d 1043, 1045–47 (5th Cir. 1990); and then citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

107. *Texas v. United States (Texas II)*, 809 F.3d 134, 146, 188 (5th Cir. 2015); *Texas III*, 787 F.3d at 743.

108. *Texas II*, 809 F.3d at 146.

109. *Id.* at 154–55.

procedural right to challenge EPA decisions was in the text of the Clean Air Act and provided the Court with the justification to find standing by the states.<sup>110</sup> The court noted that the procedural statute relied on in the present case was more attenuated because the APA did not specifically apply to immigration law.<sup>111</sup> However, the majority believed that because the DHS had taken affirmative action to bestow rights on illegal aliens, rather than the EPA's decision not to regulate, no similar procedural right was even necessary to support state standing.<sup>112</sup> The court again held that Texas had satisfied the standing requirement due to the cost of issuing driver's licenses,<sup>113</sup> that such injury was fairly traceable to DAPA,<sup>114</sup> and that the matter was redressable through an injunction.<sup>115</sup>

The majority again denied the government's claim that Section 701(a)(2) of the APA exempted such challenges from judicial review because deferral decisions were committed to agency discretion by law.<sup>116</sup> The court characterized DAPA as an affirmative decision to grant lawful presence with accompanying benefits, rather than a decision to refrain from prosecuting a deportation proceeding.<sup>117</sup>

Despite the discretionary language in the DAPA memorandum, the court was still not convinced it should be categorized as a policy statement, thereby exempt from the APA's notice-and-comment rulemaking procedures.<sup>118</sup> Like the district court, the appellate panel viewed the Agency's characterization with great suspicion, finding the statements regarding discretion to be "merely pretext" because so few applications for the previous program, DACA, had been denied.<sup>119</sup>

The court also found that DAPA did not qualify as a rule "of agency organization, procedure or practice" exempt from rulemaking procedures under Section 553(b)(A) of the APA.<sup>120</sup> The court applied the "substantial impact test" to determine that DAPA was not merely procedural in nature because it conferred lawful presence on a half-million residents of Texas, which would then have to spend millions on driver's licenses or undergo a change in the law.<sup>121</sup>

Remarkably, despite the fact that the district court had not ruled on the substantive APA claims,<sup>122</sup> the Fifth Circuit addressed them in its opinion, citing its

110. *Id.* at 151 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)).

111. *Id.* at 152 (first quoting 5 U.S.C. § 702 (2011); and then citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 694, 696 n.13 (10th Cir. 2009); *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241–42 (10th Cir. 2008)).

112. *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); 5 U.S.C. § 704 (1966)).

113. *Id.* at 149.

114. *Texas II*, 809 F.3d at 156.

115. *Id.* at 161.

116. *See id.*

117. *Id.* at 148–49.

118. *Id.* at 177.

119. *Id.* at 172; *Texas v. United States (Texas IV)*, 86 F. Supp. 3d 591, 613 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd per curiam*, 136 S. Ct. 2271 (2016).

120. *Texas II*, 809 F.3d at 176–77.

121. *Id.* at 176.

122. *See Texas IV*, 86 F. Supp. 3d at 677.

authority to “affirm the district court’s judgment on any grounds supported by the record.”<sup>123</sup> The court noted that the APA provided that the

reviewing court shall . . . hold unlawful and set aside agency action . . . found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.<sup>124</sup>

Further, under the *Chevron* Doctrine, a court reviewing an agency’s interpretation of a statute must first ask whether Congress already “addressed the precise question at issue.”<sup>125</sup> The court stated that Congress had already addressed the issue of what classes of immigrants could be “lawfully present” in the country, including those eligible for deferred action status.<sup>126</sup> Those classes did not include the 4.3 million illegal immigrants under DAPA, according to the court, who further analyzed immigration law to show that DAPA expanded on existing classifications of immigration law.<sup>127</sup> The court reasoned that if Congress had wanted to vastly increase the class of persons subject to deferred action, it would have done so expressly.<sup>128</sup> Even if Congress had not spoken directly to the issue, the court would strike down DAPA as “manifestly contrary” to the Immigration and Naturalization Act.<sup>129</sup> Finding no other error with the district court’s order, the Fifth Circuit affirmed the granting of the preliminary injunction.<sup>130</sup>

Judge King responded to the majority opinion with a scathing fifty-three page dissent in which she characterized the grant of the preliminary injunction as “a mistake,”<sup>131</sup> “clearly erroneous,”<sup>132</sup> “wrong,”<sup>133</sup> “dangerous precedent,”<sup>134</sup> “reversible error,”<sup>135</sup> without “precedent,”<sup>136</sup> “an abuse of discretion,”<sup>137</sup> and a “litany of errors.”<sup>138</sup> Similarly, the majority opinion was a “mistake”<sup>139</sup> and “misleading.”<sup>140</sup>

123. *Texas II*, 809 F.3d at 178 (citing *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (5th Cir. 2009)).

124. *Id.* at 178 (citing 5 U.S.C. § 706(2) (1966)).

125. *Id.* at 179 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

126. *See id.*

127. *Id.*

128. *See id.* at 181 (citing *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015)).

129. *See Texas II*, 809 F.3d at 181–82.

130. *Id.* at 186, 188.

131. *Id.* at 189.

132. *Id.* at 190.

133. *Id.*

134. *Id.* at 201.

135. *Texas II*, 809 F.3d at 207.

136. *Id.* at 208.

137. *Id.* at 213.

138. *Id.* at 214.

139. *Id.* at 217, 219.

140. *Id.* at 217.

The first point the dissent made related to the issue of prosecutorial discretion.<sup>141</sup> She noted that of the 11.3 million aliens subject to removal, Congress only provided the DHS with financial resources to deport approximately 400,000 per year.<sup>142</sup> Congress has generally left it up to the Secretary of the DHS “to [e]stablish national immigration enforcement policies and priorities.”<sup>143</sup> With limited funds to work with, the DHS followed the command of Congress to focus on removing aliens convicted of crimes.<sup>144</sup> Both DACA and DAPA represent a decision by the Secretary to place a category of deportable aliens on a lower priority status, a classic expression of prosecutorial discretion.<sup>145</sup>

As for standing, Judge King believed the majority misconstrued *Massachusetts v. EPA* by taking a single, isolated phrase from the case, “special solicitude,” and converting it into an unlimited expansion of state standing.<sup>146</sup> She noted that standing was found in that case because of a provision of the Clean Air Act that gave standing to challenge the EPA’s rulemaking decisions.<sup>147</sup> Neither the INA nor the APA gave such standing to the states.<sup>148</sup> She considered this decision to be a “breathtaking expansion of state standing” with “no principled limit.”<sup>149</sup> She also dismissed the assertion that an incidental increase in driver’s license fees was sufficient to constitute an injury-in-fact for standing purposes because Texas had voluntarily decided to underwrite the cost of all driver’s licenses and had voluntarily allowed immigrants with deferred action status to apply for them.<sup>150</sup> Any “pressure to change state law” had been manufactured by the litigants for this case.<sup>151</sup>

The dissent agreed with the analysis of the prior dissenter, Judge Higginson, concluding that the matter was simply nonjusticiable because the DAPA memorandum was simply a matter of enforcement discretion unreviewable under the APA.<sup>152</sup> The DAPA memorandum did not itself confer any rights or benefits.<sup>153</sup> For example, the work authorization was provided by a separate regulation that had been in force since the 1980s, which had been promulgated using notice-and-comment rulemaking under the APA.<sup>154</sup> Further, the majority’s conclusion that “lawful presence” constituted a benefit was misplaced.<sup>155</sup> She pointed out that “lawful status” created a protected legal right, while “lawful presence” was merely the “exercise of discretion by a public official.”<sup>156</sup> She observed that the proper resolution of the case

141. *Texas II*, 809 F.3d at 188.

142. *Id.*

143. *Id.* at 190 (citing 6 U.S.C. § 202(5) (2016) (internal quotes omitted)).

144. *Id.* (citing Dep’t of Homeland Sec. Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015)).

145. *Id.*

146. *Id.* at 193, 195.

147. *Texas II*, 809 F.3d at 193 (citing *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)).

148. *Id.*

149. *Id.* at 194–95 (quoting a 1993 law review article written by Chief Justice Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993)).

150. *Id.* at 195.

151. *Id.*

152. *Id.* at 196.

153. *See Texas II*, 809 F.3d at 196.

154. *See id.* at 197–98 (citing 8 C.F.R. § 274a.12(c)(14) (2016)).

155. *Id.* at 199.

156. *Id.* (citing *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013)).

was through the political process because it was simply a dispute over immigration policy.<sup>157</sup> She noted, as had Judge Higginson, that the dozens of amicus briefs filed by politicians and law enforcement officials reflected the political nature of the dispute, and even the district court opinion reflected dissatisfaction with the immigration system.<sup>158</sup> This, despite the fact that there had been a record number of deportations under the Obama Administration.<sup>159</sup>

The dissent next addressed the procedural claim under the APA, suggesting that the starting point in the analysis was the memorandum creating DAPA itself, which stated ten times that determinations of deferred action status were to be made on a case-by-case basis.<sup>160</sup> The amount of discretion given to the case officers reflected its status as a statement of policy rather than a substantive rule subject to notice-and-comment procedures.<sup>161</sup> The district court also committed reversible error in its factual conclusion that the discretionary language in the DAPA memorandum was merely “pretext” because DAPA had yet to be implemented, so there was no factual support for that conclusion.<sup>162</sup> The dissent also found it unprecedented that the district court would rely on the President’s press releases and the DAPA website to support its conclusions that DAPA was a substantive rule.<sup>163</sup>

Judge King also found that there were sufficient conflicts in the evidence, as reflected in the affidavits, and that the district court had abused its discretion in failing to hold an evidentiary hearing.<sup>164</sup>

The dissent also voiced an objection to the majority’s address of the substantive APA claim when the district court had not based its decision on that issue, nor had the issue been adequately briefed on the appellate level.<sup>165</sup>

The dissent noted that the majority had misapplied the *Chevron* test, which requires courts to defer to an agency’s interpretation of a statute if it is reasonable.<sup>166</sup> The majority erred in finding that Congress had already addressed the issue of deferred action by creating “lawful immigration classifications,” including some grants of deferred action.<sup>167</sup> However, Congress had not “directly spoken to the precise question at issue” in DAPA, so step one of the *Chevron* test was not satisfied.<sup>168</sup> The majority also erred in finding DAPA unreasonable under step two of the *Chevron* test because it did not conflict with any provision in the INA.<sup>169</sup> Therefore, DAPA was not a substantive violation of the APA.<sup>170</sup>

The dissent forcefully concluded that “a mistake has been made.”<sup>171</sup>

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157. *Id.* at 201.

158. *Id.* at 201–02.

159. *Texas II*, 809 F.3d at 202.

160. *Id.* at 203.

161. *See id.* at 203–04.

162. *Id.* at 207.

163. *Id.* at 208.

164. *Id.* at 212–13.

165. *Texas II*, 809 F.3d at 214–15.

166. *Id.* at 215.

167. *Id.*

168. *Id.* at 216 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984)).

169. *Id.* at 218.

170. *Id.*

171. *Texas II*, 809 F.3d at 219.

#### IV. THE SUPREME COURT

The United States filed a Petition for Writ of Certiorari on November 20, 2015, presenting three questions for review:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500, et seq., to challenge the Guidance because it will lead to more aliens having deferred action[;]
2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with the law[; and]
3. Whether the Guidance was subject to the APA's notice-and-comment procedures.<sup>172</sup>

The petition was granted on January 19, 2016, with the following order: “[T]he parties are directed to brief and argue the following question: Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, Sec. 3.”<sup>173</sup>

Justice Scalia passed away on February 12, 2016, leaving the Court with eight members.<sup>174</sup> After hearing oral arguments and receiving numerous amicus briefs, the Court issued a *per curiam* decision on June 23, 2016, which stated: “The judgment is affirmed by an equally divided Court.”<sup>175</sup>

On July 18, 2016, the United States took the unusual step of filing a Petition for Rehearing, citing instances in which the Court had granted rehearings following the death or vacancy of a Justice, such as Justice Cardozo's death in 1938.<sup>176</sup> The Petition for Rehearing was distributed for Conference on September 26, 2016.<sup>177</sup> The Petition was denied.<sup>178</sup>

172. *Texas II*, 809 F.3d 134, *petition for cert. filed*, <http://www.scotusblog.com/wp-content/uploads/2015/11/us-v-texas-petition.pdf>.

173. *Texas II*, 809 F.3d 134, *cert. granted*, *United States v. Texas* (No. 15-674), [https://www.supremecourt.gov/orders/courtorders/011916zor\\_15gm.pdf](https://www.supremecourt.gov/orders/courtorders/011916zor_15gm.pdf).

174. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

175. *United States v. Texas (Texas I)*, 136 S. Ct. 2271 (2016) (*per curiam*).

176. Petition for Rehearing at 2–3, *Texas I*, 136 S. Ct. 2271 (2016) (No. 15-674), <http://www.scotusblog.com/wp-content/uploads/2016/08/15-674-Petition-for-Rehearing.pdf>.

177. Proceedings and Orders at 4, *Texas I*, 136 S. Ct. 2271 (2016) (No. 15-674), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-674.htm>.

178. *United States v. Texas*, 137 S. Ct. 285 (2016).

## V. THE SCHOLARLY DEBATE

While the matter was pending before the Supreme Court, fifty-one amicus briefs were filed with the Court.<sup>179</sup> However, two briefs merit particular attention, both in support of the petitioners.

Professor Walter Dellinger “is the Douglas B. Maggs Professor Emeritus of Law at Duke University” and a noted scholar in administrative law.<sup>180</sup> Professor Dellinger noted at the outset that immigration issues were at the forefront of the current presidential election campaign as “one of the most divisive, ideologically charged questions of our day.”<sup>181</sup> He thought there was only one answer to the question of whether the case should be heard by the federal judiciary, and that was a resounding “no.”<sup>182</sup> Rather, the resolution had to be left to the political process.<sup>183</sup> He also worried that the precedential value of the case would open the door to future state challenges to federal action that had no place within the court system.<sup>184</sup> Further, the “novel theory of APA review would likewise place the courts in a supervisory status over a wide range of discretionary executive decisions, without any meaningful standards for evaluating them.”<sup>185</sup>

The second submission worth noting was the Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners, filed by twelve administrative law scholars at the finest law schools in America, including Harvard, Yale, Michigan, and Columbia.<sup>186</sup> They noted that the DAPA memorandum merely represented “the formalization of the DHS’s policy with respect to the agency’s exercise of statutory enforcement discretion” that did not create legal rights or obligations.<sup>187</sup> As a general policy statement, it was exempt from notice-and-comment rulemaking procedures under Section 553 of the APA.<sup>188</sup> They noted several errors on the part of the Fifth Circuit, including the mistaken assumption that the DAPA memorandum was rulemaking because it did not leave employees free to exercise discretion in administering the policy.<sup>189</sup> In fact, the very purpose of a policy statement is to bind lower level agency officials so the agency policies are

179. Proceedings and Orders at 4, *Texas I*, 136 S. Ct. 2271 (2016) (No. 15-674), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-674.htm>.

180. Brief for Walter Dellinger as Amici Curiae Supporting Petitioners, *Texas I*, 136 S. Ct. 2271 (2016) (No. 15-674), <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674-tsac-Dellinger.pdf>.

181. *Id.* at 3.

182. *Id.* at 4.

183. *Id.*

184. *Id.*

185. *Id.*

186. Brief for Administrative Law Scholars as Amici Curiae Supporting Petitioners, *Texas I*, 136 S. Ct. 2271 (2016) (No. 15-674), <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacAdminLawScholars.pdf>. (Amici included: Daniel A. Farber, U.C. Berkley; Michael Herz, Cardozo School of Law; Ronald M. Levin, Washington University School of Law; Jerry L. Mashaw, Yale Law School; Nina A. Mendelson, University of Michigan Law School; Gillian E. Metzger, Columbia Law School; Anne O’Connell, U.C. Berkley School of Law; Richard J. Pierce, Jr., George Washington Law School; Susan Rose-Ackerman, Yale Law School, Kevin M. Stack, Vanderbilt Law School, Peter L. Strauss, Yale Law School; and Adrian Vermeule, Harvard Law School).

187. *Id.* at 3.

188. *Id.* (citing 5 U.S.C. § 553(b)(A) (1966)).

189. *Id.* at 3–4.



followed.<sup>190</sup> To require notice-and-comment rulemaking every time an agency head provides guidance to employees would impair the ability of agencies to function effectively.<sup>191</sup>

The Fifth Circuit further erred in applying the “substantial impact test” as a basis for requiring notice-and-comment rulemaking.<sup>192</sup> Nothing in the APA can be read to require such a test, which would effectively nullify the existing APA exemptions to rulemaking.<sup>193</sup> Policy statements naturally have “practical effects” on the public, without creating legal rights and obligations that are the basis for requiring rulemaking procedures.<sup>194</sup>

Neither does the ability of deferred action designees to seek work authorization convert the DAPA memorandum into a substantive rule.<sup>195</sup> That right was the result of a 1987 regulation that did go through the rulemaking procedures.<sup>196</sup> The academics further warned that the Fifth Circuit was improperly adding procedural layers to the APA.<sup>197</sup>

Not all administrative law scholars support the government’s position. In an interesting symposium held online at the SCOTUSblog.com website, many different views have been exchanged.<sup>198</sup>

For example, John Eastman of Chapman University School of Law observed that three constitutional issues raised by the DAPA policy were troubling.<sup>199</sup> First, the INS statute employs the word “shall” to mandate removal of all illegal aliens from the United States.<sup>200</sup> That removes the discretion of the INS to implement deferred action.<sup>201</sup> Second, that there is a significant difference between the exercise of prosecutorial discretion in individual cases and the “impermissible wholesale suspension of the law.”<sup>202</sup> Third, the President’s decision is more than one not to prosecute, but the granting of lawful presence with associated benefits such as work authorization.<sup>203</sup> However, the INA prohibits the employment of “unauthorized aliens” who are defined as those who are not “lawfully admitted for permanent residence.”<sup>204</sup> Thus, the Administration is actually violating the INA with the DAPA program.<sup>205</sup>

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190. *Id.* at 4.

191. *Id.*

192. Brief for Administrative Law Scholars as Amici Curiae Supporting Petitioners, *supra* note 186, at 4.

193. *Id.* at 5 (citing 5 U.S.C. § 553(b)(A) (1966)).

194. *Id.* at 4–5.

195. *Id.* at 5.

196. *Id.* (citing Control of Employment of Aliens, 8 C.F.R. § 274a (2016)).

197. *Id.* (citing *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015)).

198. See *United States v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-texas/> (last visited Oct. 14, 2016).

199. John Eastman, *Symposium: Barack Obama Is Not King*, SCOTUSBLOG (Feb. 11, 2016, 1:19 PM), <http://www.scotusblog.com/2016/02/symposium-barack-obama-is-not-king/>.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Eastman, *supra* note 199.

Jay Sekulow, Chief Counsel for the American Center for Law and Justice, argues that President Obama “was correct when he said he ‘changed the law.’”<sup>206</sup> However, it was an unconstitutional, unilateral action that violated the Take Care Clause.<sup>207</sup> Sekulow describes DAPA as “an extra-legislative reincarnation of the DREAM Act, which Congress has repeatedly refused to enact.”<sup>208</sup>

Richard Samp, Chief Counsel of the Washington Legal Foundation, supports the assertion that DAPA creates a substantive rule under the APA because it instructs subordinates how to carry out immigration law with regard to a specific set of unauthorized aliens.<sup>209</sup> A general policy statement, on the other hand, merely informs the public of how the agency intends to enforce the law in the future.<sup>210</sup>

Dan Stein, President of the Federation of American Immigration Reform, believes that the Obama Administration has shirked its duty to enforce immigration laws, and by substituting its own policies in their place, has rendered meaningless the powers vested in Congress by the Constitution.<sup>211</sup>

Jonathan Adler, of Case Western Reserve University School of Law, probably best summed it up when he commented that “legal and political commentators tended to split along ideological lines. Progressives generally supported the president’s authority to take broad unilateral actions; conservatives generally opposed.”<sup>212</sup> This leads us to the premise of this article, which is the political nature of the immigration debate.

## VI. THE POLITICS

One aspect of this case that has received little attention is the political alignment of the judges who have been involved in the proceedings. A closer look demonstrates that the judges have split along the familiar conservative/progressive divide. For example, Judge Hanen was appointed to the federal bench by President George H.W. Bush in 1992, but his nomination lapsed when President Clinton took office.<sup>213</sup> He was again nominated by President George W. Bush in 2002 and assumed duties as a federal district judge for the Southern District of Texas with chambers in

206. Jay Sekulow, *Symposium: Constitutional Limits of Presidential Power—Changing the Law or Enforcing It*, SCOTUSBLOG (Feb. 8, 2016, 10:09 AM), <http://www.scotusblog.com/2016/02/symposium-constitutional-limits-of-presidential-power-changing-the-law-or-enforcing-it/>.

207. *Id.*

208. *Id.*

209. See Richard Samp, *Symposium: The Government’s Violation of the APA’s Notice-and-Comment Requirements Provides a Simple Solution to a Thorny Case*, SCOTUSBLOG (Feb. 10, 2016, 11:04 AM), <http://www.scotusblog.com/2016/02/symposium-the-governments-violation-of-the-apas-notice-and-comment-requirements-provides-a-simple-solution-to-a-thorny-case/>.

210. See *id.*

211. Dan Stein, *Symposium: Why United States v. Texas Is the Most Important Case the Court Will Decide this Year*, SCOTUSBLOG (Feb. 9, 2016, 9:55 AM), <http://www.scotusblog.com/2016/02/symposium-why-united-states-v-texas-is-the-most-important-case-the-court-will-decide-this-year/>.

212. Jonathan Adler, *Symposium: Tripped Up by a Tie Vote*, SCOTUSBLOG (June 24, 2016, 7:41 AM), <http://www.scotusblog.com/2016/06/symposium-tripped-up-by-a-tie-vote/>.

213. See *Biographical Directory of Federal Judges, Hanen, Andrew S.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2931&cid=999&ctype=na&instate=na> (last visited Oct. 15, 2016).

Brownsville, Texas.<sup>214</sup> A reading of his opinion in *Texas v. United States* shows a very strong bias against Obama immigration officials, as noted in an excellent article by Anil Khan of Drexel University Law School.<sup>215</sup> He writes: “Drawing more from the political discourse surrounding the deferred action initiatives than from sound legal principles, the ruling highlights an erosion of the conventional lines between litigation, adjudication, and public discourse in politically salient cases . . . .”<sup>216</sup> Khan notes that Judge Hanen attacked the Obama Administration’s immigration policies and officials in other cases as well, so that by 2014 he had “excoriated the Obama administration’s policymaking officials for the manner in which they established enforcement priorities, issued administrative guidance, implemented policies, and exercised prosecutorial discretion.”<sup>217</sup> Judge Hanen’s open hostility to the Administration was again on display in the current case when, believing that Department of Justice attorneys had lied to him about the number of DAPA beneficiaries who had already been processed, he ordered the entire Justice Department staff of as many as 3000 Justice Department attorneys, within twenty-six states, to complete mandatory ethics training.<sup>218</sup> He later stayed his own order.<sup>219</sup> This is hardly the nonpartisan hearing expected in a federal court.

On the appellate level, the judges of the Fifth Circuit were polite to each other on the surface before plunging in the knives.<sup>220</sup> However, the judges also split along ideological lines. The author of the motions panel opinion and the full appeal was Judge Jerry Smith, a Reagan appointee in 1987,<sup>221</sup> while the other judge in the majority, Judge Jennifer Elrod was a G.W. Bush appointee in 2007.<sup>222</sup> The dissenter in the motions panel decision was Judge Stephen A. Higginson, appointed by President Obama in 2011,<sup>223</sup> and the dissenter on the full appeal was Judge Carolyn King, appointed by President Carter in 1979.<sup>224</sup>

As for the Supreme Court, the *per curiam* decision did not reveal how the Justices voted, only that there was a 4-4 split.<sup>225</sup> One can assume that was also

214. *Id.*

215. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015).

216. *Id.* at 64.

217. *Id.* at 81.

218. Debra Cassens Weiss, *Judge Who Required Ethics Training for Possibly 3,000 DOJ Lawyers Stays His Order*, ABA J. (June 8, 2016), [http://www.abajournal.com/news/article/judge\\_who\\_required\\_ethics\\_training\\_for\\_possibly\\_3000\\_doj\\_lawyers\\_stays\\_his](http://www.abajournal.com/news/article/judge_who_required_ethics_training_for_possibly_3000_doj_lawyers_stays_his).

219. *Id.*

220. “Our dedicated colleague has penned a careful dissent, with which we largely but respectfully disagree. It is well-researched, however, and bears a careful read.” *Texas v. United States (Texas II)*, 809 F.3d 134, 146 n.5 (5th Cir. 2015), *aff’d per curiam*, 136 S. Ct. 2271 (2016).

221. *Biographical Directory of Federal Judges, Smith, Jerry Edwin*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2219&cid=999&ctype=na&instate=na> (last visited Oct. 15, 2016).

222. *Biographical Directory of Federal Judges, Elrod, Jennifer Walker*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3159&cid=999&ctype=na&instate=na> (last visited Oct. 15, 2016).

223. *Biographical Directory of Federal Judges, Higginson, Stephen Andrew*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3400&cid=999&ctype=na&instate=na> (last visited Oct. 15, 2016).

224. *Biographical Directory of Federal Judges, King, Carolyn Dineen*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1963&cid=999&ctype=na&instate=na> (last visited Oct. 15, 2016).

225. *See United States v. Texas (Texas I)*, 136 S. Ct. 2271, 2272 (2016) (*per curiam*).

reflective of the standard liberal/conservative divide that has plagued the Court in recent years.

The irony is that when a Republican President is in power, the abuse of the executive discretionary power is bemoaned by Democrats and when a Democrat is in power, the reverse is true. We now have President Trump, who would use his executive discretion to deport as many undocumented aliens as humanly possible.

Judges Higginson and King probably had the better argument that the case was nonjusticiable due to the political nature of the dispute. In the meantime, the split vote by the Supreme Court means that the preliminary injunction will stay in place until there is a full trial on the merits in Texas before a judge who has already indicated his disdain for the government's policies and legal positions, crushing the dreams of citizenship for millions of undocumented aliens and sending them back into the shadows of illegal status.