

## *Notes*

# **Executive Foreign Affairs Power and Immigration Relief**

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*This Note addresses whether the president may take action on immigration as an exercise of foreign affairs power. In particular, it focuses on DACA and DAPA, two Obama-era policies of deferred action for certain classes of undocumented immigrants. Exactly how much authority a president and his executive departments should have over immigration without running afoul of Congress's Article I power "to create a uniform Rule of Naturalization" is still unsettled. Furthermore, it is shaded in public debate by partisan views on immigration and how much power a given party thinks its own president should have.*

*As immigrants still formally owe their allegiance to a foreign sovereign, might the executive branch perform lenient or ameliorative actions over them via executive foreign affairs power? Would that only add to the trend of creating a more monarchical presidency? What would the boundaries of this power look like? This Note posits that presidential foreign affairs authority, based on past practice, supports the president's power to offer limited forms of immigration relief, at least in the absence of clear congressional prohibition, if the president judges that denying such relief might have foreign affairs consequences.*

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## INTRODUCTION

Undocumented immigration<sup>1</sup> has become a polemical issue in American politics. In 2012 and 2014 respectively, the Secretary of Homeland Security announced two policies styled as prosecutorial discretion: Deferred Action for Childhood Arrivals (“DACA”)<sup>2</sup> and

1. Undocumented immigrants arrive or remain in a given country without that country’s authorization. Even though statutes, prior case law, and public discourse have used a number of terms here (including “illegal aliens,” “illegal immigrants,” and “undocumented noncitizens”), I use the term “undocumented immigrant” for this Note, when not quoting an authority that uses another term.

2. DEP’T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter DACA MEMORANDUM].

Deferred Action for Parents of Americans (“DAPA”).<sup>3</sup> These policies allowed undocumented immigrants who came to the United States as children, or the undocumented immigrant parents of citizens or lawful permanent residents, to apply for a limited term, nonbinding assurance from the federal government that removal proceedings would not be initiated against them, provided they met certain conditions. The legal, congressional, and academic challenges to DACA and DAPA framed the issue as an abuse of prosecutorial discretion—either as an abrogation of rulemaking procedures or of the executive’s law enforcement duties.<sup>4</sup>

Are these the only ways to approach the issue? The executive has plenary power over foreign affairs and interaction with foreign nations.<sup>5</sup> Since undocumented immigrants are usually still the citizens of a foreign sovereign, might the executive have power over immigration by virtue of its foreign affairs power? If so, what are the ramifications of this for the Trump administration, led by a president known for hardline rhetoric against undocumented immigration?<sup>6</sup>

During the arguments on the stay of President Donald Trump’s first “travel ban” executive order, at least one attorney for the federal government alluded to a judicial inability to review executive actions on immigration.<sup>7</sup> This argument invoked the president’s plenary power over foreign affairs. This reasoning raises the issue of whether the president has plenary, unchecked power over immigration in every situation. Assuredly, such absolute power would not square with the

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3. DEP’T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter DAPA MEMORANDUM].

4. See *infra* Part II.

5. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015).

6. See, e.g., Donald J. Trump, Speech Accepting the Republican Party’s Nomination for President (July 21, 2016), [https://assets.donaldjtrump.com/DJT\\_Acceptance\\_Speech.pdf](https://assets.donaldjtrump.com/DJT_Acceptance_Speech.pdf) (“We are going to build a great border wall to stop illegal immigration, to stop the gangs and the violence, and to stop the drugs from pouring into our communities.”).

7. See Brief for Appellants at 2, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), 2017 WL 511013 at \*2 (“[T]he power to admit or exclude aliens is a sovereign prerogative....’ [The district court’s injunction] also contravenes the considered judgment of Congress that the President should have the unreviewable authority to suspend the admission of any class of aliens.” (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)) (emphasis added)). See generally Exec. Order No. 13769 82 Fed. Reg. 8,977 (Jan. 27, 2017) (“Protecting the Nation from Foreign Terrorist Entry into the United States”) (establishing the basis for the *Washington v. Trump* litigation). In recent times, the Trump Administration has embraced the concept of executive action unreviewability. See, e.g., *Face the Nation* (CBS television broadcast Feb. 12, 2017) (“[T]he powers of the President to protect our country are very substantial and will not be questioned,” said presidential senior advisor Stephen Miller).

Constitution's overarching theme of defining boundaries for federal power.

This Note proposes that presidential foreign affairs authority, based on past practice, supports the president's power to offer limited forms of immigration relief, at least in the absence of clear congressional prohibition, if the president judges that denying such relief might have foreign affairs consequences. This authority has been discussed at length as a power inherent in sovereignty existing generally in the federal government.<sup>8</sup> This analysis fits with the president's role as the United States' constitutional representative on the international scene. Likewise, numerous administrations prior to that of President Barack Obama took action on immigration on the president's own accord, with varying levels of input from Congress. Congress's Article I legislative power, however, forbids the president from using his power to create substantive immigration laws absent congressional approval. Examination of prior executive actions reveals that the president may use his foreign affairs power to take ameliorative or lenient action on immigration where it advances significant foreign affairs interests for the United States, but not where such action would rise to the level of being a substantive immigration law. This Note focuses on immigrant-inclusive executive actions—actions that operate to keep immigrants in the United States—rather than immigrant-exclusive actions, which operate as a bar or restriction on entry.

## I. IMMIGRATION AND THE CONSTITUTION

The trajectory of the presidency has been to become more and more powerful and imperial in nature.<sup>9</sup> Moreover, American politics has disintegrated into being as vituperatively partisan as ever.<sup>10</sup> Accordingly, the rule of "the President must act as he sees fit regarding

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8. See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (discussing the historical origins and evolution of the doctrine of inherent powers over foreign affairs).

9. See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008).

10. This has manifested itself in a number of ways. This hyper-partisan political environment has been framed as a danger to world peace (see, for example, *Divisive Political Rhetoric a Danger to the World, Amnesty Says*, BBC NEWS (Feb. 22, 2017), <http://www.bbc.com/news/world-39048293>); as affecting day-to-day economics (see, for example, Jonathan Bacon, *How Brands Are Responding to the Divisive Politics of 2016*, MARKETING WK. (Dec. 2, 2016, 3:12 PM), <https://www.marketingweek.com/2016/12/02/brands-dragged-divisive-politics-2016/>); and as affecting interpersonal stability (see, for example, Jason Silverstein, *Woman Claims Her Marriage of 22 Years Ended over Husband's Donald Trump Vote*, N.Y. DAILY NEWS (Feb. 7, 2017, 12:51 PM), <http://www.nydailynews.com/news/national/couple-22-years-divorcing-trump-vote-article-1.2966332>).

foreign affairs" will no longer hold.<sup>11</sup> The current seesaw in immigration policy from administration to administration begs for the establishment of boundaries regarding immigration law and policy, particularly since the long-standing congressional gridlock on the issue<sup>12</sup> means that the electorate—as it did in the 2016 election—will look to the president as the source of action on immigration. This occurred when the Obama administration formulated DACA and DAPA, to the applause of the political Left and the condemnation of the political Right.<sup>13</sup> This again occurred when President Trump signed his first "travel ban" executive order in January 2017, to the applause of the Right and the condemnation of the Left.<sup>14</sup>

A new way of conceptualizing the President's immigration power is necessary as long as: (1) immigration law remains an area where the executive has considerable enforcement discretion; (2) Congress cannot agree upon immigration reform; and (3) existing procedures across administrations do little to improve the welfare of undocumented immigrants. Furthermore, a foreign affairs theory of immigration—foreign affairs power being an area comprising considerable case law and preexisting theory—solves the issue of immigration law being so unlike many other areas of law. The government cannot treat citizens the way it treats immigrants, whether documented or not. For example, upon commission or conviction of a relatively minor legal violation, a citizen cannot be hauled before an administrative proceeding to be removed to a country he has not seen in decades.<sup>15</sup> The difference between immigration law and other substantive areas of law is relatively under-theorized. Finding a new solution that steers clear of value

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11. Cf. Marshall, *supra* note 9, at 522 ("After all, one does not have to be an originalist to accept the proposition that the Framers, having just gone through a revolutionary war to depose a monarch, did not create a constitution that, in the name of national security or foreign affairs, would vest unchecked power in the hands of a single individual.").

12. See, e.g., David Nakamura, *For More than 25 Years, It's Never Been the Right Time for Immigration Reform*, WASH. POST (Feb. 15, 2014), [https://www.washingtonpost.com/politics/for-more-than-25-years-its-never-been-the-right-time-for-immigration-reform/2014/02/15/90a4ff08-93f9-11e3-84e1-27626c5ef5fb\\_story.html?utm\\_term=.oe405b48df3d](https://www.washingtonpost.com/politics/for-more-than-25-years-its-never-been-the-right-time-for-immigration-reform/2014/02/15/90a4ff08-93f9-11e3-84e1-27626c5ef5fb_story.html?utm_term=.oe405b48df3d).

13. In the United States since the late twentieth century, the Democratic Party has filled the role of the mainstream left, and the Republican Party has filled the role of the mainstream right.

14. Compare Michael A. Memoli, *House Passes GOP-Backed Bill Aimed at Obama's Imperial Presidency*, CHI. TRIB. (Mar. 12, 2014, 6:20 PM), <http://www.chicagotribune.com/news/la-pn-house-imperial-presidency-bills-20140312-story.html> (regarding the Obama administration), with Carrie Napoleon, *Protesters rally in opposition to immigration policy changes*, CHI. TRIB.: POST-TRIBUNE (Feb. 4, 2017, 5:41 PM), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-east-chicago-demonstrate-st-0205-20170204-story.html> (regarding the Trump Administration).

15. See, e.g., Kate Morrissey, *Deportation of Grandmother Leaves a San Diego Military Family Reeling*, L.A. TIMES (Mar. 4, 2017, 8:30 AM), <http://www.latimes.com/local/lanow/la-me-grandmother-deportation-20170304-story.html> (discussing the deportation of a woman who was made an "enforcement priority" because of her lying on government paperwork ten years prior).

judgments—"criminals plotting terror attacks" and "huddled masses" alike—and instead looks at immigration law as being a constitutional issue involving foreign affairs could wipe the muddled, punditry-laden slate clean.

As of this writing, the number of undocumented immigrants living in the United States is estimated at around 11 million.<sup>16</sup> Undocumented immigration poses unique issues for governmental and economic systems. Although undocumented immigrants are formally removable, there are far too many to find and deport in one stroke, especially given that the Supreme Court has long held that undocumented immigrants possess constitutional rights of due process<sup>17</sup> and equal protection of the laws.<sup>18</sup> Furthermore, the deportation of undocumented immigrants cannot be undertaken without foreseeing a considerable blow to American business, where undocumented immigrants constitute 26 percent of the agricultural workforce and seventeen percent of the cleaning and maintenance workforce.<sup>19</sup>

The United States Constitution gives Congress the power to "establish a[ ] uniform Rule of Naturalization."<sup>20</sup> Known as the Naturalization Clause, the Supreme Court has interpreted this language, when read parallel to the Necessary and Proper Clause, to give Congress "considerable power over aliens" beyond solely naturalization.<sup>21</sup> Congress has acted upon this power with considerable magnitude. Federal laws governing immigration and naturalization are codified at Title 8 of the United States Code.<sup>22</sup> These laws cover the minutiae of the

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16. See, e.g., BRYAN BAKER & NANCY RYTINA, DEP'T OF HOMELAND SEC., OFF. OF IMMIGRATION STATS., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 (2013), [https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012\\_o.pdf](https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012_o.pdf) (estimating the number at 11.4 million); JEFFREY S. PASSEL ET AL., PEW RES. CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED (2014), [http://www.pewhispanic.org/files/2014/09/2014-09-03\\_Uncategorized-Final.pdf](http://www.pewhispanic.org/files/2014/09/2014-09-03_Uncategorized-Final.pdf) (estimating the number at 11.3 million); Caitlin Dickerson & Jennifer Medina, *California Farmers Backed Trump, but Now Fear Losing Field Workers*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html> (discussing the impact that mass deportations would have on California's agricultural economy).

17. See Wong Wing v. United States, 163 U.S. 228, 238 (1896).

18. See Plyler v. Doe, 457 U.S. 202, 212 (1982).

19. Jeffrey S. Passel & D'Vera Cohn, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, PEW RES. CTR. (Mar. 26, 2015), <http://www.pewhispanic.org/2015/03/26/share-of-unauthorized-immigrant-workers-in-production-construction-jobs-falls-since-2007/>.

20. U.S. CONST. art. I, § 8, cl. 4.

21. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 418 (9th Cir. 1980), *aff'd*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). See generally U.S. CONST. art. I, § 8, cl. 18 ("[Congress shall have power to] make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

22. For illustrative provisions codified in Title 8, see *infra* notes 23–26.

immigrant experience in the United States, from immigration,<sup>23</sup> to naturalization and removal,<sup>24</sup> to refugee assistance,<sup>25</sup> to restriction of public benefits.<sup>26</sup>

However, as a matter of course, Congress cannot enforce the immigration laws it makes. That duty must be left to the president, acting largely through the Department of Homeland Security (“DHS”). The Constitution vests all executive power in the president,<sup>27</sup> stating that the president “shall take Care that the Laws be faithfully executed.”<sup>28</sup> The Take Care Clause acts as a congressional check on the president, prohibiting him from suspending laws he finds objectionable or inapposite to his policy goals.<sup>29</sup> A certain amount of enforcement or “prosecutorial” discretion is necessary nonetheless, for three reasons. The first is a holistic type of fairness. To-the-letter enforcement of federal law—or any law—regardless of a person’s good-faith mistake or other lack of a culpable activity does little to further the ends of justice. The second reason is efficiency. The sheer volume of federal laws and regulations that a comparatively small federal government is tasked with enforcing means that rigorous enforcement of federal law would place too great of a strain on the system.<sup>30</sup> Third, the president has the independent power to judge a law’s constitutionality, and may decline enforcement on constitutional grounds.<sup>31</sup>

The first two factors were at play when, in 2012, under the direction of the Obama Administration, DHS announced DACA, a policy of prosecutorial discretion for undocumented immigrants who came to the United States as children. Fairness was a major consideration behind DACA, as it applied to “certain young people who were brought to this country as children[,] . . . know only this country as home . . . [, and] lack[ ] the intent to violate the law . . . ”<sup>32</sup>

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23. See 8 U.S.C. §§ 1151–1381 (2012).

24. See 8 U.S.C. §§ 1421–1459 (2012).

25. See 8 U.S.C. §§ 1521–1524 (2012).

26. See 8 U.S.C. §§ 1601–1646 (2012).

27. See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

28. U.S. CONST. art. II, § 3. This provision is commonly called the Take Care Clause.

29. For a detailed analysis of the Take Care Clause and its interplay with enforcement discretion, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690 (2014).

30. See *id.* at 676.

31. This theory, called “departmentalism,” holds that each branch of the government is an adequate judge of the constitutionality of its own acts and those of the other branches. The tenth edition of *Black’s Law Dictionary* characterizes it as “prominent in the decades shortly after ratification,” but mostly giving way to judicial supremacy afterward. *Departmentalism*, BLACK’S LAW DICTIONARY (10th ed. 2014). But see *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (regarding the executive’s declining to defend the Defense of Marriage Act in the *Windsor* litigation, which might be viewed as a modern articulation of departmentalism).

32. DACA MEMORANDUM, *supra* note 2, at 1.

Furthermore, DACA attempted to incorporate administrative efficiency considerations, to ensure that “enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.”<sup>33</sup> Procedurally, DACA offered a non-binding, two-year, renewable guarantee that removal proceedings would not be initiated against applicants who met the following criteria:

1. Arrival in the United States under the age of sixteen;
2. Residence in the United States for at least five years prior to 2012 and at the time the policy was initiated;
3. Education or military service requirements;
4. No felony or significant misdemeanor convictions;
5. Under the age of thirty; and
6. Successful completion of a background check.<sup>34</sup>

Two years later, the DHS expanded DACA to remove the age cap and initiated a similar policy for people who are undocumented immigrants but have citizen or lawful permanent resident children, subject to similar conditions as DACA.<sup>35</sup> This expanded program was known as DAPA.

## II. OBJECTIONS TO DACA AND DAPA

Both DACA and DAPA have seen a number of challenges in Congress and in the judiciary. Among the most vehement objections to DACA and DAPA arose from both houses of Congress. 2014 marked the first election in eight years in which the Republican Party gained a majority of both the Senate and House of Representatives, creating a forceful opposition against the Democratic Party that controlled the White House.<sup>36</sup> As a result, a vigorous dispute ensued in the legislative branch about the constitutionality of the deferred action policies. This was in addition to the litigation that the policies had already generated in the judicial branch.

On June 15, 2017, President Trump’s then-Secretary of Homeland Security, John F. Kelly, issued a formal rescission of DAPA, thereby mooted the qualms related to that policy.<sup>37</sup> This action specifically left

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33. *Id.*

34. For all of these elements, see *id.*

35. DAPA MEMORANDUM, *supra* note 3.

36. Compare FED. ELECTION COMM’N, FEDERAL ELECTIONS 2014: ELECTION RESULTS FOR THE U.S. SENATE & THE U.S. HOUSE OF REPRESENTATIVES (2015), with FED. ELECTION COMM’N, FEDERAL ELECTIONS 2006: ELECTION RESULTS FOR THE U.S. SENATE & THE U.S. HOUSE OF REPRESENTATIVES (2007).

37. DEPT OF HOMELAND SEC., RESCISSION OF NOVEMBER 20, 2014 MEMORANDUM PROVIDING FOR DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS (“DAPA”) (2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [hereinafter DAPA RESCISSION MEMORANDUM].

in place DACA.<sup>38</sup> This came as a shock to many, since President Trump had stated that he would rescind DACA while on the campaign trail in 2015 and 2016.<sup>39</sup> A rescission of DACA came not long after, on September 5, 2017.<sup>40</sup> The DHS's memorandum rescinding DACA—after fleetingly casting doubts on the policy's constitutionality<sup>41</sup>—indicated that deferred action status would not be terminated immediately, but would be adjudicated afterward on a case-by-case basis where still applicable.<sup>42</sup> Given that this launched litigation not only by individual DACA beneficiaries, but also by sixteen state attorneys-general, the fight over DACA's constitutionality seems likely to persist for some time after the ink was spilled rescinding the program.<sup>43</sup>

#### A. CONGRESSIONAL AND JUDICIAL REACTIONS TO DEFERRED ACTION POLICIES

Congressional hearings shortly after the 2014 election cycle contested the constitutionality of the policies. In the House Judiciary Committee's hearing on DACA and DAPA, Congressman Bob Goodlatte, a Virginia Republican and the chair of the committee, derided the policies as a usurpation of Congress's legislative authority and an abdication of the president's law enforcement duty.<sup>44</sup> Characterizing DACA and DAPA as "one of the biggest constitutional power grabs ever by a President," Congressman Goodlatte viewed the policies as allowing undocumented immigrants a plethora of benefits, including work authorization, social security, and tax benefits.<sup>45</sup> One of the hearing's

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38. Press Release, Dep't of Homeland Sec., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful> ("The June 15, 2012 memorandum that created the Deferred Action for Childhood Arrivals (DACA) program will remain in effect.").

39. See, e.g., *Meet the Press* (NBC television broadcast, Aug. 16, 2015) ("The executive order gets rescinded . . . We have to make a whole new set of standards," said President Trump regarding the Obama-era immigration actions, including DACA.).

40. DEP'T OF HOMELAND SEC., MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS ("DACA") (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

41. The day before DACA's rescission, the U.S. Attorney General Jeff Sessions sent a letter to the DHS indicating his opinion that "DACA was effectuated by the previous administration through . . . an open-ended circumvention of immigration laws [and] was an unconstitutional exercise of authority by the Executive Branch." *Id.* (quotation marks omitted).

42. *Id.*

43. See Second Amended Complaint at \*34–35, *Vidal v. Duke*, No. 1:16-cv-04756 (NCG) (JO) (E.D.N.Y. Sept. 19, 2017) (challenging DACA's rescission, filed by DACA recipients); Complaint for Declaratory and Injunctive Relief at \*55, *New York v. Trump*, No. 17-cv-5228 (E.D.N.Y. Sept. 6, 2017).

44. *Unconstitutionality of Obama's Executive Actions on Immigration: H. Comm. on the Judiciary*, 114th Cong. 1–3 (2015) (opening statement of Rep. Bob Goodlatte, Chairman of the House Committee on the Judiciary) [hereinafter *House Deferred Action Hearing*].

45. *Id.* at 1.

witnesses, Nevada Attorney General Adam Paul Laxalt, advanced a legal argument against deferred action, namely that the policies violated the Take Care Clause and the Administrative Procedure Act (“APA”).<sup>46</sup> Congresswoman Zoe Lofgren, a California Democrat, raised a political defense and argued that DACA and DAPA function as a means of effecting change on immigration policy in view of partisan-motivated government shutdowns and obstructionism.<sup>47</sup>

The Senate Judiciary Committee’s hearing, pressingly (if melodramatically) entitled *Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration*, featured testimony from a number of immigration experts and political theorists. One such witness, Mark Krikorian of the conservative-leaning Center for Immigration Studies, stated that the deferred action policies were not “true” prosecutorial discretion, which he defined as actions by “individual law enforcement officers in ways that do not undermine the agency’s mission.”<sup>48</sup> Rather, Krikorian described the deferred action policies as being a “pretext for exempting the vast majority of immigration violators from any possibility of legal consequences.”<sup>49</sup>

The judiciary has been no friend to the deferred action policies, despite not tackling the issue head-on. One case in the federal appeals court for the D.C. Circuit, *Arpaio v. Obama*, rejected a claim against the policies due to lack of the plaintiffs’ standing,<sup>50</sup> despite one concurring judge calling the policies “problematic.”<sup>51</sup> The Fifth Circuit, in *Texas v. United States*, affirmed a preliminary injunction that halted the implementation of DAPA.<sup>52</sup> An evenly divided Supreme Court, in the wake of Justice Antonin Scalia’s death, affirmed the Fifth Circuit in a one-line per curiam opinion.<sup>53</sup> Although the underlying claims in *Texas v. United States* were that DAPA violated rulemaking procedures and abrogated the President’s law execution duty, the Fifth Circuit did not address the merits of the claims.<sup>54</sup>

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46. *Id.* at 11.

47. *Id.* (statement of Rep. Zoe Lofgren, Ranking Member of the House Judiciary Subcommittee on Immigration and Border Security).

48. *Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration: Hearing Before the Subcomm. on Immigration and the Nat'l Interest of the S. Comm. on the Judiciary*, 114th Cong. 1 (2016) (statement of Mark Krikorian, Exec. Dir. of the Ctr. for Immigration Studies) [hereinafter *Senate Deferred Action Hearing*].

49. *Id.*

50. *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015).

51. *Id.* (Brown, J., concurring).

52. *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015).

53. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016). It is worth noting, however, that the Supreme Court’s affirmation cannot be viewed as establishing any kind of binding precedent.

54. See *Texas*, 809 F.3d at 146.

## B. THE MISSING FOREIGN AFFAIRS PUZZLE PIECE

Two notable themes in the above challenges to the deferred action policies exist. One is that DACA and DAPA violate the rulemaking procedures and requirements under the APA.<sup>55</sup> The APA sets forth notice and public comment requirements before a federal agency can make a new rule.<sup>56</sup> It also allows a court to set aside agency rules that exceed the agency's statutory authority, or if the rules are unconstitutional.<sup>57</sup> Opponents of the policies argue that since DACA and DAPA are the "rules" of an administrative agency (here, DHS), and because they did not go through the APA-mandated processes, they must be set aside. The opaque nature of agency rulemaking doctrine tends to confuse the constitutional issue around these policies. Moreover, at least one set of scholars believes a challenge to DACA and DAPA on rulemaking grounds would not likely prevail.<sup>58</sup> Therefore, this Note assumes *arguendo* that there is no rulemaking issue with these policies.

The other theme is that the policies are flatly unconstitutional, owing to Congress's Article I authority and the president's Take Care Clause duty. However, many of these objections are based upon a traditional understanding of constitutional jurisprudence, under the assumption that immigration law is treated the same from a constitutional point of view as, for example, criminal law and civil actions. A principle of "immigration exceptionalism"—that is, a departure from "mainstream constitutional norms"<sup>59</sup>—marks American immigration jurisprudence. A large part of this theory derives from the plenary power doctrine in immigration case law, which states that the federal government has plenary power over immigrants as an essential attribute of sovereignty.<sup>60</sup>

This plenary power is aligned with and derives from the plenary power over foreign affairs that the federal government has—specifically, the president—as discussed in Part III.B. Truly, this exercise of power is exceptional, resulting in "a regulatory regime that... 'would be

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55. The DHS, which formally propagated the policies, is considered an "agency" under the APA. See 5 U.S.C. § 551(1) (2012).

56. See 5 U.S.C. § 553 (2012).

57. See 5 U.S.C. § 706(2) (2012).

58. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 216 n.313 (2015) (doubting that a court could consider DACA and DAPA as "legislative rules").

59. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584 (2017).

60. See *id.* at 596; accord *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)) (recognizing that power to exclude immigrants is a "fundamental sovereign attribute").

unacceptable if applied to citizens.”<sup>61</sup> Ordinarily, mainstream constitutional theory as it applies to citizens does not quite work when considering immigration law, and so much of the jurisprudence surrounding the federal government’s interaction with immigrants is rooted in its power to conduct international affairs. It follows that immigration law and foreign affairs power should be discussed in tandem.

### III. HISTORICAL PERSPECTIVES ON FOREIGN AFFAIRS POWER

Article II of the U.S. Constitution alludes to indicia of the president’s foreign affairs power.<sup>62</sup> Some of these powers are vested in the president alone, such as the power to be “Commander in Chief of the Army and Navy of the United States,”<sup>63</sup> and the power to “receive Ambassadors and other public Ministers.”<sup>64</sup> Other foreign affairs powers occur only with Senate agreement, such as the power to appoint ambassadors “by and with the Advice and Consent of the Senate,” and the power to make treaties “provided two thirds of the Senators present concur.”<sup>65</sup> This is the extent of where the Constitution speaks on executive power over foreign affairs.

#### A. THEORETICAL FOUNDATIONS OF EXECUTIVE FOREIGN AFFAIRS POWER

It would be misleading to state that the federal government only possesses foreign affairs power through constitutional fiat. The federal government has power over foreign affairs simply by virtue of its status as a sovereign nation.<sup>66</sup> Since the states cannot, for example, enter into agreements themselves with foreign nations, it follows that the states lack this foreign affairs power.<sup>67</sup> According to Professor Sarah H. Cleveland, foreign affairs power is not “derived from, nor substantially limited by, the Constitution” and is largely insulated from judicial review because it is a power inherent in sovereignty.<sup>68</sup>

Building on this “inherence” theory, immigration is part of this foreign affairs power. The immigration of foreigners to the United

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61. Rubenstein & Gulasekaram, *supra* note 59, at 596 (quoting *Matthews v. Diaz*, 426 U.S. 67, 80 (1967)).

62. U.S. CONST. art. II, §§ 2–3.

63. U.S. CONST. art. II, § 2, cl. 2.

64. U.S. CONST. art. II, § 3.

65. U.S. CONST. art. II, § 2, cl. 2.

66. See Cleveland, *supra* note 8, at 7; cf. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”).

67. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation.”).

68. Cleveland, *supra* note 8, at 8.

States was very much on the minds of the Framers. Indeed, one of the grievances that the founding generation had against Great Britain before the Revolution was that “the King had obstructed free immigration to the colonies,” and furthermore, “at the time of the framing, the United States generally encouraged free immigration, while various states maintained laws authorizing the expulsion of aliens deemed undesirable.”<sup>69</sup> Notably, the Constitution’s Naturalization Clause took this power away from the states, and most courts today look with disfavor on allowing the states to remove immigrants themselves.<sup>70</sup> Moreover, as the United States’ federal system matured throughout the nineteenth century, numerous scholars of that era found a nation’s right to control who may enter its borders to be a foundational principle of international law, without weighing the Constitution into the calculus.<sup>71</sup>

It would be inadvisable to use the “inherence” analysis to supersede the constitutional text entirely. The rule of law in the United States—in its most general terms—requires governmental acts to flow from constitutional authority and to be subject to judicial review, within reason.<sup>72</sup> However, the “inherence” principle provides cohesion for the Constitution’s piecemeal approach to executive foreign affairs powers. Led by the “inherence” theory, a major constitutional principle becomes apparent: the Naturalization Clause operates not so much to make immigration and naturalization the exclusive province of Congress, but rather to make them the exclusive province of the federal government. This is a reaction to the pre-Framing removal authority that the states understood themselves to possess.<sup>73</sup> It should not be interpreted as

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69. *Id.* at 81. For a prime example of the founding generation’s immigration grievance against Great Britain, see also THE DECLARATION OF INDEPENDENCE (U.S. 1776): “He [i.e., King George III of Great Britain] has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; [and] refusing to pass others to encourage their Migrations hither.”

70. Recently, courts have applied this rule to strike down state and local laws against undocumented immigrants on the grounds that those laws act as a usurpation of the federal authority on immigration. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012); Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013). *Contra* Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013) (holding anomalously that a city ordinance forbidding undocumented immigrants from holding rental occupancy licenses was not an impermissible regulation of immigration, the direct opposite of the *Villas at Parkside Partners* holding above).

71. *See* Cleveland, *supra* note 8, at 85–86.

72. I say “within reason” purposefully here, as some acts cannot be open to judicial review, such as those that are considered chiefly political questions. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

73. *See* Cleveland, *supra* note 8, at 81. The records of the 1787 Constitutional Convention likewise indicate a desire to take naturalization power away from the states and place it in the hands of the federal government. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 245 (Max Farrand ed., 1911) (“Res[olve]d. the rule for naturalization ought to be the same in every State”). Indeed, the federal supremacy of varied aspects of immigration law, and not just the naturalization mentioned in the Naturalization Clause, figured quite early in United States immigration

shearing the president of all authority to act on immigration by himself, rather than acting as Congress's loyal factotum, as many commentators have alluded he should.<sup>74</sup>

### B. HISTORICAL FOUNDATIONS OF EXECUTIVE FOREIGN AFFAIRS POWER

Support for the executive's possession of plenary power over foreign affairs arises both in writings near in time to the Framing as well as in later case law interpreting the Constitution. The Constitution's approach to foreign affairs power is markedly different from that of the Articles of Confederation, which required the consent of "the United States in Congress assembled" in order to conduct diplomatic acts.<sup>75</sup> Almost half a century after the Constitution's drafting, Supreme Court Justice Joseph Story argued in favor of the Constitution's pivot away from the Articles of Confederation's approach to foreign affairs. To Justice Story, certain diplomatic functions, such as receiving ambassadors in particular, must be left to the executive alone.<sup>76</sup> Accordingly, the Constitution's delegation of these powers to the executive accounted for three considerations: first, that foreign governments had vested this power in their executive as well; second, that it would be too onerous to keep the Senate (for example) in constant session to allow for potential international emergencies if the Senate were to exercise that power; and third, that the President was unlikely to abuse the power.<sup>77</sup>

In constitutional jurisprudence on foreign affairs power, a leading decision (and incidentally one which largely bolsters the "inherence" theory) is the Supreme Court's landmark opinion in *United States v. Curtiss-Wright Export Corp.* Curtiss-Wright—an aircraft manufacturer and defense contractor—was charged with selling arms and munitions to the South American belligerents in the Chaco War, in violation of a

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jurisprudence. See generally *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (striking down state laws that levied a per-head tax on foreign nationals arriving in the states' ports).

74. For a representative example of this view, see Guillermo I. Martinez, *True Immigration Reform Should Not Be Done by Executive Order*, SUN-SENTINEL (July 29, 2015), <http://www.sun-sentinel.com/opinion/fl-gmcol-oped0730-20150729-column.html>.

75. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 ("No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State.").

76. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, §§ 1565–1569 (2d ed. 1851).

77. See *id.* § 1561. It is worth remembering that Justice Story was writing in the midst of the golden age of imperialism, when the United States maintained diplomatic relations with a small fraction of the nations that it currently does. This was largely because the vast empires of the United Kingdom, Spain, the Ottomans, and France, as well as the lack of connections to many Asian and African countries, made the possibility foreign relations with hundreds of competing nations a nullity. His assertion that reception of ambassadors had a low potential for abuse might seem quaint in view of twenty-first century international relations.

congressional resolution and presidential proclamation.<sup>78</sup> The issue in the case was whether Congress had improperly delegated to the president the power to prevent the arms sales.<sup>79</sup> The Court held that there was no such improper delegation, because “[t]he President is the constitutional representative of the United States with regard to foreign nations.”<sup>80</sup> This is so because, since before the Revolution, the individual states never had international relations powers: The power of “external sovereignty” passed from the British Crown to the new United States government, first to the Continental Congress,<sup>81</sup> and eventually to the executive once the Constitution created that office.<sup>82</sup> Applying the “inherence” principle, the Court stated:

[T]he very delicate, plenary and exclusive power [is held by] the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.<sup>83</sup>

This holding strikingly contemplates constitutional boundaries to the powers. The essential principle here is that the president has the power to conduct foreign affairs, and those powers are plenary. In other words, the president’s foreign affairs powers are wide-ranging, requiring no delegation from Congress and minimal oversight from that body.

Fourteen years later, the Supreme Court explicitly upheld executive action on immigration as an indicium of the sovereign’s foreign affairs power in *United States ex rel. Knauff v. Shaughnessy*.<sup>84</sup> *Knauff* pertained to a German national who was denied entry into the United States upon confidential evidence and without a hearing, notwithstanding her marriage to a U.S. citizen.<sup>85</sup> Justice Minton wrote for a four-person majority, with two justices recused and three dissenting. Citing to *Curtiss-Wright*, *inter alia*, as authority, the Court stated:

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78. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 311 (1936).

79. See *id.* at 314–15.

80. *Id.* at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24).

81. *Id.* at 316–17.

82. *Id.* at 316.

83. *Id.* at 320.

84. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

85. See *id.* at 539–40.

[T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation . . . . When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.<sup>86</sup>

The foreign national wife was thus barred from entering the United States.<sup>87</sup> *Knauff* signals the acceptance of the plenary power doctrine as it pertains to immigration.<sup>88</sup>

### C. PRESIDENTIAL POWER AND CONGRESSIONAL POWER

One problem with applying the plenary power theory to executive actions on immigration is particularly glaring. Congress has Article I power over immigration through the Naturalization Clause.<sup>89</sup> The distribution of power here must, in some form, respect Congress's legislative authority over immigration. Although the Naturalization Clause firmly plants the power over immigration and naturalization in the realm of the federal government, the constitutional text is insurmountable: the power is conferred upon Congress, not the president. The constitutional text, as interpreted over time by courts, gives Congress the power to create substantive immigration laws, the Immigration and Nationality Act ("INA") and its various amendments being exemplary.<sup>90</sup> Notably, the INA respects the president's plenary power, especially at sections 212(f),<sup>91</sup> 214(a)(1),<sup>92</sup> and 215(a)(1),<sup>93</sup> where

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86. *Id.* at 542; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

87. *Knauff*, 338 U.S. at 547.

88. See, e.g., *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 443 (3d Cir. 2016) ("Thus, *Knauff* and *Mezei* essentially restored the political branches' plenary power over aliens at the border seeking admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking admission to the country.").

89. See U.S. CONST. art. I, § 8, cl. 4.

90. The Immigration and Nationality Act ("INA") as first enacted in 1952 overhauled the United States legislative schema on immigration, while still keeping in place various restrictive elements like nationality quotas and prohibitions against people with certain political views. See generally INA of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952). Subsequent amendments to the INA of 1952 loosened several of the original restrictions, although United States immigration law still retains many vestiges of the old systems. See generally Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911 (1965) (abolishing the quota system based on national origin); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (providing for family-based immigration visas and the Diversity Immigrant Visa program, as well as the Temporary Protected Status visa for immigrants from countries experiencing armed or environmental upheaval). But see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (allowing, inter alia, immigrants who had committed minor criminal offenses to be eligible for deportation).

91. See *infra* Part V.A.

92. INA § 214(a)(1) (codified at 8 U.S.C. § 1184(a)(1) (2012)) (allowing admission of

it treats the presidential authority as being one of regulation and discretion.

On the other hand, the president himself does have substantive foreign affairs power. The Supreme Court recognized this in *Dames & Moore v. Regan*, which contemplated whether an executive order's suspension of all claims against Iran brought before a claims tribunal—a reaction to the 1979 Iran hostage crisis—was a constitutional invocation of executive power.<sup>94</sup> In light of “the character of the legislation Congress has enacted in the area” and “the history of [congressional] acquiescence in executive claims settlement,” the Court held that it was constitutional.<sup>95</sup> This holding was based in part on Supreme Court Justice Robert Jackson’s concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, where the validity of the president’s action, when the president and Congress have concurrent authority, must be viewed in light of “congressional inertia, indifference or quiescence.”<sup>96</sup> Accordingly, an evaluation of the whole character of the President’s actions regarding foreign affairs—and Congress’s interaction with the subject—is in order to determine the constitutionality of the President’s actions in that sphere.

In sum, the president has no power to create substantive immigration laws by himself and of his own prerogative. There is, however, a foreign affairs nexus that allows for a measure of independent presidential authority: immigrants remain citizens or subjects of a foreign sovereign until naturalized, therefore “[a]n Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.”<sup>97</sup> Just as the Supreme Court concluded in *Dames & Moore* regarding presidential authority to act on foreign affairs matters independently, finding the president’s independent authority on immigrant-inclusive actions as an exercise of foreign affairs power requires examining the existing legislative scheme and the history of Congress’s action, inaction, or acquiescence in similar matters.<sup>98</sup> In terms of the preexisting legislative scheme, the provisions of the INA

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nonimmigrant aliens “for such time and under such conditions as the Attorney General may by regulations prescribe”).

93. *Id.* § 215(a)(1) (codified at 8 U.S.C. § 1185(a)(1) (2012)) (“Unless otherwise ordered by the President, it shall be unlawful—(a) for any alien to depart from or enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.”).

94. *Dames & Moore v. Regan*, 453 U.S. 654, 660–62 (1981).

95. *Id.* at 686.

96. *Id.* at 668–69 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

97. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*357–58 (1765).

98. See *Dames & Moore*, 453 U.S. at 686.

cited above afford the president considerable discretion in many actions on immigration.<sup>99</sup> An examination of prior executive actions on immigration—and congressional interaction with them—proves helpful in determining the shape of this presidential authority and the situations in which it may be exercised.

#### IV. CONTEMPLATING PRIOR EXECUTIVE ACTIONS ON IMMIGRATION

Presidents generally abide by the traditions of their predecessors, and breaks from those traditions are significant when they occur. However, there is no formal presidential equivalent of *stare decisis*. Presidents are not legally bound by the actions of prior presidents in the same way that judges are by prior opinions.<sup>100</sup> In this way, referring to past presidents' actions on immigration to support the reasoning in the sections above are all varieties of the "appeal to tradition" fallacy.

However, the brevity of Article II, coupled with the current complexities of the executive branch, mean that a number of executive functions are necessarily established by tradition or other extra-constitutional authorities that have the force of law. Most noteworthy, the power to issue executive orders has no explicit constitutional foundation. Likewise, the specific procedures of senatorial advice and consent are without express constitutional basis, other than a general provision allowing the congressional bodies to "determine the Rules of [their] Proceedings."<sup>101</sup> The point here is that while presidents might not necessarily be legally bound by the actions of their predecessors, time, tradition, and procedural rules create a quasi-legal precedent by which presidents should abide.<sup>102</sup>

Accordingly, evaluating prior executive actions on immigration can be useful in determining how past presidents have implicitly invoked a foreign affairs rationale in taking those actions. The following analysis will focus on executive actions that kept foreign nationals in the country, rather than excluding them. These situations will be the most

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99. Especially of note here is the provision allowing "admission to the United States of [nonimmigrant] alien[s] . . . for such time and under such conditions as the Attorney General may . . . prescribe . . ." INA § 214(a)(1) (codified at 8 U.S.C. § 1184(a)(1)).

100. See Cox & Rodríguez, *supra* note 58, at 114 (declining to treat actions by other administrations as "quasi-legal precedent").

101. U.S. CONST. art. I, § 5, cl. 2. Rule XXXI of the Standing Rules of the United States Senate, for example, governs how confirmation hearings are to be conducted in a manner that provides the Senate's advice and consent for presidential nominees. See U.S. SENATE COMM. ON RULES & ADMIN., U.S. SENATE MANUAL, S. DOC. NO. 113-1, Rule XXXI, at 58–59 (2014). It is important to note that the rules in the Senate Manual are parliamentary procedures, not laws, and thus do not go through the usual bicameralism and presentment procedures prescribed for laws by Article I, Section 7 of the Constitution.

102. William P. Marshall also contemplates that previous presidents' usage of power created room for subsequent presidents' usage of that same power, allowing for an inevitable "one-way ratchet" in increasing the presidency's power. Marshall, *supra* note 9, at 511.

help in determining the permissibility of policies such as DACA and DAPA. Three twentieth century examples most pointedly implicate executive foreign affairs powers being exercised in an immigrant-inclusive context, and take place over both Democratic and Republican administrations and Congresses: the *bracero* program, which started in the 1940s, slightly over 900 “foreign-born orphans” adopted by U.S. citizen parents in 1956, and the program for Chinese students implicated in the Tiananmen Square protests in the 1980s.

#### A. THE BRACERO PROGRAM

The *bracero* program operated in the United States from 1942 to 1964<sup>103</sup> and was initiated through a bilateral international agreement. This invoked the executive’s foreign affairs power, and wavered in Congressional support throughout the program’s lifetime. It is substantially different from the other examples below in that it was not solely a reaction to a specific event of limited duration. The genesis of the *bracero* program was a shortage of farm labor as a result of World War II,<sup>104</sup> but the entire program lasted for a generation beyond that. The program allowed contract farm laborers to come to the United States from Mexico, initially guaranteeing them thirty cents per hour,<sup>105</sup> subject to various guarantees of working conditions and subsistence wages in case of unemployment.<sup>106</sup> Although twenty-four states availed themselves of the program,<sup>107</sup> it was not universally popular. Contemporary economic reviews found that the program depressed the wages of the United States’ own farm laborers,<sup>108</sup> in addition to a common view that the program was a type of wage-slavery.<sup>109</sup>

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103. “Manual laborer,” from Spanish *brazo*, “arm.” KITTY CALAVITA, INSIDE THE STATE—THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 1 (1992).

104. *E.g., id.* at 19.

105. \$4.46 per hour in 2017 dollars. CPI Inflation Calculator, U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Nov. 21, 2017) (adjusting for inflation between August 1942 and August 2017).

106. Agreement for the Migration of Mexican Agricultural Workers, Mex.-U.S., Aug. 4, 1942, 56 Stat. 1759, 1767–68 (“Wages and Employment” section of the international agreement establishing the program).

107. *E.g.,* CALAVITA, *supra* note 103, at 21.

108. U.C. Davis Dep’t of Agric. Econ., *The Bracero Program*, RURAL MIGRATION NEWS, Vol. 9, No. 2 (Apr. 2003), <https://migration.ucdavis.edu/rmn/more.php?id=10>.

109. For example, Tom Lehrer sneered in a 1965 lyric, “And after all, even in Egypt, the pharaohs / Had to import Hebrew *braceros*.” TOM LEHRER, *George Murphy*, on THAT WAS THE YEAR THAT WAS (Reprise Records 1965). A decidedly less tongue-in-cheek view of the *bracero* program in popular culture is Woody Guthrie’s 1948 song “Deportee (Plane Wreck at Los Gatos),” about migrant Mexican farmworkers killed in an airplane crash while being deported to Mexico, and the contemptuous treatment that they received in the United States previously. WOODY GUTHRIE, *Deportee (Plane Wreck at Los Gatos)*, on THE GREATEST SONGS OF WOODY GUTHRIE (Vanguard 1972) (written as a poem by Woody Guthrie in 1948, put to music by Martin Hoffman, and performed in this album by Cisco Houston).

The *bracero* program has parallels to DACA and DAPA as an invocation of executive power for multiple reasons. To begin, it stands as “a series of programs initiated by administrative fiat, subsequently endorsed by Congress, and kept alive by executive agreement whenever foreign relations or domestic politics threatened their demise.”<sup>110</sup> The program was administered at various points by the Department of Agriculture and its divisions, the Farm Security Administration, the War Food Administration, the Department of State, the Immigration and Naturalization Service (“INS”), and the United States Employment Service<sup>111</sup>—all part of the Executive Branch. Thus, like DACA and DAPA, the *bracero* program existed as an entity of administrative agencies, and not by actual “executive order.” Furthermore, the periods in which Congress wavered on its endorsement of the program are similar to Congress’s qualms over the validity of the Obama Administration’s actions, which stopped short of passing legislation to terminate the policies.<sup>112</sup>

More relevant to our analysis, there is an implicit executive invocation of foreign affairs power underlying the *bracero* program. The program began through a 1942 agreement between the United States and Mexico, negotiated between the United States Ambassador to Mexico and the Mexican Minister for Foreign Relations.<sup>113</sup> A supplemental agreement detailing further conditions followed nearly nine months later.<sup>114</sup> Three days after the second agreement, Congress formally endorsed the *bracero* program in a farm labor appropriation, exempting contract agricultural workers from North, South, and Central America from head taxes and admission charges, and loosening documentation requirements.<sup>115</sup> The *bracero* program endured until Congress, by law, decided upon a final termination date of December 31, 1947.<sup>116</sup> This was not the death knell for the program. Another international agreement, effected by an exchange between the United States *Chargé d’Affaires ad interim* and the Mexican Secretary for Foreign Relations, allowed not only for the program’s continuation, but also for new contract workers to arrive from Mexico.<sup>117</sup> The agreement

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110. CALAVITA, *supra* note 103, at 1–2.

111. *Id.* at 20–21.

112. See *supra* Part II.A.

113. Agreement for the Migration of Mexican Agricultural Workers, *supra* note 106.

114. Agreement for the Migration of Mexican Agricultural Workers Revising the Agreement of Aug. 4, 1942, Mex.-U.S., Apr. 26, 1943, 57 Stat. 1152.

115. Act of Apr. 29, 1943, ch. 82, § 5(g); 57 Stat. 70, 73 (providing for the supply and distribution of farm labor for 1943).

116. Act of Apr. 28, 1947, ch. 43, 61 Stat. 55, 56 (providing for the continuance and liquidation of the farm labor supply program).

117. Agreement for the Migration of Mexican Agricultural Workers Superceding the Agreement Apr. 26, 1943 and May 10, 1947, Mex.-U.S., Feb. 21, 1948, 62 Stat. 3887–89.

itself stated that its existence contemplated the prior administrative regime's sunsetting on December 31, 1947, in addition to considering "the continued need for additional agricultural workers in certain regions of the United States."<sup>118</sup> This agreement continued to govern until the passage of Public Law 82-78 in 1951,<sup>119</sup> which would be the definitive word on the *bracero* program (with four extensions through 1959<sup>120</sup>) for the remainder of its existence.

The *bracero* program's functioning through international agreements belies a foreign affairs power consideration that the executive branch invoked in the Franklin D. Roosevelt and Harry S. Truman Administrations—both were Democratic presidents navigating Democrat- and Republican-controlled Congresses. The agreements between the United States and Mexico in 1942, 1943, and 1948 are just that—bilateral agreements between two countries, not treaties that required the Senate's advice and consent in accordance with the Constitution. The executive may enter into an international agreement on the United States' behalf when acting pursuant to a preexisting treaty, to preexisting legislation, or to inherent executive authority (for example, when acting as the United States' representative in foreign affairs, when exercising the nation's recognition powers, or when acting as Commander-in-Chief).<sup>121</sup> Likewise, as put by the *Curtiss-Wright* Court, "the power to make such international agreements [that] do not constitute treaties in the constitutional sense"<sup>122</sup> is one of the main areas of sovereign power where, by reason of that case's holding, the president has plenary authority to act on behalf of the nation.

Accordingly, diplomatic power—here the power to enter into non-treaty international agreements—was invoked to create the *bracero* program, and indeed sustained it when Congress wavered in legislative support for it. This is so even when considering the program's sizeable impact on immigration. Indeed, to administer the program more effectively in the late 1940s, the INS developed a de facto legalization program for undocumented *braceros*, even legalizing 55,000 undocumented farmworkers in Texas alone in the summer of 1947.<sup>123</sup> All this occurred in addition to a significant foreign affairs interest that the Department of State described immediately postwar: The United States' agreement with Mexico helped to stabilize Mexico against

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118. *Id.* at 3887.

119. Act to amend the Agricultural Act of 1949, ch. 223, 65 Stat. 121.

120. CALAVITA, *supra* note 103, at 45.

121. See U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL §§ 723.2-2–732.2-2(C) (2006), <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

122. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

123. CALAVITA, *supra* note 103, at 24. Professor Calavita expounds upon the Texas statistic, stating that this legalization scheme "effectively circumvent[ed] the exclusion of Texas from the formal program." *Id.*

communism in Latin America.<sup>124</sup> On either rationale—the authority to enter into international agreements, or to advance policy interests abroad—the *bracero* program and the executive's exercise of foreign affairs power go hand-in-hand. This principle endures especially given that the program had a major effect on immigration that colors the United States' relationship with Mexico today. In short, the *bracero* program, as do the following two examples, lie at the nexus of immigration policy and foreign affairs power.

#### B. "FOREIGN-BORN ORPHANS"

A different type of executive power—the commander-in-chief power—was at play in President Dwight D. Eisenhower's 1956 policy statement regarding foreign-born orphans adopted by U.S. citizens. Arguably, many of his executive actions have considerable import, as they were the first slew of executive immigration actions since the INA's passage over President Truman's veto in 1952. Eisenhower issued a policy statement on foreign-born orphans in 1956. He took issue with the nationality quota system in the INA (as originally enacted) and the Refugee Relief Act.<sup>125</sup> The exhaustion of these quotas, which persisted in immigration law since the 1920s,<sup>126</sup> prevented many United States citizens, who adopted foreign-born, non-U.S. citizen children, from bringing those children to the United States.<sup>127</sup> Indeed, the existing scheme under the then-current INA made citizenship of a foreign-born child contingent upon at least two years of permanent residency. Thus, the inability to bring these children into the United States had the added detriment of delaying the naturalization process of those who were already adopted by United States citizens.<sup>128</sup> Eisenhower was especially sensitive to the status of many of these adoptive parents as members of the armed forces who had adopted children during their missions abroad.<sup>129</sup>

As a remedy to the foreign-born orphans situation, Eisenhower consulted the Attorney General and the Secretary of State to see if there was a solution "within the framework of existing law."<sup>130</sup> Evidently, there was such a solution, and over 900 foreign-born adoptees were

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124. See U.C. Davis Dep't of Agric. Econ., *supra* note 108.

125. Statement by the President Concerning the Entry into the United States of Adopted Foreign-Born Orphans, 1956 PUB. PAPERS 1033, 1033 (Oct. 26, 1956).

126. See generally Emergency Quota Act of 1921, Pub. L. No. 67-5, ch. 8, 42 Stat. 5 (limiting the immigration of aliens into the United States).

127. See Statement, *supra* note 125, at 1033.

128. See INA § 323(a)(3), ch. 447, 66 Stat. 163 (1952) (articulating the two-year requirement).

129. See Statement, *supra* note 125, at 1033.

130. *Id.*

able to enter the United States pursuant to the policy.<sup>131</sup> Eisenhower concluded by stating: “Provision for bringing these orphans into our country, pending action by Congress to amend the law, will be put into effect immediately.”<sup>132</sup>

The heart of the inquiry is whether Eisenhower invoked some type of foreign affairs power in issuing the 1956 statement. Similar to DACA, it was not a literal “executive order,” but rather an enunciation of enforcement intent, and it pertained to families with non-citizen members seeking residence in the United States. In explicit relation to foreign affairs power, it is impossible to overlook that the Eisenhower statement specifically addresses adoptive parents who were servicemembers. This arose out of a particular moment in American history. In consequence of the Korean War as well as the rebuilding of Europe and Japan after World War II, many members of the armed forces overseas adopted “foreign-born” children.<sup>133</sup> Indeed, Congress at this time specifically considered emergency legislation that would have amended the Refugee Relief Act in order to allow for more “orphan visas”—an action that the Department of State at the time considered as grounded in foreign affairs.<sup>134</sup> It is worth remembering, however, that the foreign-born orphans statement only refers to servicemembers in a general sense, and does not refer to the servicemembers in Korea, Japan, and Europe specifically. The circumstances described above are probative of context only.

The president’s commander-in-chief power is a foreign affairs power, and it illuminates the background of the 1956 foreign-born orphan policy. This conclusion flows from the specific citation of American servicemembers in the statement, as well as in the historical context. Of course, commander-in-chief power cannot be construed to afford the president the power to micromanage the lives of people who happen to serve in the armed forces.<sup>135</sup> However, the view of what this

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131. See *id.*; see also *Executive Grants of Temporary Immigration Relief, 1956–Present*, AM. IMMIGR. COUNCIL (2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/executive\\_grants\\_of\\_temporary\\_immigration\\_relief\\_1956-present\\_final\\_o.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/executive_grants_of_temporary_immigration_relief_1956-present_final_o.pdf) (indicating 923 orphans as beneficiaries of the Eisenhower policy).

132. Statement, *supra* note 125, at 1033–34.

133. See Eleana Kim, *The Origins of Korean Adoption: Cold War Geopolitics and Intimate Diplomacy* 4 (U.S.-Kor. Inst. at Johns Hopkins Sch. Advanced Int’l Stud., Working Paper No. 09-09, 2009). Indeed, nearly all of the “inter-country adoptions” by American servicemembers in 1954 were Japanese children. *Id.* at 21 n.16.

134. 35 DEP’T ST. BULL. 45, 75 (1956); accord Kim, *supra* note 133, at 10.

135. Cf. David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 484–85 (2008) (discussing the narrowness of the Commander-in-Chief power); see also *id.* at 487 (“[Foreign affairs authority] might be thought to subsume the commander in chief authority.”). David Luban illustrates in his article *On Commander in Chief Power* that the power most recently reached a zenith during the George W. Bush Administration, in response to the September 11, 2001, terrorist attacks. See *id.* at 568–69. The President cannot, however, invoke his Commander-in-Chief power to

commander-in-chief power entails has waxed and waned, both legally and academically, over time. It seems to follow, then, that the president might invoke his commander-in-chief power, even when not “making war,” when soldiers are explicitly involved. The 1956 foreign-born orphan policy specifically indicated servicemembers as the parties affected by the policy, after over a decade of the United States being a warring or occupying force in Europe and Asia. An invocation of commander-in-chief power arises not only out of the parties affected, but the situation that led to their adopting foreign-born orphans in the first place.

### C. THE STUDENTS OF TIANANMEN SQUARE

The senior President Bush’s administration saw executive action pertaining to Chinese nationals in the United States, a reaction to the 1989 pro-democracy protests in the People’s Republic of China. Congress later enacted legislation in accordance with the executive order. Beginning in April 1989, several thousand Chinese university students marched on Tiananmen Square in Beijing, demanding a governmental shift toward democracy in light of the recent death of Chinese Communist Party leader Hu Yaobang.<sup>136</sup> As the protests grew and continued for almost two months, Beijing was placed under martial law,<sup>137</sup> whereby the Chinese armed forces violently suppressed the protest in Tiananmen Square by June 5.<sup>138</sup> The protests and the martial law that followed left the country in disarray even after the protests’ suppression.<sup>139</sup>

The following year, President George H. W. Bush issued Executive Order 12711—entitled “Policy Implementation with Respect to Nationals of the People’s Republic of China”—in response to the protests and consequent upheaval in Mainland China.<sup>140</sup> The order provided for a number of protections directed toward Chinese nationals in the United States, including: (1) deferred deportation of any Chinese nationals who were in the United States from June 5, 1989 (the date the protests were forcibly suppressed) and April 11, 1990 (the date of the

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affect the lives and businesses of civilians, as the *Youngstown* majority opinion iterated. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

136. E.g., Nicholas D. Kristof, *Chinese Students March for Democracy*, N.Y. TIMES, Apr. 18, 1989, at A3.

137. E.g., *Beijing Is Placed Under Martial Law—Protestors Defy Order to Disperse; Zhao Reportedly Has Resigned*, SEATTLE TIMES, May 19, 1989, at A1; *Martial Law Declared in Beijing—Protesters Block Troops; TV Reporters Restricted*, AUSTIN AM. STATESMAN, May 20, 1989, at A1.

138. See, e.g., Nicholas D. Kristof, *Turmoil in China; Foreboding Grasps Beijing; Army Units Crisscross City; Foreigners Hurry to Leave*, N.Y. TIMES, June 8, 1989, at A1.

139. See *id.*

140. Exec. Order No. 12711, 3 C.F.R. 13897 § 1 (1990).

order) until January 1, 1994;<sup>141</sup> (2) waiver of various documentation requirements required for residence and reentry to the United States;<sup>142</sup> and (3) employment authorization through January 1, 1994.<sup>143</sup> The order also provided for “enhanced consideration... for individuals from any country” articulating a fear of “forced abortion or coerced sterilization” upon return to their home country based upon that country’s policies<sup>144</sup>—a probable nod to China’s then-current “one-child policy.”<sup>145</sup> The terms of Executive Order 12711 were solidified through legislation upon the passage of the Chinese Student Protection Act in 1992.<sup>146</sup>

While similarities between Executive Order 12711 and DACA can be drawn, they are superficial. Both policies delay the removal of people who are nonetheless formally removable. Furthermore, both policies have time-based boundaries of applicability and contemplate employment authorization.<sup>147</sup> Nonetheless, the comparison is not truly on-point. In 1992, the Democrat-controlled Congress ratified Republican President Bush’s actions through the Chinese Student Protection Act two years after the executive order. On the other hand, the Republican-controlled Congress in 2015 and 2016 held hearings on whether the Obama policies were constitutional, as a threshold matter.<sup>148</sup> In the House Judiciary Committee hearing, Congressman Goodlatte disputed relying on the Executive Order 12711 as precedent, stating that President Bush’s actions were authorized by the INA.<sup>149</sup> On the other hand, as Congressman Goodlatte stated, the Obama Administration acted “[w]ithout any crisis in a foreign country to justify [the President’s] actions, . . . granting deferred action without any statutory authorization, . . . [and] clearly exceed[ing] his constitutional authority.”<sup>150</sup>

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141. *Id.*

142. *Id.* § 2.

143. *Id.* § 3(c).

144. *Id.* § 4 (cross-referencing the Attorney General’s then-new regulation, Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2,803 (Jan. 29, 1990) (to be codified at 8 C.F.R. § 205.5(b)).

145. See generally, W.X. Zhu, *The One Child Family Policy*, 88 ARCHIVES DISEASE CHILDHOOD 463, 463 (2003) (describing the Chinese government’s hope that there will be a shift towards the “small family culture”).

146. See Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969.

147. Compare Exec. Order No. 12711 § 3(c) (establishing employment authorization for the applicable Chinese nationals), with DACA MEMORANDUM, *supra* note 2, at 3 (allowing U.S. Citizenship and Immigration Services to accept applications to determine eligibility for work authorization).

148. See *House Deferred Action Hearing*, *supra* note 44; *Senate Deferred Action Hearing*, *supra* note 48.

149. *House Deferred Action Hearing*, *supra* note 44, at 3.

150. *Id.*

The congressman's comment gets at the heart of President Bush's invocation of foreign affairs power in issuing Executive Order 12711. Before considering this issue, it must be said that setting a bright line at a "crisis in a foreign country" before taking executive action is misplaced. Indeed, an action like the *bracero* program hardly meets the definition of a "crisis in a foreign country" and occurred without statutory authorization. Similarly, the foreign-born orphans policy did not arise out of a "crisis" in the usual sense—in fact, that statement and the Obama-era deferred action policies both attempt to ward off family disunity, a "crisis" albeit on a personal level, not an international one. The point remains, however, that President Bush's executive order was in reaction to an international crisis, and nationals of that country—some eligible for deportation—remained in the United States. Surely, it would be inhumane to apply the U.S. laws governing deportation so much by rote as to deport people to their native country that had just called in its army to suppress a pro-democracy series of protests. Thus, Executive Order 12711 invoked the executive's foreign affairs power—generally, to promote the United States' foreign affairs, and particularly, to take a stance against what the federal government viewed as the bloody stifling of democracy and free expression abroad.<sup>151</sup>

#### D. LESSONS FROM THREE EXECUTIVE ACTIONS

These immigrant-inclusive executive actions, which all invoked the president's foreign affairs power to some degree, are noteworthy precisely because of their uncontroversial nature. That these actions did not cause sustained friction in Congress or the federal judiciary indicates a view that these presidents were operating within their proper sphere of power. Because (1) there is no clear statutory through-line giving the president this power; (2) the actions involved foreign nationals or the United States' interaction with foreign nations; and (3) the president has plenary power to conduct foreign affairs, it follows that the actions described in Parts IV.A. through IV.C. were reasonable exercises of the president's foreign affairs power.

Therefore, another part of the rule that will be discussed in Part V emerges: the president reasonably exercises foreign affairs power over immigration when his actions can be called "individual presidential

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151. Both the President and members of Congress denounced the actions of the Chinese government as soon as they happened. See, e.g., Robert D. McFadden, *The West Condemns the Crackdown*, N.Y. TIMES, June 5, 1989. Accord Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.").

foreign affairs power.” Individual presidential foreign affairs power includes presidential power either expressly authorized by the Constitution (for example, commander-in-chief power, pertaining to the foreign-born orphans policy) or existing by virtue of sovereign authority (for example, entering into non-treaty international agreements, or promoting foreign affairs interests in time of international crisis). There are doubtless other categories in the field of “individual presidential foreign affairs,” however, those are best determined based upon a case-by-case basis. Express statutory delegation will be discussed below.<sup>152</sup>

## V. SYNTHESIZING A THEORY OF FOREIGN AFFAIRS POWER ON EXECUTIVE IMMIGRATION ACTIONS

Part III of this Note concluded by stating that the president may exercise his foreign affairs power pertaining to immigration actions, but must do so in a manner that respects Congress’s Article I authority. Part IV concluded by detailing what an appropriate exercise of this foreign affairs power might look like in immigrant-inclusive actions, within the parameters of “individual presidential foreign affairs.” Because, even from the early days of the Republic,<sup>153</sup> the Constitution requires *all* governmental actors to have limits upon their power in order to maintain the rule of law, a rule can be synthesized out of the foregoing arguments: presidential foreign affairs authority, based on past practice, supports the president’s power to offer limited forms of immigration relief, at least in the absence of clear congressional prohibition, if the president judges that denying such relief might have foreign affairs consequences. This rule can be used to delineate the limits on the executive’s otherwise plenary diplomatic power when the executive acts alone on immigration.

This rule can be distilled into a framework that may be applied in the case of DACA or future similar scenarios where a president independently takes an action on immigration that provides relief or otherwise acts to keep the immigrants in the nation’s borders. Specifically, the president may act on immigration by himself (or through an executive department) if the action: (1) does not interfere with Congress’s legislative power over immigration, and (2) falls within the realm of “individual presidential foreign affairs powers.”

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<sup>152.</sup> See *infra* Part V.A.

<sup>153.</sup> In *The Federalist*, for example, Alexander Hamilton explained why treaty ratification required the advice and consent of the Senate rather than being vested in the President alone. To Hamilton, the President should have his treaty-making authority checked by the legislature, since “[a]n ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents” were the President alone able to conclude treaties. THE FEDERALIST NO. 74, 522 (Alexander Hamilton (Henry B. Dawson ed., 1863)).

Application of this conjunctive test is ultimately up to a court to decide, based upon given facts. The following sections present one possible way in which a court might apply this test.

#### A. THE ACTION MUST “NOT INTERFERE WITH CONGRESS’S LEGISLATIVE POWER OVER IMMIGRATION”

Determining Congress’s legislative power over immigration requires a close reading of the Naturalization Clause. The Naturalization Clause grants Congress the power to create a uniform rule of *naturalization*, a process to create more citizens and to govern their behavior while in the United States.<sup>154</sup> Moreover, it is a *uniform* rule. It allows uniformity of negotiation and governance, so that “foreign countries concerned about the status, safety, and security of their nationals in the United States [can] confer and communicate . . . with one national sovereign, not the 50 separate States.”<sup>155</sup>

Congress has enacted a number of immigration laws that fall within its Article I power. *Arizona v. United States* provides some guidance on determining the scope of presidential foreign affairs authority over immigration. *Arizona* considered whether federal law preempted the State of Arizona’s then-recently enacted statutory scheme that gave state officials considerable power over undocumented immigrants.<sup>156</sup> In interpreting whether each provision of the *Arizona* law was preempted, the Court expounded upon what Congress’s actual authority over immigration entailed. Although this analysis was originally provided to contrast state-versus-federal power over undocumented immigrants, it is probative of the nature of Congress’s power to legislate on immigration matters, generally speaking. In the Court’s view, congressional power over immigration included: (1) determining the entry requirements of immigrants, and allowing for removal procedures<sup>157</sup>; (2) requiring immigrants to register solely with the federal government<sup>158</sup>; (3) regulating the employment of undocumented immigrants<sup>159</sup>; (4) regulating when an immigrant can be

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154. Cf. U.S. CONST. art. I, § 8, cl. 4.

155. *Arizona*, 132 S. Ct. at 2498.

156. See *id.* at 2497–98.

157. See *id.* at 2499.

158. “As it did in *Hines*, the Court now concludes that, with respect to the subject of alien registration, Congress intended to preclude states from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.’” *Id.* at 2503 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941), insertions in original).

159. “Congress enacted IRCA as a comprehensive framework for ‘combating the employment of illegal aliens.’” *Arizona*, 132 S. Ct. at 2504 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

detained during the removal process;<sup>160</sup> and (5) allowing state officials to verify immigration status during an authorized, lawful detention by a state or local officer.<sup>161</sup>

The list indicated above is not exhaustive. Nonetheless, where a president attempts to act in a manner that falls within one or more of these areas of congressional action, this prong of the immigration-foreign affairs power rule will not be satisfied. Moreover, any action would also have to respect the basic constitutional rights with which Congress has been entrusted,<sup>162</sup> such as due process of the law, equal protection of the laws,<sup>163</sup> and First Amendment rights. As such, this constitutional compliance step may properly be called the “zero step” of this analysis.

Congressional acquiescence goes hand-in-hand with the discussion on congressional authority, to recall the Supreme Court’s reasoning in *Dames & Moore*.<sup>164</sup> While many members of Congress voiced their disagreement, the voices of individual representatives or senators do not equal congressional action. As DACA reached its fifth anniversary unrevoked and without meaningful abrogation or ratification by Congress, this evidence of congressional acquiescence must support the view that the policy did not interfere with Congress’s legislative power over immigration.

Not every action the president may take on immigration acts to keep immigrants in the country’s borders. What to make of situations like section 212(f) of the INA, wherein Congress has specifically delegated the president expansive power to exclude? After all, that section reads, in relevant part:

Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restriction he may deem to be appropriate.<sup>165</sup>

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<sup>160.</sup> *Arizona*, 132 S. Ct. at 2505. The Court went on to state that this regulation also prohibited state officers from “mak[ing] warrantless arrests of aliens based on possible removability except in specific limited circumstances.” *Id.* at 2507.

<sup>161.</sup> *Id.* at 2509.

<sup>162.</sup> Although these rights have been viewed as applying against all governmental actors, the text of the Constitution specifically applies them to legislative matters. *E.g.*, U.S. CONST. amend. I (“Congress shall make no law” abridging freedoms of religion, the press, speech, petition, or assembly) (emphasis added); U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

<sup>163.</sup> Although the Fourteenth Amendment, requiring equal protection, is written regarding the states, the doctrine of reverse incorporation applied it to the federal government as well. *See Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

<sup>164.</sup> *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

<sup>165.</sup> INA § 212(f) (codified at 8 U.S.C. § 1182(f)(2012)).

Section 212(f) pertains to immigrant-exclusive actions, or executive actions that act as a bar or restriction on entry. As such, this is outside of this Note's scope. However, while this power might sound expansive—a wholesale legislative concession to the president to act on immigration as he sees proper—in practice, it was not so prior to 2017. From 1981 to 2016, aliens excluded under section 212(f) had to belong to discrete, well-defined classes of people who performed acts that might threaten national security, such as “engaging in malicious cyber-enabled activities” or engaging in a coup d'état.<sup>166</sup> Furthermore, removing immigrants or barring them from entry implicates due process considerations<sup>167</sup> that actions to permit immigrants to continue residing in the United States do not.

#### B. THE ACTION MUST “FALL WITHIN THE REALM OF ‘INDIVIDUAL PRESIDENTIAL FOREIGN AFFAIRS POWERS’”

For an executive action to satisfy the second prong of this rule, it must fall within the realm of “individual presidential foreign affairs powers.” As explained throughout Part IV, these “individual presidential foreign affairs powers” include: (1) power granted expressly through the Constitution, such as commander-in-chief power (the “foreign-born orphans” statement) or recognition power (*Zivotofsky v. Kerry*<sup>168</sup>); (2) power invoked pursuant to an international agreement not rising to the level of a treaty (the *bracero* program); and (3) power invoked in response to larger international concerns (*United States v. Curtiss-Wright Export Corp.*), especially when nationals of the affected foreign country are in the United States (Executive Order 12711).

These examples raise an important issue: If the president may navigate only within these and similar areas a court might designate as “individual presidential foreign affairs powers,” is the president’s foreign affairs power truly plenary? This Note posits that it still is. Boundaries to the power are necessary lest a president argue that everything he does relating to immigrants is “diplomatic” in nature, thereby causing gridlock with Congress and cloaking himself in quasi-dictatorial power. The power is still plenary within these boundaries. This is the overarching theme of having a federal government exercising

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<sup>166</sup> KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6–10 (2017).

<sup>167</sup> See U.S. CONST. amend. V (“No person shall . . . be deprived of . . . liberty . . . without due process of law . . . .”) (emphasis added); see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

<sup>168</sup> In *Zivotofsky v. Kerry*, the Court held that, constitutionally, the power to recognize foreign nations resided solely in the President. 135 S. Ct. 2076, 2094 (2015). This prevented the American parents of a child born in Jerusalem from listing the child’s place of birth as “Jerusalem, Israel” (versus “Jerusalem”) on the child’s United States passport, contrary to a congressional act. *Id.* at 2096.

limited delegated powers pursuant to a written constitution—that freedom requires powers to be exercised within limits.

### C. APPLICATION TO DACA AND DAPA

Upon application of this test to DACA and DAPA, these Obama-era immigration policies pass the first prong of the rule set forth above. The deferred action policies do not trammel upon Congress's Article I legislative power. The policies do not attempt to regulate the actions of immigrants, documented or not, during their time in the United States. It is possible to argue that the policies interfere with removal procedures regarding the immigrants who were "inadmissible at the time of entry," as the *Arizona* Court considered.<sup>169</sup> However, the merits of this argument are in question. The policies do not create new swaths of immigrants who are deportable, or create de facto amnesty for undocumented immigrants already in the United States. This is apparent on the face of the policies—the government's guarantee through DACA is nonbinding,<sup>170</sup> and the DAPA policy specifically states that it guarantees "no substantive right, immigration status or pathway to citizenship."<sup>171</sup> The nonbinding nature of the policies reinforces their exercise as enforcement discretion, rather than a substantive change in the law that would require congressional input. Choosing how to enforce the nation's immigration laws is peculiar to the executive branch as a separation-of-powers principle, and because it would be impossible "to coherently identify a set of congressional priorities for immigration enforcement" by performing a textual analysis on the "300-page immigration code."<sup>172</sup> Therefore, it seems as though the deferred action policies pass the first prong of the rule.

The second prong of the rule is where the analysis becomes troublesome. In light of the judicial issues that surrounded DAPA, this analysis is limited to DACA. The Obama DHS did not establish DACA pursuant to an international agreement. The essential inquiry is whether DACA serves some foreign affairs end. It would likewise be possible to argue that DACA could prevent undocumented immigrants from being discharged into potentially hostile environments in their home countries, such as Executive Order 12711 under President Bush's Administration. President Obama expounded upon the policy underlying DACA at the press conference where the policy was announced. He stated: "Imagine you've done everything right your entire life... only to suddenly face the threat of deportation to a

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169. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

170. See *DACA MEMORANDUM*, *supra* note 2, at 3.

171. *DAPA MEMORANDUM*, *supra* note 3, at 5.

172. Cox & Rodríguez, *supra* note 58, at 110.

country that you know nothing about, with a language that you may not even speak.”<sup>173</sup> Although DACA’s beneficiaries hail from many different countries—not all of which might be rent by war or other domestic turmoil—President Obama’s statement hearkens to an underlying presumption that they might. Furthermore, the military service provision of DACA,<sup>174</sup> as well as President Obama’s specific contemplation that DACA would help “a young person who is serving in our military, protecting us and our freedom,”<sup>175</sup> call upon the president’s constitutional authority over the military, in penumbral fashion. Furthermore, although not an example of individual presidential foreign affairs power, larger concerns of international amity were at stake with DACA. In this respect, the decline in tourism to the United States after President Trump’s Executive Orders 13769 and 13780 indicate the pitfalls of being perceived as a nation unfriendly to foreigners.<sup>176</sup>

Thus, it appears that DACA, at least, might pass the rule enunciated in this Note. However, reasonable minds can differ. At the very least, though, this framework affords an alternative to the Obama-era stalemate between Congress and the executive branch over DACA. This stalemate ensued in the controversies that DACA and DAPA provoked regarding the APA and the Take Care Clause. This proposed new framework specifically avoids implicating those legal or constitutional provisions.

#### CONCLUSION

On March 9, 2015, forty-seven Republican U.S. Senators drafted an open letter to the leaders of Iran regarding the then-current nuclear negotiations between Iran and the United States.<sup>177</sup> Naturally, this letter encroached upon the executive branch’s authority to transact international relations, as it did not conform to any legal, theoretical, or historical bases for exercising foreign affairs power. Since the president

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173. President Barack Obama, *Remarks by the President on Immigration* (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

174. See DACA MEMORANDUM, *supra* note 2, at 1.

175. Obama, *supra* note 173.

176. See, e.g., Christopher Muther, *You Could Call US Tourism a Victim of Trump’s Travel Ban*, BOSTON GLOBE (Feb. 14, 2017), <https://www.bostonglobe.com/lifestyle/travel/2017/02/14/trump-ban-causes-tourism-drop-and-industry-fears-lasting-effect/yzMAVzeLvqywP8gEekoFsL/story.html>.

177. See Letter from Tom Cotton et al., U.S. Senators, to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), <https://web.archive.org/web/20150311023113/http://www.cotton.senate.gov/sites/default/files/150309%20Cotton%20Open%20Letter%20to%20Iranian%20Leaders.pdf>; see also Press Release, Sen. Tom Cotton, Cotton and 46 Fellow Senators Send Open Letter to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), <https://www.cotton.senate.gov>; Peter Baker, *G.O.P. Senators’ Letter to Iran About Nuclear Deal Angers White House*, N.Y. TIMES, Mar. 9, 2015, at A1.

is the only constitutional actor with the authority to interact with foreign dignitaries,<sup>178</sup> the drafting and publication of the letter was arguably an act without constitutional authority.

The purpose of discussing the Iran letter is not to set up a *tu quoque* argument (“If the Republicans can thwart the Democrats’ constitutional duties, why can’t the Democrats do the same?”). Rather, it reveals how the branches of government encroach on each other’s authority—often in shows of political posturing—all the time. This intrusion can occur even in area like national security and foreign affairs, where the president’s power is usually regarded with extreme deference. This interplay is an inherent risk of having a government composed of three coequal branches, all governing a diverse and often rancorous body politic.

Largely, this Note rebuts the uncomplicated view of executive power over immigration law that many commentators put forth since the DHS announced DACA in 2012 up to President Trump’s litany of executive orders on immigration in early 2017. The public’s views on these two presidents’ actions often wafted like a feather in the political breeze. Some condemn DACA as executive overreach while esteeming President Trump’s “travel ban” judicially unreviewable—and vice versa. A new framework is necessary as long as the federal government continues to stalemate on the issue of immigration, and the American citizenry continues to demand change in one direction and then the other.

Admittedly, the argument posed in this Note is novel. Immigration is an oddity in the United States legal system, and the constitutional rights of immigrants—especially undocumented ones—remain convoluted.<sup>179</sup> Furthermore, the presidency has transformed by leaps and bounds since the days of the Framers. President Washington considered the presidency an office of the nation’s “Chief Magistrate,”<sup>180</sup> an administrative responsibility. Compare this with the election of 2016, where rhetoric around the presidency seemed to reflect a

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178. See U.S. CONST. art. II, § 3 (“[The President] shall receive Ambassadors and other public Ministers.”).

179. See generally Rubenstein & Gulasekaram, *supra* note 59; see also I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) (stating that removal proceedings do not require proof beyond a reasonable doubt; Fourth Amendment-based exclusionary rules are inapplicable; Ex Post Facto Clause does not apply in removal cases; the Eighth Amendment does not require bail to be granted in removal cases); see also Ray v. Gonzales, 439 F.3d 582, 586 (9th Cir. 2006) (“Because a deportation hearing is a civil proceeding involving non-citizens, aliens involved in such proceedings do not enjoy the full panoply of constitutional rights that American citizens would enjoy in a criminal proceeding.”). But see Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (requiring removal proceedings to conform to Fifth Amendment due process); Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 526 (2013).

180. President George Washington, Second Inaugural Address (Mar. 4, 1793).

perception that the president is directly and personally responsible for creating jobs, passing laws, and ensuring the nation's health and greatness.<sup>181</sup> As the people of the United States look to the president, and not a deadlocked Congress to set immigration law and policy, a clearer framework for the president's power is necessary.

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This is the riddle of immigration law in the United States: that a nation that passed the Chinese Exclusion Act into law in 1882 also produced Emma Lazarus's poem "The New Colossus" scarcely more than a year later. All of the preceding analysis aside, it is worth remembering that immigration law and policy in the United States is not really about passports, visas, statutes, constitutional provisions, and sovereign power. In short, immigration law is not really about immigration "law." Immigration law, as wave after wave of discrimination since the nineteenth century has illustrated, is about the nexus of race, class, and religion with the prevailing policy of dominant social classes. Until that becomes the background for conceptualizing immigration law, this field will remain condemned to an eternal tug-o'-war in the courts, in Congress, in the White House, and on the streets.

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<sup>181</sup>. See, e.g., Carmen Fishwick & *Guardian* readers, *Why Did People Vote for Donald Trump? Voters Explain*, THE GUARDIAN (Nov. 9, 2016), <https://www.theguardian.com/us-news/2016/nov/09/why-did-people-vote-for-donald-trump-us-voters-explain>.