AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

**United States v. Juarez-Escobar, No. 14-0180** (W.D. Penn., 2014)

*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. 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.”*

*Elionardo Juarez-Escobar is a Honduran national who was arrested in New Mexico by the United States Border Patrol. He was deported from the United States in December 2005. He subsequently returned to the United States, crossing the border in Texas and eventually travelling to Pennsylvania. There he was employed in the landscaping business owned by his brother, a United States citizen. In 2014, he was arrested by local police for driving while intoxicated and driving without a license. The arresting police department notified the Department of Homeland Security, which determined that he was unlawfully present in the United States. At that point, he was detained by Homeland Security. He was indicted by a federal grand jury for unlawful re-entry into the United States. At that point, Juarez-Escobar would normally be sentenced to time served and deported from the United States. While his sentencing hearing was pending, however, President Obama announced his executive action, and the judge ordered arguments on the effects of president’s actions on Juarez-Escobar’s case. The district court expressed concerns that the Juarez-Escobar was being treated differently by the Obama administration than other undocumented immigrants and ordered arguments on effects of the president’s executive action on the case. After arguments, the judge concluded that the announced action was unconstitutional and ordered further argument on how the case should proceed. Juarez-Escobar decided not to contest the deportation, and the federal government did not pursue further arguments over the district court’s opinion.*

SCHWAB, JUDGE.

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Under our system of government in the United States, Congress enacts laws and the President, acting at times through agencies, “faithfully execute[s]” them. . . .

In *National Labor Relations Board v. Canning* (2014), the United States Supreme Court reiterated that:

[T]he separation of powers can serve to safeguard individual liberty . . . and that it is the “duty of the judicial department” – in a separation-of-powers case as in any other – “to say what the law is.’ *Marbury v. Madison* (1803)”

. . . .

The first policy (on deferred action) provides that individuals who fall within each of these proscribed categories would not be deported by President Obama’s administration. (“All we’re saying is that we’re not going to deport you.”). According to the President, his Executive Action does not grant citizenship, the right to permanent residence, or entitlement to benefits of citizenship, and does not apply to individuals who: (1) have “recently” come to the United States; or (2) those who might come in the future. However, the Executive Action does “create” substantive rights, including legal work authorization documentation, access to social security numbers, and other tangible benefits.

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Authority for Executive Actions and Orders must be based upon: (1) the Constitution; (2) statutes and treaties; or (3) the President’s inherent authority to ensure that the laws are “faithfully executed.” These powers are limited, even during times of national crisis. . . .

. . . .

President Obama contended, in his televised address, that his Executive Action is “lawful” and akin to actions taken by other Presidents, both Republican and Democratic. The sole citation to authority in the President’s speech was from the Old Testament. *Exodus* 22:21 (paraphrased by President Obama as “we shall not oppress a stranger, for we know the heart of a stranger – we were strangers once, too.”). President Obama has stated: (1) that his Executive Action was justified by Congressional inaction, and (2) that his Executive Action is authorized by his prosecutorial discretion to defer immigration actions.

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President Obama contended that although legislation is the most appropriate course of action to solve the immigration debate, his Executive Action was necessary because of Congress’s failure to pass legislation, acceptable to him, in this regard. This proposition is arbitrary and does not negate the requirement that the November 20, 2014 Executive Action be lawfully within the President’s executive authority. It is not.

“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad.” *Youngstown Sheet & Tube Co. v. Sawyer* (1952).

Congress’s lawmaking power is not subject to Presidential supervision or control. Perceived or actual Congressional inaction does not endow legislative power with the Executive. This measurement – the amount/length of Congressional inaction that must occur before the Executive can legislate – is impossible to apply, arbitrary, and could further stymie the legislative process.

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. . . . While “the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration,” it does not include unilateral implementation of legislative policies. *Utility Air Regulatory Group v. Environmental Protection Agency* (2014).

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This Executive Action “cross[es] the line,” constitutes “legislation,” and effectively changes the United States’ immigration policy. The President may only “take Care that the Laws be faithfully executed. . .”; he may not take any Executive Action that creates laws.

Presidents and certain members of their administrative agencies may exercise prosecutorial discretion over certain criminal matters on a case-by-case basis. Prosecutorial discretion, in the context of immigration, applies to a broad range of discretionary enforcement decisions. . . .

However, President Obama’s November 20, 2014 Executive Action goes beyond prosecutorial discretion because:

1. It provides for a systematic and rigid process by which a broad group of individuals will be treated differently than others based upon arbitrary classifications, rather than case-by-case examination; and
2. It allows undocumented immigrants, who fall within these broad categories, to obtain substantive rights.

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. . . . Despite the so-called case-by-case determination of eligibility for deferred deportation . . ., the threshold criteria will almost wholly determine eligibility. Such formulaic application of criteria, especially given the wide breadth of the program, in essence, substantively changes the statutory removal system “rather than simply adapting its application to individual circumstances.”

. . . . The Executive Action provides for a process by which undocumented immigrants will become quasi-United States citizens, such that the status given to those with President Obama’s Executive Action could not be “terminated at any time.”

. . . .

President Obama’s unilateral legislative action violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional.

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[I]f the Executive Action is constitutional, its deportation/removal priorities do not apply to Defendant in this case. As such, once the Executive Action is fully implemented, this Defendant arguably should not be in a “deportation mode” before this Court.

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. . . . Defendant’s current criminal prosecution and the civil deportation hearing that will undoubtedly follow as a result of this criminal proceeding, arguably are arbitrary and random.

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[T]he Court also concludes that the Executive Action may violate the inherent and constitutional rights of some of the undocumented immigrants, such as this Defendant. . . .

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. . . . [B]y creating a subgroup of undocumented immigrants who were parents to legal permanent residents or citizens of the United States, and instructing that they be given deferred action status, the Executive Action endowed this “parent-group” with greater rights than this Defendant.

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Although this Court recognizes that the Memorandum providing the basis for the Executive Action on immigration has opined that the Executive branch can create such subcategories of undocumented immigrants, the Court has concerns that some familial bonds are treated differently than others.

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