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## Transparent Review of Agency Immigration Decisions

*The administrative state has played an increasingly dominant role in implementing immigration law in the United States. While Congress and the President have historically been granted plenary power that limits constitutional judicial review, those same limitations have been applied haphazardly to grant plenary power to administrative agencies as well. Extensive scholarship discusses the role of plenary power in judicial review of the political branches, but there is a dearth of literature evaluating its role in administrative law. Yet the events of the past two decades, including President Barack Obama's executive mandate on November 20, 2014, have revealed that the extension of plenary power to administrative agencies subordinates constitutional principles to statutory prescriptions or even administrative practice. As a result, constitutional analysis of immigration decisions is prevented while statutory review is allowed on the theory that courts must uphold plenary power for the legislative branch by enforcing its statutes. Thus, courts review immigration decisions primarily by enforcing statutes like the 1942 Administrative Procedures Act (APA), the 1952 Immigration and Naturalization Act (INA), and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Together, these enactments provide oversight and accountability to those charged with administering immigration law in order to promote efficiency while protecting individual rights and preserving constitutional separation of powers. However, even those clearly constitutional objectives are often accomplished under the guise of statutory interpretation in order to avoid violating the plenary power doctrine. In a recent example, the 2014 executive mandate and subsequent memoranda of the Department of Homeland Security (DHS) have been challenged as substantive legislative rules under the APA that require notice-and-comment procedures. Statutory review grounded in these enactments, but actually based on constitutional principles, can only go so far in preserving constitutional rights and preventing expansion of executive power. Instead, plenary power should be disentangled from constitutional judicial review of the political branches, and eliminated altogether in the administrative state.*

## INTRODUCTION

Pedro was stranded at the gas station where his truck's battery died. He knew that he had to figure something out soon, because when he left home just a few minutes before, his wife and children were excited at the prospect of a full day's labor. A full day of work meant a stress-free weekend that Pedro could enjoy with his family—a rarity for Pedro, who usually spent weekends on the street corner waiting for contractors who needed his services. But today was different. Today, his friend had told him about an opportunity to work in the oil fields only two hours away from Pedro's home. And now, today, Pedro was stranded at the gas station.

Pedro was a good man who cared for his family and did his best to obey the law. As an undocumented worker in the United States, he believed that he had been blessed to make it safely across the border and cautiously avoided anything that would cause him to throw that blessing away. As Pedro asked others at the gas station for help, he struck up a conversation with other Mexican immigrants who understood his plight. Pedro did not really understand recent changes in immigration law, and the terms “DACA” and “DAPA” were foreign to him. But Pedro knew one thing: he needed that piece of paper authorizing him to work. For Pedro, that was salvation. Sure, a few of his friends who had obtained work authorization still spent each day scraping out a living, uncertain about the source of their next job, paycheck, and meal. But he knew that he could not even hope for a stable future without clearing that first hurdle. Pedro would do anything to be authorized to work.<sup>1</sup>

On the other hand, Arnulfo had a relatively sordid past. He had turned his life around and was working hard to provide for his wife and five-year-old son—both of whom are citizens—but his two DUI convictions made it extremely difficult for him to ever obtain legal permanent residency. He had been able to renew his Employment Authorization Document each year and continue his job in construction. That is, until March 2015, when his application for renewal was denied due to his criminal record. Now Arnulfo had just four weeks to either leave the country or officially enter the ranks of

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1. Interview with immigrant, name changed for anonymity, in Provo, Utah (Dec. 19, 2014).

the undocumented. He hoped that his boss, who had become his friend, would never realize that the copy of Arnulfo's work authorization on file was about to expire.<sup>2</sup>

It is difficult to imagine many stories where deportation becomes an option that will not present heart-breaking humanitarian difficulties. However, when the judiciary abdicates its role in reviewing immigration decisions for constitutionality, policies and procedures continue unchecked in such a way that aliens in the United States are kept in permanent limbo,<sup>3</sup> wondering whether their case will be the next case that is chosen for deportation based upon some immigration official's discretion.

The challenges are particularly difficult given the nature of the laws that must be administered, now by the Department of Homeland Security (DHS). Those laws are politically charged and substantially impact the lives of individuals whose hardships in the face of enforcement are often palpable. Families can be divided, homes left empty, children abandoned, opportunities foreclosed, and liberty rescinded. While these are all outcomes that are common in criminal law enforcement, the DHS is faced with violations of the law that do not seem as morally reprehensible as crimes like theft, robbery, or even vandalism.<sup>4</sup> While deportation is perhaps not *as* liberty-restricting as imprisonment, it often serves as a form of banishment and exile that results in additional barriers to entry, making it even less likely for a noncitizen to enter the United States legally after being removed.<sup>5</sup>

There is a great deal of scholarship discussing plenary power and prosecutorial discretion in immigration law.<sup>6</sup> However, there has never been a thorough analysis of how the plenary power doctrine interacts

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2. Interview with immigrant, name changed for anonymity, in Provo, Utah (Mar. 8, 2015).

3. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 298 (2010).

4. Improper entry is only a misdemeanor for first-time offenders, and unlawful presence is not even a crime. 8 U.S.C. § 1325 (2012).

5. 8 U.S.C. § 1326 (2012); Kurtis A. Kemper, Annotation, *Illegal Reentry Under § 276 of Immigration and Nationality Act (8 U.S.C.A. § 1326) of Alien Who Has Been Denied Admission, Excluded, Deported, or Removed or Has Departed United States While Order of Exclusion, Deportation, or Removal Is Outstanding*, 177 A.L.R. FED. 459 (2002).

6. See, e.g., 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, 81–87 (2002); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Wadhia, *supra* note 3.

with the Administrative Procedures Act (APA). More specifically, given the subtly diminishing role of plenary power in immigration cases and the not-so-subtle expansion of the administrative state, no one has considered how APA review of immigration decisions is appropriate even when constitutional review is prevented by plenary power.

This Comment attempts to begin a conversation about questions that are certain to take center stage in defining immigration law in the years to come. It argues that immigration law, despite its tradition of plenary power, cannot create a system that protects individual rights while promoting administrative efficiency simply by reviewing immigration decisions on statutory technicalities. Therefore, courts should only continue to grant plenary power if they also provide transparent constitutional review of immigration decisions, and that plenary power should not be granted to administrative agencies. Part I of this Comment reviews the history and evolution of immigration law and judicial review. Part II outlines the history and structure of the APA, and discusses the increase in executive mandates guiding administrative action. Part III discusses the application of the APA to executive action, analyzes its relationship to plenary power, and evaluates related legal issues surrounding President Obama's recent executive mandate. Part IV makes a recommendation for redefining the way that courts provide judicial review of immigration decisions.

### I. HISTORY OF IMMIGRATION LAW AND JUDICIAL REVIEW

Courts have used a number of different justifications for reviewing exclusion orders, deportation proceedings, citizenship and naturalization hearings, and numerous other actions that constitute the field of immigration law.<sup>7</sup> The changing justifications for review follow a pattern of deference to immigration officials tempered by recognition of the basic rights of non-citizens within the United States.<sup>8</sup> The plenary power doctrine significantly impacts every instance of judicial review of an immigration decision. Thus, this Part

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7. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 260 (5th ed. 2003).

8. *Cf.* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.").

first briefly describes the history and application of the plenary power doctrine. Second, it discusses congressional enactments that have formed the basis for judicial review of immigration law. Third, it describes the waning influence of the plenary power doctrine and the increasing use of prosecutorial discretion to make immigration decisions. Finally, it reviews Congress's 1996 immigration statute.

#### *A. Plenary Power*

Immigration law has traditionally enjoyed special treatment at a constitutional level as a result of the plenary power doctrine.<sup>9</sup> The doctrine took its most definite form in the 1889 *Chinese Exclusion Case*, where the Court's holding made it clear that the federal government could regulate immigration virtually without the threat of judicial review.<sup>10</sup> In that case, a Chinese immigrant, Chae Chan Ping, had come to the United States under a treaty that provided for unrestricted immigration from China.<sup>11</sup> Shortly thereafter, a new treaty permitted limitations by the United States government on Chinese immigration. Pursuant to that treaty, Congress banned Chinese immigration for ten years in 1882 with a provision that immigrants wishing to leave could obtain certificates for reentry.<sup>12</sup> However, a year after Chae Chan Ping obtained a certificate and returned to China, Congress excluded even those that had certificates of reentry in 1887.<sup>13</sup> The Court emphasized the federal government's power in immigration matters under the Constitution, and declined to consider alien rights as limits on government action. In doing so, it held that the federal government had the power "to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion."<sup>14</sup>

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9. Motomura, *supra* note 6, at 547.

10. *Id.* at 551.

11. *Id.* at 550–51.

12. *Id.* at 551.

13. Chae Chan Ping v. United States, 130 U.S. 581, 599–600 (1889); Motomura, *supra* note 6, at 551.

14. *Chae Chan Ping*, 130 U.S. at 604–07 (1889) ("While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."); *see also* Motomura, *supra* note 6, at 551–52.

Since that case, courts have been hesitant to entertain constitutional challenges about which aliens should be admitted or expelled because the plenary power doctrine declares that Congress and the executive branch have nearly exclusive and certainly very broad authority over immigration matters.<sup>15</sup> Thus, “classical immigration law,” as it has been termed, has resulted in a permissive judicial approach to “restrictive nationalism,” even though it sharply diverges from the liberal human rights philosophy that has dominated other areas of the law.<sup>16</sup> The decision in the *Chinese Exclusion Case* was based on a judicial preference for preserving the nation’s sovereignty.<sup>17</sup> Because of this preference, the persistent, gradual changes of the twentieth and twenty-first centuries that led to a complete overhaul of the administrative state did not fully impact judicial review of immigration law.<sup>18</sup>

Despite courts’ commitment to the plenary power doctrine, judicial review *has* been permitted by application of the “Great Writ” of habeas corpus in cases where the noncitizen seeking review is in physical custody.<sup>19</sup> Enshrined in the Suspension Clause in Article I, Section 9, Clause 2, the Constitution states: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>20</sup> Nevertheless, even though aliens have not been left completely without remedy in immigration cases, the balance has traditionally tilted decidedly in favor of the political branches and their plenary power to make immigration decisions even when they negatively impact the rights of noncitizens.

### *B. Congressional Oversight of Immigration Administration*

Interestingly, while the *Chinese Exclusion Cases* and subsequent case law reserved plenary power for the executive and legislative branches, they did not provide extremely clear guidance for how that

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15. Motomura, *supra* note 6, at 547.

16. Schuck, *supra* note 8, at 3.

17. *Chae Chan Ping*, 130 U.S. at 600–09 (1889).

18. Schuck, *supra* note 8, at 3.

19. ALEINIKOFF, *supra* note 7, at 259–60.

20. U.S. CONST, art. I, § 9, cl. 2.

power should be allocated or implemented.<sup>21</sup> Thus, the nineteenth century saw a proliferation of congressional enactments seeking to define and regulate the roles of those involved in implementing the law. In relatively quick succession, Congress enacted two extensive regulatory regimes, the APA in 1946<sup>22</sup> and the INA in 1952,<sup>23</sup> which dramatically changed the way the courts approached immigration law.<sup>24</sup> Specifically, the INA provided for judicial review using the procedures outlined in the APA for all cases arising under the INA.<sup>25</sup>

In fact, some in Congress sought to exempt immigration decisions from review under the APA entirely,<sup>26</sup> arguing that judicial oversight would create a costly and cumbersome bureaucracy that was inappropriate for the political and foreign affairs functions of immigration law.<sup>27</sup> While no such exemption was codified, the exemption exists for all practical purposes. In practice, the new statutory regime under the INA required courts to balance a deeply ingrained tradition of respecting the government's plenary power with a statutory command to review immigration decisions under the APA and INA. The INA did not result in universal application of APA review in the courts, which this comment argues is largely due to a continued commitment to plenary power. However, immigration cases increased as a percentage of the overall administrative caseload

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21. Motomura, *supra* note 6, at 551.

22. Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (codified as amended in 5 U.S.C. §§ 551–59, 701–06 and scattered sections of Title 5).

23. Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in 8 U.S.C. §§ 1101–1537).

24. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 515–16 (2009).

25. Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1968 (2000); see *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (clarifying that the INA's provision that deportation orders of the Attorney General should be "final" only meant final for the administrative procedure); see also Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 890 (stating that the "[deportation] decision of the Secretary of Labor shall be final"); Reorganization Plan of April 3, 1939, Reorganization Plan No. 76-5, 54 Stat. 1238 (transferring the Immigration and Naturalization Service from the Department of Labor to the Department of Justice).

26. See H.R. 6652, 80th Cong. (1948) (as referred to H.R. Comm. on the Judiciary on May 24, 1948) (exempting immigration decisions from the APA); 94 CONG. REC. 5655, 6374 (1948) (exempting immigration decisions from the APA was sent to the house judiciary committee where it was reviewed but no further action was taken).

27. Schuck, *supra* note 8, at 32.



by eight percent.<sup>28</sup> That growth has only heightened the challenges that have always existed for those charged with implementing immigration law under complex statutory regimes, now with the added procedural requirements of the APA.

*C. Prosecutorial Discretion and Plenary Power After the INA*

In the decades since the APA and INA became law, the same outcomes produced under the plenary power doctrine have been achieved using prosecutorial discretion. While the term “prosecutorial discretion” generally refers to executive decisions to allocate enforcement resources and to elect not to prosecute certain categories of offenses or individuals, the end result is similar to that of the plenary power doctrine—namely, that courts are substantially limited in reviewing the enforcement decisions of immigration officials.<sup>29</sup> The INS, along with every other administrative agency, has always used prosecutorial discretion in one form or another. However, there is no record of when the INS began implementing a systematic internal policy of prosecutorial discretion.<sup>30</sup>

The practice came to light in 1974 in a lawsuit regarding the deportation of British songwriter John Lennon.<sup>31</sup> In seeking to obtain permanent residency in the United States, Lennon’s attorney used the Freedom of Information Act to obtain the “blue sheets”—documents used privately by administrators in the INS—that had previously been unavailable to the public.<sup>32</sup> Those documents revealed a deferred action policy by which the INS categorized individuals as “non-priority” for removal where removal would be unconscionable.<sup>33</sup> That

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28. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1015–16 (1990) (“[I]mmigration cases, which comprised only 5.4% of the caseload in 1965, now account for 13.7% and comprise the third largest group of cases (after the NLRB and MSPB cases).”).

29. *See, e.g.*, *Jay v. Boyd*, 351 U.S. 345, 354 (1956) (explaining that the agency decision to suspend deportation is a matter of grace and not a matter of right).

30. *See, e.g.*, Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976); *see also* Wadhia, *supra* note 3, at 246–48.

31. *Lennon v. Richardson*, 378 F. Supp. 39 (S.D.N.Y. 1974).

32. Wadhia, *supra* note 3, at 247–48.

33. *Id.* at 247–48.

policy had been in place in the INS, unbeknownst to the public.<sup>34</sup> Due to the publicity of the case and the novelty of the policy, courts quickly split over whether such a policy could fly under the radar or should instead be made public through notice-and-comment rulemaking.<sup>35</sup>

Courts reviewing immigration decisions often distinguish between substantive rights—like the right to enter the country or to receive certain benefits that Congress can confer or deny—and procedural rights—like the right to due process, which varies less with times, conditions, or the will of Congress.<sup>36</sup> Notably, several circuit courts issued opinions that recognized the substantive nature of the rights provided by the INS’s categorization system. The Eighth Circuit in *David v. INS* found that it was appropriate to defer the deportation of an alien given the evidence presented, implying that “deferred action” had reached the status of a substantive right to which aliens were entitled if specific factual circumstances were demonstrated.<sup>37</sup> The Ninth Circuit followed similar reasoning in *Nicholas v. INS* to find that the INS’s policy for deferred action was clearly a substantive rule because it operated for the benefit of aliens contesting deportation rather than for the internal benefit of the INS.<sup>38</sup> While the Ninth Circuit did not evaluate the need to follow the APA procedures, it pointed out characteristics of the INS’s Operations Instructions that would trigger those procedures in any other administrative setting.<sup>39</sup>

In the decade following those cases, increased civil unrest throughout the world led to greater numbers of foreigners seeking

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34. Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979); Wadhia, *supra* note 3, at 246–48.

35. See Wildes, *supra* note 34, at 106 (“In accordance with a well-established principle of administrative law, a written expression of ‘policy’ may be a rule and have the impact of a rule, regardless of how the agency attempts to designate or describe it. The Operations Instruction thus appears to be a firm rule. As such, it should probably be subject to the notice and publication requirements of the Administrative Procedure Act.”) (citing 5 U.S.C. § 553 (1976)).

36. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) (“Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment.”).

37. *David v. Immigration & Naturalization Serv.*, 548 F.2d 219, 223 (8th Cir. 1977); see Wadhia, *supra* note 3, at 249.

38. *Nicholas v. Immigration & Naturalization Serv.*, 590 F.2d 802, 806–07 (9th Cir. 1979).

39. *Id.*

admission to the United States.<sup>40</sup> As a result, the national interest in immigration law was high when the Supreme Court handed down its decision in *Jean v. Nelson*.<sup>41</sup> In that case, the Supreme Court evaluated a constitutional challenge on behalf of Haitians seeking asylum in the United States who claimed that the United States' immigration policies discriminated against Haitians on the basis of race and national origin.<sup>42</sup> For the first time in many years, the facts in *Jean* seemed to directly require analysis of constitutional issues as they pertained to immigration law. For that reason, *Jean* provided the Court with the perfect opportunity to provide clarity in an area of the law confused between plenary power, congressional enactments and amendments, and administrative flexibility through prosecutorial discretion. However, the Supreme Court in *Jean* focused its analysis almost entirely on statutory interpretation, conspicuously omitting the larger questions about constitutional protection of noncitizens.<sup>43</sup> Justice Marshall dissented, however, preferring to base the decision on the constitutional grounds suggested by the facts and invalidate the policy as discriminatory on the basis of national origin.<sup>44</sup> These kinds of decisions have been described as the application of "phantom" constitutional norms that allow the Court to avoid addressing sensitive constitutional issues.<sup>45</sup> Courts have used these norms to uphold statutory and regulatory requirements that are able to benefit individuals subject to deportation proceedings on a case by case basis, while gradually inserting constitutional arguments that would have been precluded by plenary power.<sup>46</sup> As a result, the plenary power doctrine has been weakened in practice, even though no explicit judicial pronouncements have overturned it.

#### *D. The 1996 Act*

The most recent chapter in the story of congressional control and oversight of immigration was written in 1996 when Congress passed

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40. See Motomura, *supra* note 6, at 546.

41. *Jean v. Nelson*, 472 U.S. 846 (1985).

42. *Id.* at 848.

43. See Motomura, *supra* note 6, at 547–48.

44. See *Jean*, 472 U.S. at 861 (Marshall, J., dissenting) (“[The regulations] do not, by their terms, prohibit the consideration of race or national origin.”).

45. See Motomura, *supra* note 6, at 592–93.

46. *Id.* at 564–65.

amendments to the INA, known as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>47</sup> and the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>48</sup> In essence, AEDPA limited the INA's judicial review provision by barring review of final deportation orders against aliens that had been convicted of crimes.<sup>49</sup> Shortly thereafter, IIRIRA was enacted to similarly limit judicial review, and to add several protections for immigration officials in various discretionary capacities.<sup>50</sup> These acts had the cumulative effect of increasing the efficiency of immigration officials by making more resources available to them and reducing the likelihood of judicial review.<sup>51</sup> However, the acts were also widely criticized for failing to account for the rights of accused criminals and individuals subject to "efficient" deportation without a mechanism for review by the judiciary.<sup>52</sup>

## II. APPLYING THE APA TO EXECUTIVE MANDATES

In the past two decades, the executive branch has issued a number of mandates related to immigration.<sup>53</sup> In 1987, President Reagan announced that residency granted to aliens under the Immigration Reform and Control Act of 1986 would be extended to the children

47. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

48. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

49. See Neuman, *supra* note 25, at 1975-76.

50. IIRIRA §§ 309(c)(1), 309 (c)(4), 110 Stat. at 3009-625, 3009-626-27; see Neuman, *supra* note 25, at 1975-76.

51. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1943 (2000).

52. See, e.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893 (2000) ("If criminal aliens are no longer here, and if they are prevented from returning, they are *ipso facto* no longer part of our crime problem . . . [because they become] somebody else's problem."); Morawetz, *supra* note 51, at 1943; Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007).

53. See Danny Vinik, *Reagan and Bush Acted Unilaterally on Immigration, Too—for the Same Reason That Obama Will*, NEW REPUBLIC (Nov. 19, 2014), <http://www.newrepublic.com/article/120334/obama-immigration-order-legal-bush-and-reagans-were>.

of those new residents.<sup>54</sup> Later, in 1991, President George H.W. Bush further extended residency to spouses of these new residents.<sup>55</sup> More recently, in 2012, President Obama, through the DHS, announced Deferred Action for Childhood Arrivals (DACA).<sup>56</sup> The initiative was met with significant backlash from conservatives in Congress<sup>57</sup> and on the Supreme Court,<sup>58</sup> who claimed that the action was unprecedented because, unlike Presidents Reagan and Bush's actions, it was not based on a preceding statutory grant of authority. But most importantly for the purposes of this Comment, DACA initiated a renewed debate surrounding the legitimacy of unilateral executive action in immigration matters and the applicability of the APA in limiting those actions.<sup>59</sup> In order to fully understand the interaction between immigration mandates and the APA, one must be familiar with the general background and history of the APA, as well as the specific procedures that are required for certain administrative actions. The following section first discusses the history and background of the APA, then provides greater detail on the procedures required for administrative rules, and finally, reviews the arguments for and against applying the APA's procedural requirements to DACA.

#### *A. History and Background of the APA*

In the midst of the Great Depression, when the United States economy was on the brink of collapse and many questioned the validity of free market principles, politicians of all political stripes—both conservative and liberal—dramatically increased the number of

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54. *Id.*

55. *Id.*

56. DEP'T OF HOMELAND SEC., *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

57. *See, e.g.*, Letter from Lamar Smith, Chair, House Judiciary Comm., to John Morton, Director, U.S. Dep't of Homeland Sec., Immigration and Customs Enforcement (July 3, 2012).

58. *See Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., dissenting); Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 260 (2013).

59. *See* Greg Sargent, *What the debate over Obama and deportations is really about*, WASH. POST: THE PLUM LINE (Aug. 13, 2014), <https://www.washingtonpost.com/blogs/plum-line/wp/2014/08/13/what-the-debate-over-obama-and-deportations-is-really-about>.

administrative agencies in Washington.<sup>60</sup> With that increase, the need for administrative reform became increasingly clear throughout the first half of the twentieth century, and various bills were introduced to limit administrative power.<sup>61</sup> However, most of those bills were motivated, in large part, by those seeking to limit the policies of whichever party controlled the agencies at that time.<sup>62</sup>

Substantial disagreements on a variety of issues in administrative law made it necessary to draft the Act's provisions with enough ambiguity to gain acceptance by a majority of the members of Congress.<sup>63</sup> Thus, when the Act was passed in 1946, it provided little guidance for interpreting the APA as it applies to immigration law.<sup>64</sup> Alternatively, an extensive legislative history was created as the opposing sides in the administrative law debate issued dueling interpretations in hopes of influencing future judicial decisions.<sup>65</sup> Unfortunately, those efforts created legislative records that are as conflicted as the statute itself and the case law applying it.<sup>66</sup> Thus, a considerable amount of ambiguity still exists regarding the application of the APA.

The APA is generally understood to implement a set of procedures in four different kinds of administrative actions: informal and formal rulemaking, and informal and formal adjudications.<sup>67</sup> The lines between formal adjudication, informal adjudication, and agency discretion are not altogether clear from the text of the APA or subsequent case law.<sup>68</sup> Generally speaking, formal adjudications can be defined as the application of the statute that an agency is charged to

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60. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–62 (1996) (noting that in the first three decades of the twentieth century, even as “conservatives dominated national politics, the number of agencies doubled,” and that the growth “quicken[ed] under Franklin D. Roosevelt’s administration”).

61. *Id.* at 1565–80.

62. *Id.* at 1567.

63. *Id.* at 1662–64.

64. *Id.*

65. *Id.* at 1663.

66. *Id.* at 1665–66.

67. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 305 (7th ed. 2016).

68. Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 489 (1986).

administer in accordance with agency policy to a specific set of facts.<sup>69</sup> Section 554 of the APA sets forth the requirements for notice that must be given to affected parties and procedures that must be followed in formal adjudication hearings.<sup>70</sup> Informal adjudications, on the other hand, include the application and development of agency practices, and therefore do not include the same hearing requirements, such as the application of law to facts.<sup>71</sup>

Perhaps most importantly for this Comment, section 553 outlines the procedures for rulemaking.<sup>72</sup> It first lists exceptions to the procedures for the “military or foreign affairs function of the United States,” and for matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”<sup>73</sup> Section 553 also specifically states that these procedural requirements do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>74</sup> Accordingly, the procedures in section 553 apply to informal rulemaking that creates generally applicable rules. Informal rulemaking has been broadly construed by courts to include even narrow decisions about when to grant licenses.<sup>75</sup> Formal rulemaking, on the other hand, is subject to sections 556 and 557, which set forth the hearing requirements when a statute requires the rules to be made “on the record” and “after opportunity for an agency hearing.”<sup>76</sup> Thus, formal rulemaking procedures are rarely reviewed by courts, while cases considering the procedures used for more common informal rulemaking abound.

In terms of judicial review, the APA requires that courts “compel agency action unlawfully withheld or unreasonably delayed,” and set

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69. Shapiro, *supra* note 68, at 481 (categorizing three types of decisions requiring agency judgment: (1) every day decisions made by agencies that consist of “basic fact determinations that recur in case after case and infrequently raise questions of policy or law,” (2) formal adjudications involving a “mix of particularized considerations of past conduct with considerations of agency policy,” and (3) informal adjudications that involve the application and development of agency practices).

70. 5 U.S.C. § 554 (2012).

71. *Id.*

72. *Id.* § 553.

73. *Id.* § 553(a)(1)–(a)(2).

74. *Id.* § 553(b)(3)(A).

75. *See, e.g.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 526–27, 546–48 (1978).

76. 5 U.S.C. §§ 553(c), 556, 557.

aside agency decisions that are “arbitrary [and] capricious.”<sup>77</sup> Given that this provision was enacted in 1946, the drafters of the APA likely did not intend it to refer to the kind of “arbitrary and capricious” review that developed along with other judicial innovations in the 1960s, but it has nevertheless been applied accordingly.<sup>78</sup> Some commentators discuss evidence that Congress did not intend to create the high degree of judicial deference that has been afforded to agencies.<sup>79</sup> Despite this general trend toward deference, or perhaps in part because of it, much of the case law surrounding the APA remains ambiguous.

The APA’s procedural requirements have been used to invalidate agency actions that fail to implement proper procedures required by the APA in conjunction with the statute that grants power to the agency. Initially, courts reviewed administrative action under two standards: In cases where the court concluded that Congress intended a specific result but simply expressed that result unclearly, the court would review the administrative decision *de novo*.<sup>80</sup> However, in cases where the statute made it clear that Congress intended for the agencies to have discretion in administering the statute, courts gave deference to the agency’s interpretation.<sup>81</sup> That dual approach changed when the Supreme Court handed down its landmark decision in *Chevron, U.S.A., Inc. v. National Resources Defense Council*, which provided a two-step approach to reviewing administrative decisions.<sup>82</sup>

First, courts are to evaluate whether Congress spoke directly to the question at issue.<sup>83</sup> If so, the question should be resolved according to Congress’s pronouncement.<sup>84</sup> If not, courts move to the second step, where they evaluate whether the agency’s construction was

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77. *Id.* § 706(1)–(2)(A) (1994); *see, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 403 (1971).

78. Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1401 (1996).

79. Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 289–90 (1986).

80. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989).

81. *Id.*

82. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

83. *Id.* at 842; *see also* Scalia, *supra* note 80, at 511–12.

84. *Chevron*, 467 U.S. at 842–43; *see also* Scalia, *supra* note 80, at 511–12.



reasonable and permissible within the limits of the statute.<sup>85</sup> The Court has held that *Chevron* applies to decisions made by the Board of Immigrations Appeals, although courts continue to recognize exceptions due to the political and foreign-relations functions of immigration officials.<sup>86</sup> In essence, those exceptions represent an extension of the plenary power doctrine that allows immigration officials in many cases to avoid procedural review under the APA.<sup>87</sup> Justice Scalia criticized the APA's approach to judicial review in general, arguing that under both the pre-*Chevron* and the post-*Chevron* approaches the outcome generally depends on how likely a judge is to find ambiguity in a statute or to characterize ambiguity as a license to use discretion.<sup>88</sup>

However, a few key provisions of the APA have been definitively interpreted by the U.S. Supreme Court so as to provide clear guidance in a limited number of circumstances. One provision that has been widely and consistently interpreted is the requirement that, in order for a rule to be subject to formal rulemaking under sections 556 and 557, the statutory mandate for the agency action must use the phrase "on the record after opportunity for an agency hearing."<sup>89</sup> This bright line rule has allowed Congress to clearly indicate when it wishes to require formal rulemaking procedures. As a result, few statutes require formal rulemaking procedures because congressional majorities enacting new laws invariably consider them to be urgent solutions requiring flexible and efficient application.

A second relevant point of administrative law that is abundantly clear, is that reviewing courts cannot add procedural requirements to agency actions beyond those clearly outlined in the APA.<sup>90</sup> These two

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85. *Chevron*, 467 U.S. at 843; see also Scalia, *supra* note 80, at 511–12.

86. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 531–32 (2003).

87. *Id.* at 542–43.

88. Scalia, *supra* note 80, at 514–16.

89. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973) (quoting 5 U.S.C. § 553(c) (2012)); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1785 (2007) ("The Court said that it would not require agencies to use formal procedures unless Congress . . . us[ed] in the organic statute the same magic words that trigger formal procedures in the APA: '[O]n the record after opportunity for an agency hearing.'" (second alteration in original)).

90. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978).

provisions play an important role in defining the administrative nature of executive actions and, at the same time, limiting the power of courts to impose greater procedural constraints on those actions.

*B. Administrative Rules and Notice-and-Comment Procedures*

The APA requires agencies to follow very specific procedural requirements in creating rules that are generally applicable. The purpose of these requirements is to improve the quality of rulemaking by agencies that are otherwise largely unchecked by and unaccountable to members of the voting public or their representatives in Congress.<sup>91</sup> The APA clearly identifies distinct procedural requirements for two categories of rulemaking: formal rules requiring the creation of a record in a formal hearing, and informal rules that are also generally applicable but can be issued using notice-and-comment rulemaking.<sup>92</sup>

The most commonly applied test for classifying agency action as a rule and determining which APA procedures are required comes from the D.C. Circuit, which evaluates (1) “whether the rule is legally binding or leaves the agency free to exercise its discretion,” (2) “how the Agency has characterized the rule,” (3) “the language used in the rule itself,” and (4) “whether the rule has been published in the Federal Register or Code of Federal Regulations.”<sup>93</sup> In order to determine whether new guidance to an agency limits the agency’s discretion, courts look at whether the agency frequently exercised discretion contrary to the agency guidance provided.<sup>94</sup>

Sections 553(b) and (c) outline the procedural requirements for notice-and-comment rulemaking.<sup>95</sup> First, the agency must provide general notice by publishing the proposed rule in the Federal Register, including a description of the rule making proceedings, an explanation of the statutory basis for the rule, and “the terms or substance of the

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91. See Shepherd, *supra* note 60, at 1565–80.

92. LAWSON, *supra* note 67, at 309.

93. Gilbert, *supra* note 58, at 290.

94. Am. Bus. Ass’n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp., 589 F.2d 658, 666–67 (D.C. Cir. 1978)) (accepting a so-called policy statement that in purpose or effect “narrowly limits administrative discretion . . . [as] a binding rule of substantive law”).

95. 5 U.S.C. § 553(b)–(c) (2012).

proposed rule.”<sup>96</sup> Once notice is given, the agency must give “interested persons” the opportunity to comment, then consider the relevant matter, and finally “incorporate in the rules adopted a concise general statement of their basis and purpose.”<sup>97</sup> While some have criticized these procedures for failing to provide a mechanism for meaningful oversight and democratic participation,<sup>98</sup> others have found the process to be overly onerous given the need for flexibility in administrative practice.<sup>99</sup> However, because the mandates included in DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) are generally applicable, and because they do not use the specific language required for formal rulemaking, they are subject to challenge on the basis of procedural inadequacy because they failed to implement required notice-and-comment procedures.

### C. DACA and the APA

When DACA was implemented in 2012, the agencies charged with applying it did not follow the notice-and-comment procedures outlined in the APA.<sup>100</sup> The memorandum directing the DHS to implement the deferred action policy was issued by Secretary Janet Napolitano on June 15, 2012. It stated that “ICE is directed to begin implementing this process within 60 days of the date of this memorandum.”<sup>101</sup> Exactly sixty days after the memorandum was distributed, the U.S. Citizenship and Immigration Services (USCIS), which focuses exclusively on the administration of immigration benefit

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96. *Id.* § 553(b).

97. *Id.* § 553(c).

98. Strauss, *supra* note 78, at 1405 (arguing that these procedures are “little more than a consultative process for public presentation of information and views, loosely comparable to what might be employed by a congressional committee”).

99. Shapiro, *supra* note 68, at 483 (“A growing consensus now exists that informal rulemaking has become too formal and thus too cumbersome and time-consuming . . .”).

100. Gilbert, *supra* note 58, at 289 (citing Memorandum from Janet Napolitano, Sec’y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., & John Morton, Dir., U.S. Immigration and Customs Enf’t (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>).

101. Gilbert, *supra* note 58, at 289; Napolitano, *supra* note 100, at 2.

applications, published the only DACA-related rule subject to notice-and-comment rulemaking in the Federal Register.<sup>102</sup> However, rather than inviting comments on the new agency policy and criteria for handling individual immigration cases, the proposed rule only invited comments regarding the wording of the DACA application form.<sup>103</sup>

The lack of procedure in implementing immigration law has been criticized by practitioners<sup>104</sup> and challenged by attorneys and officials at ICE.<sup>105</sup> The DHS justified the lack of APA procedures as proper because the statements promulgating DACA were “general statements of policy” rather than binding rules that trigger the APA.<sup>106</sup> Leaders within the DHS characterized DACA as a thoughtful way to exercise prosecutorial discretion more consistently.<sup>107</sup> In her directive to the DHS, Secretary Napolitano explained that her memorandum “confer[red] no substantive right, immigration status or pathway to citizenship.”<sup>108</sup> Critics, on the other hand, have made the opposite claim; an executive mandate that prioritizes immigration enforcement actually *eliminates* prosecutorial discretion by limiting the choices that can be made by those actually on the ground prosecuting those that violate immigration law.<sup>109</sup> While this Comment does not claim to resolve the complex debate about whether executive actions provide substantive rights, it does assert that a contributing factor to the complexity is the inability of courts to analyze the APA alongside

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102. Comment Request, 77 Fed. Reg. 49451 (Aug. 16, 2012), <https://www.gpo.gov/fdsys/pkg/FR-2012-08-16/pdf/2012-20247.pdf>.

103. *Id.*

104. See U.S. Dep’t of Homeland Sec., U.S. Citizenship and Immigration Servs., Questions and Answers: USCIS Am. Immigration Lawyers Ass’n (AILA) Meeting 2–3 (Mar. 19, 2009), [https://www.uscis.gov/sites/default/files/files/nativedocuments/aila\\_aao\\_qa\\_19march09.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/aila_aao_qa_19march09.pdf).

105. Complaint, *Crane v. Napolitano*, No. 3:12-CV-03247-O (N.D. Tex. Aug. 23, 2012).

106. See 5 U.S.C. § 553(b)(3)(A) (2012). In *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980), the D.C. Circuit cites to the Attorney General’s Manual on the Administrative Procedure Act (1947), which defines “general statements of policy” under the APA as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Id.*

107. David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J.F. 167, 168 (2012) (explaining that the DHS “justifies DACA as a systematic and thoughtful way of exercising prosecutorial discretion”).

108. Napolitano, *supra* note 100, at 3.

109. See, e.g., Kris W. Kobach, Opinion, *The ‘DREAM’ order isn’t legal*, N.Y. POST (June 22, 2012, 4:00 AM), <http://nypost.com/2012/06/22/the-dream-order-isnt-legal/>.

constitutional principles while respecting plenary power in the political branches.

### III. THE APA AND PLENARY POWER: INSIGHTS FOR DAPA

There has been considerable debate regarding what, if any, administrative procedures should be applied to agency actions related to immigration. While the tradition of plenary power plays a significant role in muddying the already murky waters of the APA, it also explains the uniqueness of APA review in immigration decisions. This Part first discusses how the APA would be applied to recent executive actions related to immigration if plenary power were not involved. It then discusses the impact of plenary power on the APA and evaluates how courts have reviewed administrative decisions in immigration cases. Third, it specifically discusses the facts surrounding President Obama's 2014 executive mandate and applies the previous discussion to those facts. Finally, it outlines the administrative and immigration law issues underlying an important ruling by the federal district court, the Fifth Circuit Court of Appeals, and the U.S. Supreme Court in *Texas v. United States*.

#### *A. Immigration Actions under the APA*

Every type of immigration action can be categorized as an action under the APA. Decisions regarding agency practice or internal procedures would likely be categorized as informal adjudication, while decisions that set policies for granting or denying petitions based on specific facts are likely informal rules. While the labels or titles used by agencies in taking certain actions are a factor in determining how the agency itself characterized the rule, they are generally insufficient to establish the kind of action that has been taken.<sup>110</sup> For example, after the Ninth Circuit invalidated the INS's deferral policy in *Nicholas*, the INS sought to avoid meaningful review of internal policies similar to the Operations Instructions by clearly stating its intent to establish internal guidelines for administrative decision making and not binding

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110. See U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984) (“[T]he substantial impact test is the primary means by which [we] look beyond the label ‘procedural’ to determine whether a rule is of the type Congress thought appropriate for public participation.”).

rules with future effect.<sup>111</sup> By responding with little more than an updated label for its Operations Instructions, the INA did not resolve the concerns surrounding the “binding effect” of those instructions that made them substantially similar to rules under the APA.<sup>112</sup> After all, the Supreme Court has held that “[t]he particular label placed upon [agency action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.”<sup>113</sup>

Far more important than the label given to the action, then, is its substance, or the practical outcomes produced by the action. The focus on substance is supplemented by a few bright line rules, such as the clear pronouncement that an agency action is not a formal rule if the statutory basis for the rule is not implemented “on the record and after opportunity for an agency hearing.”<sup>114</sup> Thus, executive mandates that derive their authority from the INA would only be formal rules if they met those requirements.<sup>115</sup>

Executive mandates also do not appear to be adjudications because they do not merely apply a policy or statute to a singular set of facts. Instead, executive mandates issue specific, broadly applicable guidance to agencies, with which they are expected to conform. There is not yet sufficient data to evaluate whether agencies have retained their discretion to act contrary to the 2014 executive mandate. Given the broad definition of informal rulemaking, courts are likely to find that the administrative policies put in place by executive actions require notice-and-comment procedures.

### *B. The Impact of Plenary Power on APA Review*

Plenary power has served to limit judicial review of immigration decisions. The APA, on the other hand, has provided an avenue for review of immigration decisions by administrative agencies. In light of the provisions of the APA discussed in Part II, the continued

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111. Wadhia, *supra* note 3, at 282.

112. *Nicholas v. Immigration & Naturalization Serv.*, 590 F.2d 802, 806–07 (9th Cir. 1979).

113. *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942).

114. 5 U.S.C. § 553(c) (2012).

115. *See id.*

application of the plenary power doctrine raises interesting questions about the doctrine's purpose, scope, and role in administrative law.

The purpose of plenary power and the APA in judicial review is to allow the executive and legislative branches to take necessary steps to ensure the security of the nation and enforcement of immigration policies.<sup>116</sup> However, given the APA's purpose to conform administrative actions to the underlying congressional mandates, the impact of plenary power is to allow greater flexibility for agencies and limited oversight by Congress and the President.<sup>117</sup> In other words, a doctrine that was created expressly to reserve power for the executive and legislative branch has legitimized power for what has been called the "headless Fourth Branch" of government, while actually limiting the political branches' ability to control the agencies.<sup>118</sup> In practice, this has served to severely limit judicial protection of noncitizen rights where efficiency-driven agencies and a politically-motivated Congress continue to enforce a system of "restrictive nationalism."<sup>119</sup>

The APA was designed to resolve a tension between the mandates of the legislative branch and the need for flexibility in the administrative agencies of the executive branch,<sup>120</sup> not to enable administrative agencies to act independently, without direction from executive guidance or legislative mandates.<sup>121</sup> This becomes extremely important given that, in practice, much of the work of the executive branch is performed by administrative agencies. Unfortunately, the practical impact of plenary power is to prevent courts from reviewing administrative decisions so that agencies are insulated from both executive and legislative oversight. Courts either wholly refuse to review actions that fit under the umbrella of plenary power or defer to reasonable agency interpretations, requiring Congress to take the legislative pains of amending the statute or enacting new laws rather than simply enforcing the statutes to override agency practice.

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116. Motomura, *supra* note 6, at 547.

117. *Id. Contra* Sunstein, *supra* note 79, at 280.

118. *Freytag v. Comm'r*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring).

119. Schuck, *supra* note 8, at 3–4; *see also* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (stating that plenary power can be used to "make[] rules that would be unacceptable if applied to citizens").

120. *See, e.g.*, Shepherd, *supra* note 60, at 1562–63; Sunstein, *supra* note 79, at 279–80.

121. *See* Shapiro, *supra* note 68, at 458–59.

*C. President Obama's 2014 Executive Mandate and Texas v. United States*

President Obama's recent executive actions raise two questions: (1) whether the President's executive guidance to administrative agencies is subject to APA review, and (2) whether the President's plenary power in immigration law prevents those actions from invalidation under the APA.

*1. Does the APA apply to an executive mandate?*

Given that recent executive actions have not followed the procedures outlined by the APA and were administered by agencies, they could be invalidated by a court that finds they are subject to the APA. However, APA review may be precluded by the reservation of plenary power for the political branches.

First, then, it is helpful to understand how the APA is generally applied to executive actions. Before President Obama issued his first immigration mandate for DREAM Act beneficiaries, he received a letter from ninety-five law professors stating that the contemplated action was a constitutional use of executive power.<sup>122</sup> However, that letter did not address the question of whether the APA applies to executive action.<sup>123</sup> The missing analysis that is most interesting on that point is whether an executive mandate, issued by a popularly elected President, obviates the necessity for administrative procedures in issuing a mandate.

The APA does not contemplate any specific exception for executive mandates. However, the historical purpose of the APA to provide oversight to those charged with administering congressional enactments is insightful. Where the President issues a mandate because of Congress's failure to act, as was the case in 2014,<sup>124</sup> it would not be surprising to find that portions of that mandate run contrary to the intent of Congress. Interestingly, President Obama and members of his cabinet expressed their public support for the DREAM Act along

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122. See Letter from Immigration Law Professors to President Obama (May 28, 2012), <https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf>.

123. See *id.*

124. Gilbert, *supra* note 58, at 264–65.



with an assertion that it was up to Congress to pass a law.<sup>125</sup> DHS Secretary Janet Napolitano even responded to a letter urging executive action to “insist that as sympathetic as they were, no category of Prosecutorial Discretion . . . would be employed for groups of individuals.”<sup>126</sup>

Even though a popularly elected President has clear democratic legitimacy, executive action must still fit within the dictates of the statutes that the President is required to execute. When the executive mandate is specifically issued to administrative agencies with the charge to apply it consistently, the APA is implicated because the substance of such a mandate is the same as an administrative rule. As important and valid as the motives for such an action may be, the APA should not be used when convenient to invalidate actions of the opposing side. Rather, the APA should be applied in a way that reflects one of the key purposes for its enactment—to protect the separate functions of the three branches of government.

Analysis of whether and in what way the APA should be applied must begin with an understanding of the background and application of President Obama’s widely publicized executive mandate, announced on November 20, 2014.<sup>127</sup> Immediately after the announcement, DHS Secretary Jeh Johnson issued a number of memoranda to various departments requiring compliance with the newly announced measures.<sup>128</sup> Secretary Johnson’s memorandum to both León Rodríguez, Director of the United States Citizenship and Immigration Services (USCIS), and Thomas S. Winkowski, Acting Director of the United States Immigration and Customs Enforcement (ICE), required modernization of the employment-based visa system, reformed training for foreign graduate students, and increased promotion of research and development by foreigners in the United

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125. *Id.*

126. Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 473 (2012); see also Gilbert, *supra* note 58, at 265 n.44.

127. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., and Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_business\\_actions.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf) [hereinafter First Johnson Memorandum]; DEP’T HOMELAND SEC., *supra* note 56.

128. See First Johnson Memorandum, *supra* note 127.

States.<sup>129</sup> Secretary Johnson sent a second memorandum to each of those agencies, this time including R. Gil Kerlikowske, Commissioner of the United States Customs and Border Protection (“CBP”).<sup>130</sup> That memorandum “[r]emov[ed] the age cap” from DACA, extended “renewal[s] and work authorization to three years,” “[a]djust[ed] the date-of-entry requirements,” and expanded deferred action overall.<sup>131</sup> In a third memorandum sent to the USCIS, ICE, the CBP, and Alan D. Bersin, Acting Assistant Secretary for Policy, Secretary Johnson issued “new policies for the apprehension, detention, and removal of aliens in this country” by focusing first on “threats to national security, border security, and public safety,” second on “misdemeanants and new immigration violators,” and third on “other immigration violations.”<sup>132</sup> Interestingly, that memorandum leaves significant discretion in the hands of DHS personnel even for Priority I individuals by stating that they

must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, *in the judgment* of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.<sup>133</sup>

These memoranda will likely be subject to the same criticisms as DACA given the expanded reach of their policies. Before discussing what these actions imply about judicial review of immigration decisions, a review of the current litigation in which various states are seeking to invalidate DAPA is in order.

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129. *Id.*

130. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, and R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot. 3–4 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter Second Johnson Memorandum].

131. *Id.*

132. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, et. al. 1, 3–4 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [hereinafter Third Johnson Memorandum].

133. *Id.* at 5 (emphasis added).

In February of 2015, a Federal District Judge in Texas ruled that President Obama's executive action violated the APA by failing to use notice-and-comment procedures.<sup>134</sup> Judge Andrew S. Hanen, an appointee of President George W. Bush, in an eighty-seven page opinion held that the executive mandate was unlawful because it violated the APA.<sup>135</sup> The DHS memoranda discussed in this Section created a new program that deferred the deportation proceedings of "four to five million individuals residing illegally in the United States."<sup>136</sup> In response, the state of Texas and twenty-five other states filed this case in an attempt to enjoin the implementation of that program.<sup>137</sup> Many parties interested in the lawsuit attempted to intervene, and many filed amicus curiae briefs, but the judge ruled that the parties to the lawsuit adequately represented the interests of the parties and that granting any of the motions to intervene would unduly delay the progress of the litigation.<sup>138</sup>

The opinion considered three issues: "(1) whether the States had standing to bring the case, (2) whether the DHS has the discretion to implement DAPA, and (3) whether DAPA is constitutional, comports with existing laws, and was legally adopted."<sup>139</sup> The second and third issues are discussed here as an example of the most recent application of the plenary power doctrine to avoid constitutional questions but rule on statutory grounds with the same effect.

## 2. *DHS discretion and the constitutionality of DAPA*

On those issues, the court explained that the role of the judiciary is not to second-guess the priorities set by the secretaries of administrative agencies.<sup>140</sup> Specifically, the court discusses three reasons behind the general judicial practice of not overturning decisions about non-enforcement: first, because those decisions involve considerations that are within the agency's expertise; second, a decision *not* to act does not bring to bear the "agency's coercive

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134. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir.), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

135. *Id.* at 677.

136. *Id.* at 607.

137. *Id.* at 604.

138. *Id.* at 608.

139. *Id.* at 607.

140. *Id.* at 644.

powers” and therefore does not require protection by the courts; third, and finally, a decision not to act by an agency is similar to “a prosecutor’s decision to not indict.”<sup>141</sup> Thus, the court found that Secretary Johnson’s priority-setting decisions were discretionary and fit within the executive branch’s purview “to the extent that they d[id] not violate any statute or the Constitution.”<sup>142</sup> However, the court recognized that the executive branch does not have the power to take actions that are legislative in nature.<sup>143</sup>

Decisions about how to marshal DHS resources are discretionary and within the authority of the executive branch insofar as they do not violate the Constitution or any statute.<sup>144</sup> However, the States argued that DAPA did not merely allocate resources, but implemented final agency action in the form of a legislative rule.<sup>145</sup> According to the court’s standing analysis, not only were the plaintiffs adversely affected such that they were “injured in fact,”<sup>146</sup> but they fit within the zone of interests because “DAPA . . . clearly contravenes the express terms of the INA.”<sup>147</sup>

The court also found that the agency action was within the zone of interests even though the agency claimed it was exempt by pointing to a statute that prohibited acts that were “committed to agency discretion by law.”<sup>148</sup> The Supreme Court had interpreted that exception narrowly in circumstances where the statute had such broad terms that it could not apply to specific cases, and outlined two exceptions: (1) where Congress clearly seeks to preclude judicial review, and (2) where no meaningful standard is available to perform judicial review.<sup>149</sup> The court acknowledged that this precedent exempted decisions by agencies *not* to enforce a statute, pointing out that there is a rebuttable presumption that non-action is not reviewable.<sup>150</sup> However, the court cited to *Heckler*, which held that

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141. *Id.* at 645.

142. *Id.*

142. *Id.*

143. *Id.* at 645–46.

144. *Id.* at 647.

146. *Id.* at 649.

146. *Id.* at 652.

147. *Id.* (quoting 5 U.S.C. § 701(a)(2) (2012)).

148. *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

149. *Id.* at 653 (emphasis added) (quoting *Heckler*, 470 U.S. at 831).

when the substantive statute “provide[s] guidelines for the agency to follow in exercising its enforcement powers,” the presumption against judicial review is rebutted.<sup>151</sup> Even so, the court found that the facts of this case are different than *Heckler*, because non-enforcement in this context granted deferment to an entire class of aliens, making it more like an affirmative action than inaction.<sup>152</sup> Thus, the Supreme Court’s concerns about the lack of a meaningful judicial standard were not applicable to DAPA.<sup>153</sup> The court explained that DAPA does not constitute inaction against an individual, but a widespread program that has a history of application as a binding affirmative rule rather than a resource-allocation decision, leading to inaction on the part of an agency.<sup>154</sup>

Thus, the court found that DAPA is much more than non-enforcement; rather, it is a prohibition on agencies’ ability to comply with the law, and a provision of three years’ immunity along with other benefits that come with legal presence in the United States.<sup>155</sup> *Heckler* was not meant to apply in cases where agencies create new programs that provide substantial benefits that would otherwise be unobtainable.<sup>156</sup> Even if the presumption does apply to DAPA, the court found, the presumption is rebutted under the standard set out in *Heckler* because the actions “provide guidelines for the agency to follow in exercising its enforcement powers.”<sup>157</sup>

The court also found that the INA provides clear guidance that actually circumscribes agency discretion in this case.<sup>158</sup> The INA defines which individuals are subject to a deportation proceeding,<sup>159</sup> and establishes the burden of proof on the alien to demonstrate “clearly and beyond doubt” that he or she is entitled to be admitted.<sup>160</sup> Thus, the court held that no statute gives the DHS the power to

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150. *Id.* at 656 (quoting *Heckler*, 470 U.S. at 832–33).

150. *Id.*

151. *Id.* at 655–56 (citing *Heckler*, 470 U.S. at 832).

152. *Id.*

153. *Id.*

154. *Id.*

157. *Id.* at 655–56 (quoting *Heckler*, 470 U.S. at 832).

158. *Id.* at 656–57.

159. *Id.* at 657.

160. *Id.* (quoting 8 U.S.C. § 1229a(c)(2)(A) (2012)).

provide additional legal benefits to aliens.<sup>161</sup> The INA does provide two general grants of discretion: first, an administrative grant allowing actions necessary for carrying out the Secretary's authority, and second, a provision listing the Under Secretary's responsibilities to prevent terrorism, secure borders, establish rules governing visas, and establish national immigration enforcement policies and priorities.<sup>162</sup> While those provisions grant general authority, the court found that they do not include aliens that have already entered the United States and are currently here illegally.<sup>163</sup> Thus, the court held that while the DHS can set priorities and allocate resources, it cannot award legal presence to a category that Congress has said can be deported because to do so runs directly contrary to the mandate of the statute.<sup>164</sup>

#### *D. Fifth Circuit Court and U.S. Supreme Court Decision*

The United States appealed the preliminary injunction issued by Judge Hanen to the United States Court of Appeals for the Fifth Circuit.<sup>165</sup> The Fifth Circuit issued its decision on November 9, 2015, denying the United States' motion to stay the preliminary injunction, thereby preventing the implementation of DAPA until the appeal could be resolved regarding the preliminary injunction.<sup>166</sup>

After oral arguments and briefing, two of the three-judge panel ruled to affirm the district court's ruling, and to send the case back to the district court to proceed with the trial.<sup>167</sup> Judges Elrod and Smith, in the Fifth Circuit opinion, addressed three issues,<sup>168</sup> which provide insight into the relationship between plenary power granting executive discretion and oversight of the administrative state.

First, the Fifth Circuit found that Texas had standing because DAPA effectively changed the status of certain categories of undocumented aliens by declaring them lawfully present in the United

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 660–61.

165. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

166. *Id.* at 146.

167. *Id.* at 147–49.

168. *Id.*

States.<sup>169</sup> Aliens granted “lawful presence,” a status that is revocable at any time, are eligible for certain federal and state benefits,<sup>170</sup> including the issuance of drivers’ licenses to individuals subject to deferred action under DAPA.<sup>171</sup> The Fifth Circuit held that Texas satisfied the requirements for standing because the state suffered an injury that was “fairly traceable” to DAPA, which would “enable beneficiaries to apply for driver’s licenses,” causing a demonstrable financial harm to the state.<sup>172</sup> While the federal government argued that such an incremental theory of standing is flawed because it has no conceivable limits, the majority of the Fifth Circuit explained that the same problem existed in *Massachusetts v. Environmental Protection Agency*,<sup>173</sup> and that courts could find other ways to “cabin policy disagreements masquerading as legal claims.”<sup>174</sup> Moreover, the Fifth Circuit held that Texas had satisfied the APA requirement that its asserted interests fit within “the zone of interests to be protected and regulated by the statute.”<sup>175</sup> The Fifth Circuit reasoned that Texas relied on the congressional guarantee that it would not have to spend “millions of dollars to subsidize driver’s licenses or chang[e] its statutes” without at least having the opportunity to go through notice-and-comment procedures.<sup>176</sup> While the government argued that review of the agency action should not be permitted even if the plaintiffs had standing because the statute expressly prohibits review of deportation decisions, the Fifth Circuit held that the prohibition in the statute did not apply broadly to all deportation claims.<sup>177</sup>

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 156–60.

173. *Id.* at 161–62 (citing *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 518 (2007)).

174. *Id.*

175. *Id.* at 162–63 (referring to 8 U.S.C. § 1252(g), which states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”).

176. *Id.* at 163.

177. *Id.* at 164; *see Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (rejecting the notion that “the unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a sort of ‘zipper’ clause that says ‘no judicial review in deportation cases unless this section provides judicial review’”).

Second, Judges Elrod and Smith found that the executive order initiating DAPA violated the APA because it did not follow notice-and-comment rulemaking procedures.<sup>178</sup> The Fifth Circuit concluded that DAPA did not “genuinely leave the agency and its employees free to exercise discretion”<sup>179</sup> because the requirements of DAPA were so detailed and specific that no evidence was presented of cases that had been denied for discretionary reasons.<sup>180</sup> Additionally, the Fifth Circuit found that DAPA was not a rule “of agency organization, procedure, or practice.”<sup>181</sup> In summary, the court concluded that there was a substantial likelihood of success on the merits of the procedural claim that notice-and-comment rulemaking should have been used before implementing DAPA.<sup>182</sup>

Third, the majority found that the INA did not permit deferred action in the form of DAPA.<sup>183</sup> The court found that “Congress ha[d] ‘directly addressed the precise question at issue,’” because the INA prescribes how parents may derive an immigration classification on the basis of their child’s status, foreclosing DAPA because Congress had clearly codified a specific and careful plan.<sup>184</sup> For that reason, the Fifth Circuit held that DAPA was properly enjoined because it was “manifestly contrary to the statute.”<sup>185</sup>

The United States appealed the Fifth Circuit’s ruling to the eight-member U.S. Supreme Court. The Court affirmed the Fifth Circuit’s decision on June 23, 2016, stating only that the “judgment is affirmed by an equally divided Court.”<sup>186</sup> Notably, the Supreme Court asked for briefing on whether the executive branch violated the take care clause, which requires the President to “take Care”<sup>187</sup> that the laws are faithfully executed.<sup>188</sup> This was a new constitutional question that was

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178. *Texas v. United States*, 809 F.3d at 171–72.

179. *Id.*

180. *Id.*

181. *Id.* at 176–77.

182. *Id.* at 177.

183. *Id.* at 147–49.

184. *Id.* at 186.

185. *Id.*

186. *United States v. Texas*, 579 U.S. \_\_\_\_ (2016).

187. U.S. CONST. art. II, § 3, cl. 5.

188. Garrett Epps, *Will the U.S. Supreme Court Tell Obama to ‘Take Care’?*, ATLANTIC (Jan. 21, 2016), <http://www.theatlantic.com/politics/archive/2016/01/supreme-court-united-states-texas/425031/>.



not addressed by the Fifth Circuit, demonstrating that at least some of the justices on the Supreme Court considered the issue important.

*E. Implications of United States v. Texas*

Given the history and background of immigration and administrative law discussed above, this case has the potential to significantly impact the manner and method of judicial review of immigration decisions. The federal government was found to have clearly implemented a substantive rule that was legislative in nature without following the procedures required by the APA.<sup>189</sup> The injunction put a temporary stop to the extension of legal presence to four million individuals that would qualify for deferred action under DAPA and prevented three amendments to the two-and-a-half-year-old DACA program.<sup>190</sup> Interestingly, Judge Hanen explicitly declined to enjoin the implementation of the DACA program itself, which was instituted in 2012.<sup>191</sup> Moreover, neither the District Court nor the Fifth Circuit opinion holds that President Obama's use of the executive mandate was, in and of itself, unlawful, but that the application of new rules by the DHS in order to comply with its understanding of that mandate was unlawful because it failed to comply with APA-required notice-and-comment procedures.<sup>192</sup>

Notice-and-comment procedures exist to ensure that the public has the opportunity to check administrative agencies in in the implementation of their administrative power.<sup>193</sup> Some administrators have argued that their job is not to be familiar with the law and to administer it to the letter, but to understand the underlying purposes of the law and to ensure that those purposes are accomplished.<sup>194</sup> However, the APA sought to reduce the extent to which that kind of

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189. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir.), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 809 F.3d 134, 170–77 (5th Cir. 2015).

190. *Texas*, 86 F. Supp. 3d 591 at 677–78; *Texas*, 809 F.3d 134 at 189–90.

191. *Texas*, 86 F. Supp. 3d 591 at 608–10.

192. *Id.* at 653–66; *Texas*, 809 F.3d 134 at 171–73.

193. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 75 (1938).

194. *Id.* (“One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.”).

rulemaking and decision making can occur without oversight by the citizens and the organizations that are impacted by it.<sup>195</sup> Thus, by failing to use notice-and-comment procedures, agencies essentially reduce their democratic legitimacy. For those reasons, the *Texas* decision touched upon issues that have deep constitutional and structural implications for the future of immigration law.

The assertion by Judge Hanen that DAPA was a rule because it applied categorically is interesting given that prosecutorial discretion allows for decisions not to prosecute “at both a categorical and an individual level.”<sup>196</sup>

In the Fifth Circuit opinion, Judges Elrod and Smith identified the competing values as well, finding that on balance DAPA failed to follow the notice-and-comment rulemaking procedures in place to preserve those values.<sup>197</sup> By completely eliminating the agencies’ discretion those agencies were unable to consider facts and circumstances that might justify exceptions from the extensive guidelines set forth in DAPA.<sup>198</sup> Moreover, the very specific prescriptions in the statute regarding the process for parents to obtain immigration classifications based on their child’s status were superior to substantive rules set forth, without following the proper procedure, in the DAPA memoranda.<sup>199</sup> Accordingly, the Fifth Circuit’s opinion highlights not only the importance of following proper APA procedure, but of circumscribing any administrative guidelines such that they do not run manifestly contrary to the statute that is being administered.<sup>200</sup>

The flexibility created by discretion in agency action is highly valuable when well-meaning administrators seek to prioritize the allocation of resources, but can cause problems in cases of agencies are “captured” by external interest groups, or when the flexibility is used to make categorical prosecution decisions that are discriminatory.<sup>201</sup>

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195. Shepherd, *supra* note 60, at 1562–63.

196. Wadhia, *supra* note 3, at 246 n.4 (citing T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 776 (6th ed. 2008)) (arguing that “[p]rosecutorial discretion is applied at both a categorical and an individual level”).

197. *Texas*, 809 F.3d 134 at 171–72.

198. *Id.*

199. *Id.* at 186.

200. *Id.*

201. David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL’Y 31 (2013).

When APA procedures are not used, courts are unable to obtain the kind of administrative record that is necessary to ensure that this kind of flexibility is used properly. Thus, the line between prosecutorial discretion and failure to “execute” the law is blurred. That lack of clarity is exacerbated any time plenary power is narrowly applied to one branch of government without a recognition of how it interacts with other branches that share that power.

#### IV. REDEFINING JUDICIAL REVIEW OF IMMIGRATION LAW

Many have argued that Judge Hanen and the Fifth Circuit’s reasoning was intentionally based on an “obscure and unsettled area of administrative law” in order to delay DAPA’s application.<sup>202</sup> While it is true that the line between administrative rules and discretionary resource-allocation is unsettled, much of the controversy over how courts should approach judicial review of immigration questions has touched upon administrative law since the APA was passed in 1946.<sup>203</sup> However, the facts underlying the case provide interesting insight into the benefits of transparency in evaluating constitutional as well as statutory challenges to immigration decisions.

The court’s treatment of DAPA is unique in the history of judicial review of immigration decisions. The outcome of the case involves the deportation or deferred action of potentially millions of individuals. While the vast majority of immigration case law deals with individual deportation or other proceedings, the far-reaching nature of DAPA highlights concerns about the purpose of the APA, separation of powers, and institutional protection for the constitutional rights of noncitizens. In a case like the *Texas* case, transparency on the part of the court in its constitutional analysis has the potential to significantly impact the approach of immigration agencies and officials as they implement immigration law. For example, agency counsel would be able to issue guidance based on court pronouncements recognizing due process rights for immigrant criminals, or protection against discrimination. As a result, systems and processes could be put in place

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202. David Ingram & Mica Rosenberg, *Texas judge’s immigration rebuke may be hard to challenge*, REUTERS (Feb. 15, 2015, 11:06 AM), <http://www.reuters.com/article/2015/02/18/us-usa-immigration-courts-analysis-idUSKBN0LM02Y20150218>.

203. *See, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950) (holding that a deportation hearing was an adjudication “required by statute” so as not to bring the statute into “constitutional jeopardy” even though the statute did not expressly require a hearing).

that streamline immigration decisions rather than relying on flexible and unpredictable discretion in the hands of field officers. By eliminating ambiguity on the ground level, such pronouncements could also serve to moderate the political battle over what actions are appropriate for the executive branch within the mandate of immigration statutes and which actions should be left to Congress. Additionally, if courts would fully brief and evaluate all issues that are raised by administrative action, such as the take care clause analysis performed by the Supreme Court, they would be better equipped to navigate the complicated and weighty questions that arise in immigration matters.

If an analysis of the history of plenary power and its relationship to the APA has revealed anything, it is that these two areas of law are sufficiently complex standing alone. When applied together, courts are left to pick and choose the components that support desired outcomes, or simply use those provisions to disguise constitutional decision making. In their simplest form, plenary power and the APA represent two competing interests that are in tension in immigration law: the APA seeks to reign in agency action, while plenary power attempts to provide greater flexibility. For those reasons, this Comment recommends the disentanglement of plenary power from judicial review of administrative decisions under the APA.

#### *A. Disentangling Plenary Power from Constitutional Judicial Review*

It would be a simple matter for courts to analyze constitutional issues while still granting plenary power. Courts could recognize plenary power by granting deference to the political branches while providing meaningful review any time plenary power is used to exceed the bounds of constitutional law. Thus, Congress and the President would have the power to set immigration policy according to their preferences and the preferences of their constituents so long as those policies did not violate the constitutional rights of others. Providing that discretion while preserving basic constitutional rights would provide a clear standard for lower courts to follow and disperse much of the mystery and complexity surrounding immigration law.

If the court had been more transparent in *Jean*, for example, the benefits would have been extensive and immediately apparent, and the costs minimal. Instead of holding that abuses of the INS's parole discretion would violate the statute as long as the statute was interpreted constitutionally, the Court might have addressed the

constitutional issue head-on to hold that the Constitution, rather than an obscure statute, prevented the Attorney General from considering race or national origin in regulating the conduct of aliens.<sup>204</sup> Such a holding would have avoided a number of confusing questions about how narrowly or broadly the scope of the court's statutory holding applied and whether courts would be required to exercise constant judicial oversight of the Attorney General, thereby limiting his discretion. A constitutional holding, on the other hand, would draw a clear line for the Attorney General and for all other immigration officials whose roles fit a similar description. In that case, the court would be required only to exercise review where the constitutional rights outlined were violated.

For examples of how such decisions have been received and followed, one need look no further than a line of cases that validated the constitutional rights of aliens. Some have argued that these cases do not apply to all aliens, construing them as non-immigration cases, or limiting their holding to due process rights.<sup>205</sup> However, that reasoning is circular because it begins with the assumption that plenary power prevents the holding from applying to all immigration cases. In *Yick Wo v. Hopkins*, the Supreme Court held that aliens of Chinese descent could operate laundries in San Francisco because the Constitution protected all individuals within the United States from discrimination by the state.<sup>206</sup> Later, the Court held in *Wong Wing v. United States* that a federal policy that imprisoned any Chinese immigrant found illegally in the United States for hard labor was still required to observe those individuals' Fifth and Sixth Amendment rights.<sup>207</sup> Critics have argued that *Yick Wo* was not an immigration case at all.<sup>208</sup> However, the holding in *Yick Wo* that constitutional protections applied to all individuals within the United States would naturally extend to all immigration cases if plenary power was not able to prevent constitutional review. Similarly, critics seek to limit *Wong Wing*, arguing that it provides only due process rights rather than making a general statement about the application of the

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204. Motomura, *supra* note 6, at 604–05.

205. *Id.* at 554–55.

206. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

207. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

208. Motomura, *supra* note 6, at 565–67.

Constitution to immigrants. While it is certainly true that subsequent cases have so limited *Yick Wo* and *Wong Wing*,<sup>209</sup> the commonalities between the analysis in those cases provides a much more stable foundation for judicial review than the widely varied attempts to limit immigration law on the basis of statutory technicalities or creative interpretations to avoid constitutional review.

If *Jean* had followed this line of cases instead of finding statutory justification while still respecting immigration officials' plenary power, the executive branch would not have to mete out substantive rights to immigrants at its discretion because the judicial pronouncement would instead require that basic individual rights be protected. Instead, immigration law has been defined by Supreme Court cases that grant procedural due process rights only to immigrants subject to deportation proceedings.<sup>210</sup>

### *B. Impact on the Power of APA Review*

Discretion in immigration enforcement is more likely to violate important human and individual rights when there is no threat of judicial review. While deference may increase the efficiency and speed of deportation, courts can do for immigration law what they have done for every other area of law—preserve human rights by threat of judicial review, while only reviewing a comparatively small handful of cases. Indeed, if we believe that our judicial system is what we say it is, we should have no trouble empowering judges at the expense of efficiency. Our entire governmental system is designed to sacrifice efficiency interests in favor of more important values like democratic legitimacy, the protection of individual rights, and justice.<sup>211</sup>

Of course, in some cases, judicial review may literally not be feasible. Just as in urgent domestic safety matters such as nationwide strikes by safety or security personnel, or imminent national security threats like the Cuban missile crisis, executive and administrative actors should have the real-time flexibility to act within their expertise in order to preserve national security. However, for the great majority

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209. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982).

210. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

211. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983)) (“The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”).

of cases and administrative decisions, our nation's safety or security is not threatened, and immigration decisions should proceed carefully with great respect for the rights of individuals. If attorneys prosecuting murderers or guards overseeing Guantanamo prisoners can do it, certainly officials asked to evaluate noncitizens' deportation status can show cautious regard for individual rights.

Recent attempts to focus deportation priorities on convicted criminals provides another example. While this practice is generally uncontroversial, significant humanitarian concerns can still be raised in cases where long-time residents are convicted for minor criminal conduct after entering the United States.<sup>212</sup> While the practice seeks to remedy national security concerns associated with the increase of illegal immigration, it incidentally takes a step back from a century of progress toward overt recognition of human rights in immigration law.<sup>213</sup> The convergence of criminal and immigration law, however, has the potential to further insulate those that apply immigration law from constitutional review and, as a result, delay the extension of basic constitutional rights to noncitizens that live in the United States.<sup>214</sup> Such a policy results in an inconsistent approach to discretion for immigration officials because it broadens agency discretion whenever officials tend to value immigrant rights over enforcement, and reduces discretion when officials tend to value enforcement over humanitarian concerns.

Thus, while providing deference to the executive and legislative branches may seem like the quickest solution to the obvious human rights challenges in immigration law, that deference in fact impedes a long-term solution by entrenching traditional abdication of judicial responsibility based on plenary power. Moreover, the veiled analysis and "phantom constitutional norms" of the current system wreak havoc on constitutional separation of powers by each branch to participate in its own balancing of human rights and national

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212. Kanstroom, *supra* note 52, at 1893.

213. Wadhia, *supra* note 52, at 387 ("A number of measures contained in this legislation make it more difficult for immigrants to see a judge prior to deportation, impose excessive punishment for immigrants who fit under 'tough-sounding' labels, increase the number of immigrants who can be detained by the government without an opportunity to ask for bond, and remove the ability of judges and immigration officers to consider an individual's equities, circumstances, and other factors when determining if he should be deported.").

214. Kanstroom, *supra* note 52, at 1907–09.

security.<sup>215</sup> As a result, the system is fraught with numerous and widely varied approaches to resolving difficult questions, leading to divergent and contradictory outcomes.<sup>216</sup> That is how we end up with a Democratic President usurping executive authority while a Republican Congress digs in its heels to defund essential administrative agencies. What is needed is a uniform standard—a pronouncement where the line is clearly drawn in order to protect individual rights. In order to provide that clarity, courts should move toward greater transparency in weighing the interests and rights involved in deportation decisions so that immigration officials must orient themselves toward outcomes that respect those rights, or answer to a federal court.

### *C. Removing Plenary Power from Administrative Agencies*

A few courts have extended the plenary power doctrine explicitly to administrative actions.<sup>217</sup> However, most courts simply avoid constitutional issues in reviewing agency immigration decisions on the assumption that plenary power applies. While *Chevron* deference at least requires a finding of ambiguity before deferring to agencies,<sup>218</sup> decisions based on plenary power allow a court to find that the action taken by the agency was one that was acceptable to Congress under long-standing administrative practice. Therefore, such acts should be validated, without further analysis as a manifestation of Congress's plenary power.<sup>219</sup>

For these reasons, it is imperative that courts do not impose limitations on judicial review that are based on plenary power in administrative law. Judicial review of agency action is already sufficiently limited by deference intended to provide agencies with needed flexibility in administering the law. Specifically, courts

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215. Motomura, *supra* note 6, at 600–01 (explaining that using constitutional norms only as a guide for interpretation rather than explicitly results in overbreadth as well as underinclusivity).

216. *Id.* (pointing out that phantom constitutional norms create precedent that is difficult to apply predictably); Kanstroom, *supra* note 52, at 1920–21.

217. *Kwock Jan Fat v. White*, 253 U.S. 454, 457–58 (1920) (holding that that an administrative exclusion was final unless it could be shown to be an abuse of the power given to executive officers by the statute). Motomura, *supra* note 6, at 613.

218. Scalia, *supra* note 80, at 511–12.

219. Schuck, *supra* note 8, at 31–34 (arguing that deference was inappropriate because, for some reason, when “sovereignty confronts strangers, the Constitution can be subordinated to a congressional statute, indeed, to mere administrative practice”).



reviewing agency action should use *Chevron* deference to prioritize the mandates of the legislative branch over agency interpretations, and reserve plenary power for analysis of strictly legislative and executive action. In today's complex, bureaucratic, administrative state, analysis of executive agency action is complicated enough, and plenary power has only served to prevent careful review of immigration agencies' attempts to administer the mandates of the political branches.

Interestingly, an empirical review of 1,843 cases after *Nicholas* reveals both the substantive nature of rights that are provided and the importance of not granting plenary power to agencies.<sup>220</sup> The study of 1,843 deportation cases reveals that many candidates for deportation qualified for deferred status because they were deemed mentally incompetent or infirm—the very same grounds for which they had initially been subjected to deportation.<sup>221</sup> The study found that over 100 of the 1,843 individuals were granted deferred status for “humanitarian factors,” despite the fact that they had been convicted of criminal drug offenses.<sup>222</sup> That study, and the secretive nature of the deferred action policy prior to *Lennon*, demonstrate the importance of judicial review of administrative actions that is not limited by plenary power. In sum, *Lennon* and *Nicholas* brought public and political attention to the fact that the use of plenary power in reviewing agency action actually counteracts plenary power that should be reserved for the executive and legislative branches. To the extent that courts fail to review agency action, agencies are free to act independently from or contrary to the will of the political branches of government.

#### CONCLUSION

While a more comprehensive review of the interaction between plenary power and the APA in immigration law is certainly in order, this brief analysis reveals at least two important insights. First, plenary power can serve a legitimate role in preserving much-needed flexibility in the political branches as long as it is coupled with greater transparency regarding constitutional protections for noncitizens. Second, plenary power has no role in judicial review of agency action because those actions are already dangerously independent from

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220. Wildes, *supra* note 30, at 49.

221. *Id.* at 53–55.

222. *Id.* at 51.

oversight by the political branches, and the use of the doctrine to further insulate them is directly contrary to the doctrine's purpose.

Both of these insights point toward a need to bring individual rights for aliens back into the jurisdiction of the judiciary—our nation's watchdog for individual rights. Noncitizens would no longer be left to sort out confusing paperwork and agency directives while overcrowded immigrations offices leave millions of aliens in limbo.<sup>223</sup> Arnulfo and Pedro, whatever the final outcome of their cases may be, will feel confident that they are protected. While these slight adjustments to judicial review of immigration decisions will not solve all of our nation's immigration-related problems, they will at least focus the debate on the issues that are most important, and protect individual rights along the way.

*Kyler McCarty\**

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223. Wadhia, *supra* note 3, at 298.

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