AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

**Texas v. United States, No. B-14-254** (S.D. Tex., 2015)

*The Development, Relief, and Education for Alien Minors (DREAM) Act was unsuccessfully introduced in Congress several times since 2001, and in 2010 President Barack Obama endorsed the proposal as a key component of comprehensive immigration reform. At its core, the DREAM Act would grant amnesty to illegal aliens who arrived in the United States as children and are either in school or have graduated from high school and would authorize states to provide in-state tuition for public colleges and would extend eligibility to federally funded scholarships to illegal aliens. When Congress failed to pass the bill, President Obama announced in 2012 that the Department of Homeland Security would no longer take deportation action against individuals who met the criteria that would have been adopted in the DREAM Act (a program known as the Deferred Action for Childhood Arrivals, or DACA). In November 2014, after a televised address on the subject, the president further amended that policy with a guidance statement to prosecutors indicating that they should exercise prosecutorial discretion so as not to “defer action” on pursuing deportation of many of the adults who would have been covered by the DREAM Act. Notably, the statement indicated that “the Department’s limited enforcement resources” should “be focused on those who represent threats to national security, public safety, and border security,” not “children and long-standing members of American society.” The 2014 program was known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. By the end of 2014, nearly three-quarter of a million individuals had applied for deferred action from the government, of which roughly 95 percent were accepted (primarily rejecting those who used the wrong form).*

*After President Obama’s November 2014 announcement of the DAPA program, the state of Texas filed suit in federal district court seeking an injunction to block the implementation of the executive action. Twenty-five additional states joined the Texas suit, which unusually also attracted numerous groups and individuals to seek to submit amicus curiae briefs to the district court or join the suit as additional parties. The states argued that the Department of Homeland Security did not have discretion under the immigration statutes to adopt the DAPA program and that the president had violated his constitutional duty to faithfully enforce the existing immigration laws. The federal government responded that DAPA was merely an exercise of prosecutorial discretion and the prioritization of how to use limited administrative resources. In February 2015, the district court issued a preliminary injunction against the government, later affirmed by a federal circuit court. The court concluded that the states had a reasonable likelihood of success on their statutory claim that the administration had exceeded its discretion and had violated the requirements of the Administrative Procedures Act in developing and announcing a substantial new regulatory policy. In its February 2015 opinion, the district court specifically did not reach the constitutional issues as not yet necessary to sustaining the states’ suit, though it admitted that “this ruling may imply that the Court finds differing degrees of merit as to the remaining claims.”*

HANEN, JUDGE.

. . . .

The law is clear that the Secretary’s ordering of Department of Homeland Security [DHS] priorities is not subject to judicial second-guessing:

[T]he Government’s enforcement priorities and . . . the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to make. *Reno v. American-Arab Anti-Discrimination Committee* (1999)

Further, as a general principle, the decision to prosecute or not prosecute an individual is, with narrow exceptions, a decision that is left to the Executive Branch’s discretion. *Heckler v. Chaney* (1985). . . .

The Judiciary has generally refrained from injecting itself into decisions involving the exercise of prosecutorial discretion or agency non-enforcement for three main reasons. First, these decisions ordinarily involve matters particularly within an agency’s expertise. Second, an agency’s refusal to act does not involve that agency’s “coercive” powers requiring protection by courts. Finally, an agency’s refusal to act largely mirrors a prosecutor’s decision to not indict. . . . Absent abdication, decisions to not take enforcement action are rarely reviewable under the American Procedures Act [APA].

Consequently, this Court finds that [the decision] as to how to marshal DHS resources, how to best utilize DHS manpower, and where to concentrate its activities are discretionary decisions solely within the purview of the Executive Branch, to the extent that they do not violate any statute or the Constitution.

. . . . [A]ccording to Plaintiffs, DAPA is simply the Executive Branch legislating.

Indeed, it is well-established both in the text of the Constitution itself and in Supreme Court jurisprudence that the Constitution “allows the President to execute the laws, not make them.” It is Congress, and Congress alone, who has the power under the Constitution to legislate in the field of immigration. . . .

. . . .

The Supreme Court’s concern that courts lack meaningful focus for judicial review when presented with agency inaction is . . . not present in this situation. Instead of merely refusing to enforce the Immigration and Naturalization Act’s removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence, to individuals Congress has deemed deportable or removable, as well as the ability to obtain Social Security numbers, work authorization permits, and the ability to travel. Absent DAPA, these individuals would not receive these benefits. The DHS has not instructed its officers to merely refrain from arresting, ordering the removal of, or prosecuting unlawfully-present aliens. . . .

Exercising prosecutorial discretion and/or refusing to enforce a statute does not also entail bestowing benefits. Non-enforcement is just that – not enforcing the law. Non-enforcement does not entail refusing to remove these individuals as required by the law and then providing three years of immunity from that law, legal presence status, plus any benefits that may accompany legal presence under current regulations. This Court seriously doubts that the Supreme Court, in holding non-enforcement decisions to be presumptively unreviewable, anticipated that such “non-enforcement” decisions would include the affirmative act of bestowing multiple, otherwise unobtainable benefits upon an individual. . . .

. . . .

Here, the very statutes under which the Defendants claim discretionary authority actually compel the opposite result. In particular, detailed and mandatory commands within the INA provisions applicable to Defendants’ action in this case circumscribe discretion.

. . . .

The DHS cannot reasonably claim that, under a general delegation to establish enforcement policies, it can establish a blanket policy of non-enforcement that also awards legal presence and benefits to otherwise removable aliens. As a general matter of statutory interpretation, if Congress intended to confer that kind of discretion . . . to apply to all of its mandates under these statutes, there would have been no need to expressly and specifically confer discretion in only a few provisions. . . .

. . . .

The DHS’ job is to enforce the laws Congress passes and the President signs (or at least does not veto). It has broad discretion to utilize when it is enforcing a law. Nevertheless, no statute gives the DHS the discretion it is trying to exercise here. . . .

Notably, the applicable statutes use the imperative term “shall,” not the permissive term “may.” . . . “Shall” indicates a congressional mandate that does not confer discretion – i.e., one which should be complied with to the extent possible and to the extent one’s resources allow. It does not divest the Executive Branch of its inherent discretion to formulate the best means of achieving the objective, but it does deprive the Executive Branch of its ability to directly and substantially contravene statutory commands. Congress’ use of the term “may,” on the other hand, indicates a Congressional grant of discretion to the Executive to either accept or not accept the goal.

In the instant case, the DHS is tasked with the duty of removing illegal aliens. Congress has provided that it “shall” do this. Nowhere has Congress given it the option to either deport these individuals or give them legal presence and work permits. The DHS does have the discretion and ability to determine *how* it will effectuate its statutory duty and use its resources where they will do the most to achieve the goals expressed by Congress. Thus, this Court rejects both extremes. The word “shall” is imperative and, regardless of whether or not it eliminates discretion, it certainly deprives the DHS of the right to do something that is clearly contrary to Congress’ intent.

. . . .

. . . . The Court finds that DAPA does not simply constitute *inadequate* enforcement; it is an announced program of non-enforcement of the law that contradicts Congress’ statutory goals. . . . [T]he Government here is “doing nothing to enforce” the removal laws against a class of millions of individuals. . . . Furthermore, if implemented exactly like DACA . . . the Government has publicly declared that it will make no attempt to enforce the law against even those who are denied deferred action (absent extraordinary circumstances). Theoretically, the remaining 6-7 million illegal immigrants (at least those who do not have criminal records or pose a threat to national security or public safety) could apply and, thus, fall into this category. DAPA does not represent mere inadequacy; it is complete abdication.

The DHS does have discretion in the manner in which it chooses to fulfill the expressed will of Congress. It cannot, however, enact a program whereby it not only ignores the dictates of Congress, but actively acts to thwart them. . . .The DHS Secretary is not just rewriting the laws; he is creating them from scratch.

. . . .

In sum, this Court finds, both factually based upon the record and the applicable law, that DAPA is a “legislative” or “substantive” rule that should have undergone the notice-and-comment rule making procedure mandated by [the Administrative Procedure Act]. . . .

. . . .