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## EXAMINING THE CONSTITUTIONALITY OF EXECUTIVE ORDERS: DACA, DAPA, AND THE TAKE CARE CLAUSE

*Seth R. Konopasek*<sup>1</sup>

In 2016, the Supreme Court granted certiorari to *Texas v US*, a suit alleging the unconstitutionality of President Obama’s executive order known as Deferred Action for Parental Accountability, or DAPA. In their grant of certiorari they took the extraordinary step of adding a question to the case: “whether the guidance (DAPA) violates the Take Care Clause of the Constitution, Article II, section 3.”<sup>2</sup> The Take Care Clause is one of two clauses in the Constitution that grant the President power to enforce the laws Congress passes and is also one of the sources of authority for Presidential executive orders. It reads, “[the President] shall take Care that the Laws be faithfully executed.”<sup>3</sup> The inclusion of this additional question by the Court indicates that they were poised to rule on more than just DAPA as an administrative act; they were ready to rule on the scope of power granted by the Take Care Clause and constitutionally permissible presidential powers—issues that have not been addressed by the Court since 1952 in *Youngstown Sheet and Tube Co. v. Sawyer*.<sup>4</sup> Unfortunately, the ruling on the case (*Texas v.*

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- 1 Seth Konopasek is a senior at Brigham Young University, studying American Studies, and will be entering law school upon graduation. He would like to thank Mackenzie Cannon for her invaluable contributions, particularly in the research and formation of this paper.
  - 2 *United States v. Texas*, 579 US \_\_ (2016) (No. 15-674), *cert. granted*.
  - 3 U.S. CONST. art. II, § 3.
  - 4 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952).

US) was deferred due to the death of Justice Antonin Scalia, and the Court issued a per curiam opinion affirming the judgment of the Circuit Court and made no comment on the issues raised, including their added question about the Take Care Clause.<sup>5</sup> Although this decision was deferred, the question remains whether DAPA violates the Take Care Clause of the constitution.

In the meantime, our presidents will continue to frequently issue executive orders, and as long as the scope of presidential power is unclear, the potential for abuse remains because of the profound effect of these executive actions on the laws, policies, and politics of our nation. A clear definition of the scope of presidential authority to issue executive orders is needed to ensure that the power to do so is not abused and that the various parts of our government are fulfilling and abiding their Constitutional duties and powers. This paper will outline how the Supreme Court should respond to questions regarding powers derived from the Take Care Clause when they do arise again.

I propose that the Court should adopt the following standard: in the event of extended congressional inaction towards a certain area of the law, where it is generally accepted that action is needed, the Take Care Clause of the Constitution may grant the president limited power to enact supplemental policies in his pursuit to faithfully execute the law. All such presidential action in this realm should be constrained by three requirements: 1) the action must not directly contravene the express or implied will of Congress, 2) it must not effectively rewrite or change the law, and 3) it must actually achieve a legitimate government interest.

Section I outlines the history of unilateral executive action. Section II provides a discussion on both DAPA and DACA and evaluates the potential issues found within those policies as they relate to the Take Care Clause of the constitution. Next, in Section III I provide, based upon the principles identified in the previous section, a three part framework that defines when the Take Care Clause grants the president power to enact supplemental policies.

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5 *United States v. Texas*, 579 US \_\_ (2016).

Section IV evaluates the proposed framework in both historical and hypothetical cases that show when and how executive orders may be used in accordance with the Take Care Clause.

### I. BACKGROUND AND HISTORICAL PRECEDENTS

The debate over the scope of presidential powers is even older than the Constitution itself. It is clear from the notes of the founders that they did not intend for the presidency to be a law-making office;<sup>6</sup> however, in order to be an effective enforcer of the laws, he must be more than a figurehead—the president must have some power to fulfill the purpose of his office. The Constitution is vague in identifying what exactly those powers are; the two clauses that grant the president the power to execute the laws merely reads, “The executive Power shall be vested in a President of the United States of America... he shall take Care that the Laws be faithfully executed.”<sup>7</sup> These words vexed the scholars of the day, leading one to write of the Take Care Clause in 1787, “But was ever a commission so *brief*, so *general*, as this of our President?”<sup>8</sup> In 1803, another scholar observed that, even though at one point it was doubted that the president could issue anything resembling a proclamation of the crown, “both houses of congress appear to have recognized the

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6 One of the first issues discussed at the 1787 Constitutional Convention was the nature of the executive branch. Most of the delegates agreed that the executive branch’s key role should be to enforce the laws passed by the legislature. James Wilson followed other delegate’s comments to that effect by saying that “the only powers he conceived strictly Executive were those of executing the laws and appointing officers.” See JAMES MADISON, NOTES ON THE CONSTITUTIONAL CONVENTION, (Jun. 1, 1787) ACCESSED AT THE AVALON PROJECT, YALE LAW SCHOOL. [http://avalon.law.yale.edu/18th\\_century/debates\\_601.asp](http://avalon.law.yale.edu/18th_century/debates_601.asp).

7 U.S. Const. art. II, § 3.

8 Herbert J. Storing, *The Complete Anti-Federalist*. 7 vols. CHICAGO: UNIVERSITY OF CHICAGO PRESS, 1981.

power as one that may be constitutionally exercised by him.”<sup>9</sup>

Modern scholarly discussion of the Take Care Clause primarily centers around the merits of presidential influence on regulatory enforcement of existing laws, including outright non-enforcement.<sup>10</sup> While these discussions are somewhat related to questions regarding the validity of executive actions of the likes of DACA and DAPA, they do little to define the bounds of presidential power outside of regulatory contexts or traditional notions of prosecutorial discretion. Many executive actions, however, including DACA and DAPA, are more than just presidential influence on regulatory rulemaking or directives of non-enforcement—they are proactive actions. It is these kinds of presidential actions that the Court is manifestly interested in ruling on and that will be addressed in this paper.

Executive orders, whether called by that name or not, have always been a part of the office of the presidency. George Washington issued eight executive orders during his

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- 9 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 5 vols. Philadelphia, 1803. Reprint. South Hackensack, N.J.: Rothman Reprints, 1969.
- 10 For the leading thought on the Take Care Clause in these contexts, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293–95 (2005); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1661 (2004); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 107 (2000); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 3, 671-769 (2014); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1186-87 (2012); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 210 (2012).

two terms as president.<sup>11</sup> The Emancipation Proclamation issued by President Lincoln is also what contemporary politics would consider an executive order.<sup>12</sup> While proactive executive actions have always been present in our politics, the debate over the scope of presidential powers and the constitutionality of executive orders has accelerated during the last century, beginning with President Theodore Roosevelt. Since President Roosevelt, the number of executive orders issued by the executive branch has increased drastically, as has the controversy surrounding particular orders;<sup>13</sup> it was by executive order that President Franklin D. Roosevelt set up internment camps for Japanese-Americans during WWII and that President Truman moved to take over the nation's steel mills in 1952.<sup>14</sup>

The attempt by President Truman to seize the nation's steel mills led to the Supreme Court's premier case for deciding questions of presidential power.<sup>15</sup> President Truman had ordered the government seizure of almost all the nation's steel mills to prevent the workers at the mills from going on strike and halting the production of steel during wartime. The Court's decision ruled the seizure unconstitutional and each Justice released an opinion on the case. Since that decision, Justice Jackson's concurrence has formed the basis for the Court's additional

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- 11 Gerhard Peters & John T. Woolley, *Executive Orders*. THE AMERICAN PRESIDENCY PROJECT. ED. Santa Barbara, CA. (1999-2017), <http://www.presidency.ucsb.edu/data/orders.php>.
  - 12 For commentary on the constitutionality of the Emancipation Proclamation as an executive order via the Take Care Clause, see Henry L. Chambers, Jr. *Lincoln, The Emancipation Proclamation and Executive Power*, UNIV. OF RICHMOND, UR SCHOLARSHIP REPOSITORY (2013).
  - 13 NATIONAL ARCHIVES, EXECUTIVE ORDER DISPOSITION TABLES. Accessed at <https://www.archives.gov/federal-register/executive-orders/disposition>.
  - 14 EXEC. ORDER No. 9066, 7 FED. REG. 1407 (1942); EXEC. ORDER No. 10340 17 FED. REG. 3139 (1952).
  - 15 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952); see also EXEC. ORDER No. 10340 17 FED. REG. 3139 (1952).

rulings regarding presidential power. Justice Jackson outlined three tiers for evaluating the constitutionality of presidential action.<sup>16</sup> Presidential actions fall into the first tier when the president acts in concurrence with the will of congress, whether that will be expressed or implied. It is within this first tier that the president's power is at its maximum. The second tier is what Justice Jackson calls the "zone of twilight." He claims that if Congress has not made a rule in a certain area or if they are unable to reach a consensus on an issue, then the president has tentative power to act. If the president ever acts contrary to the will of Congress, his power is at a minimum, and that is the third tier as outlined by Justice Jackson. While the common consensus is that Justice Jackson's outline is the foremost precedent on the topic of presidential powers, his framework does little to lessen the ambiguity surrounding the meaning of the words "he shall take Care that the Laws be faithfully executed."<sup>17</sup>

Given the complicated and extensive history surrounding executive orders and presidential power, it should come as no surprise that when President Obama's created DACA in 2012 and its sister program DAPA, there was immediate backlash and cries of unconstitutional presidential overreach. The intent of the following sections is to evaluate DACA and DAPA through the lens of the Take Care Clause, the root of Presidential power. This analysis will create a framework and establish a standard by which executive orders can be evaluated.

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16 *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952) (Jackson, J., concurring).

17 The Court's repeated reliance on Justice Jackson's framework, particularly in recent years, demonstrates that it is the foremost precedent on the topic of presidential powers. See *Dames & Moore v. Reagan*, 453 US 654 (1981), *Hamdi v Rumsfeld*, 542 US 507 (2004), *Medellin v Texas*, 552 US 491 (2008), *NLRB v Noel Canning* 573 US \_ (2014), *Zivotofsky v. Kerry*, 576 US \_ (2015).

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## II. DAPA AND DACA

Immigration reform has long been a major issue in American politics. In his 2004 State of the Union address, President Bush said, “I ask Congress to reform our immigration laws.”<sup>18</sup> It has remained a major policy issue in American politics ever since, but Congress has yet to pass any meaningful reform.<sup>19</sup> In addition to the economic, social, and other benefits immigration reform would bring, this lack of action puts the president—whether it be Bush, Obama, Trump, or another—in a situation where it is impossible for them to enforce the law as it stands. As defined by the Immigration and Naturalization Act (INA), there are well over 11 million illegal aliens in the United States who are required to be deported.<sup>20</sup> The amount of money appropriated by Congress to the president to execute the law, however, is wildly insufficient—in 2014, the Department of Homeland Security (DHS) apprehended under 700 thousand illegal aliens and deported just over 162,000 of them.<sup>21</sup> Other analyses find that Congress appropriates enough money for about 400,000 deportations a year.<sup>22</sup> Regardless of the exact number, it is certain that at any given time there are over 10 million illegal

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18 George W. Bush, President of the U.S., State of the Union Address, (Jan 20, 2004), [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_012004.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html).

19 As of February, 2018.

20 Krogstad, Jens, Jeffrey S. Passel, and D’Vera Cohn, *5 Facts About Illegal Immigration in the US*, PEW RESEARCH CENTER (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>; see also 8 U.S.C. § 1227(a)(1)(A); *Id.* 1182(a)(6)(A).

21 U.S. DEP’T OF HOMELAND SEC., YEARBOOK 2014. TABLES 33, 39. Accessed at <https://www.dhs.gov/immigration-statistics/yearbook/2014/table33> and <https://www.dhs.gov/immigration-statistics/yearbook/2014/table39>.

22 Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. Rev. 105, 178 (2014).



aliens who are supposed to be deported but are not, and cannot be without a massive increase in manpower and funds. The INA has no caveats for this situation, no rules or guidelines for how the president should distribute the funds he is appropriated, nor for how to treat the 10 million people who will not be deported.

We can therefore see that the president—regardless of party or preference—is utterly incapable of enforcing US immigration law as written. Theoretically, Congress could fix this problem simply by appropriating a sufficient amount of money to the executive branch to enable the deportation of all 11 million illegal aliens. Congress could also remedy the situation by instituting immigration reform, such as the 2012 Gang of Eight proposal.<sup>23</sup> A solution, however, is highly unlikely to pass Congress anytime soon. In an attempt to address the problem, President Obama implemented DACA in 2012, which allows illegally present individuals to register for “deferred action” if they were brought to the US under the age of sixteen, have no criminal record, and meet several other criteria.<sup>24</sup> Once registered, DACA beneficiaries were able to apply for work authorization permit and receive a driver’s license in most states.<sup>25</sup> A grant of deferred action lasted two years but could be revoked at any time. In 2014, Obama implemented DAPA, which granted the same benefits to illegally present adults who have a US citizen or

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23 The “Gang of 8” was a bipartisan group of Senators who wrote a bill which would have been a comprehensive reform of the American immigration system. It passed the Senate but failed in the House. See *Gang of Eight*, POLITICO, <https://www.politico.com/news/gang-of-eight/1>.

24 Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayoral, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (Jun. 15, 2012) (on file with the Dep’t of Homeland Sec.).

25 *Id.*

legal permanent resident child.<sup>26</sup> Once again, a grant of deferred action lasted two years and could be revoked at any time.<sup>27</sup>

### *A. Why DACA is Constitutional*

The defining factor of Justice Jackson's three tiers is presidential action in relation to explicit or implied congressional will, with the "twilight zone" existing in realms where there is no discernable congressional will. The current state of US immigration law, as discussed above, not only lacks explicit statutory guidance in the case of insufficient funds, but also gives no discernable congressional will to follow or take cues from. Thus, according to Justice Jackson, the presidential action of DACA was "enabled, if not invited" by Congress' inaction.

Some might argue that the lack of congressional action, specifically the lack of express authorization for DACA or a similar program, implies congressional disapproval of the program. Such an argument, however, is only possible by taking a superficial analysis of Congress and the legislative history of failed immigration bills. In a more in-depth look, we find that a markedly similar program to DACA passed the Senate with 68 votes and only failed in the House by 12 votes. This analysis demonstrates that Congressional will is mixed, but that if it does lean one way, it leans towards the authorization of DACA. In any case, the lack of clear congressional will for Presidential action one way or the other "invites" and "enables" Presidential action, such as DACA.

This analysis of congressional will, in combination with "congressional inertia, indifference, or quiescence," is all that is required of Justice Jackson's "twilight zone" method of determining presidential power. The inadequacy of this standard

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26 Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Actin Dir., U.S. Immigration & Customs Enforcement, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014) (on file with the Dep't of Homeland Sec.).

27 *Id.*

is manifest most strongly by the Supreme Court's added question in *Texas v US*: "whether the guidance (DAPA) violates the Take Care Clause of the Constitution, Article II, section 3." In acknowledging that Justice Jackson's method would not be satisfactory, the Court pointed to the constitutional root of the "twilight zone" and a potential source of presidential power—the Take Care Clause. I argue that the Take Care clause does affirmatively grant the president additional authority to "faithfully execute" the law, making DACA a valid exercise of presidential authority.

In addition to operating in the face of no Congressional will, DACA is constitutional because it did not effectively alter the existing law. DACA did not change the legal status of its beneficiaries nor the directed action against them—it did not grant amnesty, citizenship, or permanent legal status, or even temporary legal status. Although registration under DACA did come with a promise not to be deported, it was not a binding declaration of law; the promise could have been, and indeed was, nullified in 2017 when President Trump repealed the program.<sup>28</sup> The very name of the program, which begins "deferred action for...", acknowledges that their presence is illegal and that they were supposed to be deported. Unlike lawfully present persons, DACA beneficiaries are not eligible for most government benefits, such as financial aid, Medicare, Obamacare, housing vouchers, welfare, food stamps, or social security.<sup>29</sup> Not only are they ineligible for these benefits, but if they obtain a job through their new work authorization, they pay taxes that

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28 See Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James C. McCament, Acting Dir., U.S. Citizenship and Immigration Serv., Thoman D. Homan, Acting Dir., U.S. Immigration and Customs Enforcement, Kevin K. McAleenman, Acting Comm'r., U.S. Customs & Border Prot., Joseph B. Maher, Acting General Coun., Ambassador James D. Nealon Asst. Sec'y, Internat'l Engagment, and Julie M. Kirchner, Citizenship and Immigration Services Ombudsman (Sep. 5, 2017) (on file with the Dep't of Homeland Sec.).

29 James R. Edwards Jr. *What DACA Ordered*, CENTER FOR IMMIGRATION STUDIES. (Oct. 18, 2012), <https://cis.org/Memorandum/What-DACA-Ordered>.

fund government programs that they cannot participate in.

The implementation of DACA did not wholesale enact the failed legislative proposal referenced earlier, either. Though they are extremely similar, the legislative version eventually granted beneficiaries permanent legal status—it actually changed the law. When implemented by executive power, DACA did not include this provision; it was not a pathway to permanent legal status. We thus see that in enacting DACA, the President purposefully did not impede on Congress' power to make the laws. Had DACA effectively changed the law, perhaps by granting its beneficiaries permanent legal status or welfare benefits, it would not be able to stand as a valid use of Presidential Take Care power. But it did not, and thus is a valid implementation of the Take Care clause.

Even if DACA was never implemented, the enforcement priorities of the Obama administration virtually guaranteed that its beneficiaries would not have been targeted for deportation.<sup>30</sup> Therefore, DACA did nothing to change its beneficiaries' relationship to the law—even without DACA, they were going to remain in the country. In other words, the implementation of DACA was not a changing of the law; instead, it was an administrative program to aid the President in his enforcement of it. And because it was administrative, and not an effective changing of the law, it did not disqualify itself from being a valid use of Presidential power enabled by the Take Care clause.

Finally, DACA was constitutional because it was effective in mitigating the problems created by congressional inaction. Because of the state of US immigration law, the beneficiaries of DACA were already in the country and were not going to leave, whether by force or choice, before its implementation. Despite their presence, they were unable to participate in many of the basic activities that their peers participate in—things like driving, attending college, and even getting a job. Because of

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30 Muzaffar Chishti, Sarah Pierce, and Jessica Bolter, *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POLICY INSTITUTE, (January 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

DACA, they are now employed and educated; studies have found that over 97% of DACA beneficiaries are employed or enrolled in school.<sup>31</sup> With over 800,000 people served by DACA, their economic contributions are not insignificant: 65% purchased their first car,<sup>32</sup> 16% purchased their first home, and 18 of the top 25 Fortune 500 companies employ DACA recipients<sup>33</sup>. It is estimated that, if DACA were maintained, that its beneficiaries would contribute \$460.3 billion to the economy in the next decade.<sup>34</sup> In addition to these positive effects, DACA also prevented negative effects—without the option of a well-paying job, it is possible that many of these same beneficiaries would have turned to crime and the black market for a way to make a living.

Just because DACA was good for society does not automatically make it a valid exercise of presidential Take Care Clause power. However, given the of dysfunctional state of the law and the lack of Congressional will to guide the president in his duty to execute the law, President Obama was enabled by the Take Care Clause to take steps to ensure the “faithful” execution of the law. Surely, any action taken under the Take Care Clause must objectively benefit the country to qualify as being “faithful.” DACA does provide tangible benefits to society, and thus qualifies as “faithful” and is, again, not disqualified from being a valid use of presidential Take Care Clause power.

That said, if DACA contravened the will of Congress or changed the law, it would be automatically disqualified from consideration as a Take Care Clause power despite its positive societal benefits. But because it does not disqualify itself in these ways, and it because it does provide benefit to the

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31 Tom K. Wong, et al., *DACA Recipients' Economic and Educational Gains Continue to Grow*, CENTER FOR AMERICAN PROGRESS, (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

32 *Id.*

33 *Id.*

34 *Id.*

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country, it is a constitutional exercise of Take Care Clause power.

### *B. Why DAPA is not Constitutional*

The implementation of DAPA arose from the same accepted need for action—and congressional inaction—in the realm of immigration reform that precipitated DACA. As noted above, it was also substantively very similar to DACA, with the largest difference being who its beneficiaries are. This distinction in beneficiaries is crucial for constitutional analysis under the Take Care Clause. DAPA beneficiaries actively broke the law in becoming illegal aliens, whereas DACA beneficiaries became de facto aliens by no fault of their own. Because DACA beneficiaries did not break the law themselves, and because the INA does not contain any explicit or implied guidance regarding children who were brought to the US illegally, it can be said that DACA did not effectively rewrite the INA but was an administrative program. I can make no such claim for DAPA. The INA provides explicit rules regarding adults who immigrate illegally.<sup>35</sup> This explicit guidance precludes DAPA, for the allowance of work permits and other benefits to DAPA beneficiaries directly contradicts the existing law and the implied will of Congress. Although DAPA was not a grant of permanent legal status or amnesty, and although it also would bring societal benefits, it contravened the will of congress and effectively changed the law, disqualifying it as a valid use of presidential power through the Take Care Clause.

## III. THE STANDARD

Thus far, I have examined the constitutionality of the executive actions DACA and DAPA through the lens of the Take Care Clause. In this section, I explicitly distill the principles of these arguments into a framework that could be adopted by the Court and applied to all cases regarding presidential

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35 8 U.S.C. § 1227(a)(1)(A); *Id.* 1182(a)(6)(A).

power and authority. Our analyses addressed five points. First, I outlined the need for congressional action in the realm of immigration reform. Second, I discussed the lack of congressional action, allowing the problem to continue unaddressed and precipitating DACA and DAPA. Third, I examined how both DACA and DAPA do not contravene the express or implied will of congress. Fourth, I found that DACA does not have the effect of rewriting the law, but that DAPA does effectively change the law. Finally, I discussed how DACA was effective at mitigating a real societal problem created by congressional inaction.

These points can be distilled into the following standard: when there is an accepted need for legislative action, but congress is unable to reach a consensus on how to move forward, presidential action to address the issue at hand may be enabled through the Take Care Clause. Such presidential action must not contravene the express or implied will of congress, must not effectively rewrite the law, and must be effective in mitigating the problem created by congressional inaction. This standard provides a judicially manageable framework for resolving questions of presidential power. In the following section, I apply it to several hypothetical scenarios to demonstrate how a court might apply the standard.

#### IV. TEST SUITES

In June of 2017 President Trump met with a group of tribal leaders at the White House. During a conversation about the possibility of drilling for oil on the Indian reservations the President said, “just do it.” The tribal leaders responded by reminding the president that there are numerous environmental regulations that prohibit them from drilling for the oil. To this the president responded by saying, “But now it’s me. The government’s different now. Obama’s gone, and we’re doing things differently here.”<sup>36</sup> These comments may be concerning

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36 Jonathan Swan, *Axios Sneak Peek: 1 big thing: Government of One*, AXIOS (Nov. 5, 2017), <https://www.axios.com/axios-sneak-peek-2506454912.html>.

in their own right, but they do not present a legal issue for the President. But suppose that President Trump were to take these words a step further and issue an executive order allowing Indian reservations to bypass existing laws to drill the oil that is on their land. It could be argued that such an order would serve a legitimate government interest by increasing economic prosperity on the reservations. Our framework for presidential power, however, would prohibit the president making such an action. There is nothing to suggest that there is a pressing need for the tribes to extract these resources, no situation that would require congress to address the problem immediately, nor is there a universally acknowledged need for congressional action. The lack of such situations precludes executive action under the Take Care Clause. Beyond that, such an order would be blatantly against the law of the land as enacted by Congress and, therefore, not a valid exercise of Take Care Clause power.

Recently, Saudi Arabia became the first nation to grant citizenship to a robot.<sup>37</sup> This action has created a lot of controversy on the world stage and presents a series of moral questions concerning the use of AI. If artificial intelligence has the right to be granted citizenship, then how do their rights compare to those of humans? Do robots have the right to file suits for wrongdoings against them in a court of law? If there is a conflict of interest between a robot and a human, do the rights of the human's trump that of the robot? or are they on equal footing? These types of questions merit significant consideration and debate, which would understandably require time and effort for legislative bodies to resolve. If the problems these questions bring are forced upon American society in some way before congress has addressed them, our framework would allow the president to issue an executive order addressing the issue until such time as congress can reach a conclusion and implement legislation about

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37 Andrew Griffin, *Saudi Arabia Grants Citizenship to a Robot for the First Time Ever*, INDEPENDENT (Oct. 26, 2017), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/saudi-arabia-robot-sophia-citizenship-android-riyadh-citizen-passport-future-a8021601.html>.



the United States stance towards the rights of artificial intelligence. An executive order of that nature would be acceptable under our framework because, given the need for governmental action, it would not go against any legislation currently in place and would be a temporary regulation that could prevent major conflicts and problems while congress reaches a permanent decision.

In addition to hypothetical future scenarios, applying our standard to past executive actions highlights its proficiency. In the case of *Youngstown*, our standard provides a clear question on which the case must be argued: does congressional refusal to authorize government seizures of property in the Taft-Harley Act of 1947 constitute congressional will barring such seizures? If the Court found that the refusal to authorize government seizures was indeed a grant of congressional will barring seizures, as they did find in 1952, then our framework straightforwardly deems the seizure unconstitutional. If the Court had found that the omission was not a denial of power, then the seizures would be a constitutional presidential action, authorized by the Taft-Harley Act.

## V. CONCLUSION

Given the vast amount of executive orders each year, their controversial nature, and the ambiguity of the Constitution, it is unavoidable that a case involving the scope of presidential powers will come before the Supreme Court. Justice Jackson began a framework for examining executive actions in his concurrence in *Youngstown*, but the Court has acknowledged that his three tiers are not enough to adjudicate recurring questions of executive power. I propose that the Court should build upon his reasoning by looking to the root of presidential power, the Take Care Clause. As demonstrated through the analysis of DACA and DAPA, such an approach could yield a workable framework to govern all cases regarding presidential action. The framework I recommend follows thus: when there is an accepted need for legislative action—such as in the realm of immigration reform—

but Congress is unable to reach a consensus on how to move forward, presidential action to address the issue—such as DACA—is enabled through the Take Care Clause. Such presidential action must not contravene the express or implied will of congress, must not effectively rewrite the law, and must be effective in mitigating the problem created by congressional inaction.

