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The U.S. Supreme Court's Big Immigration Case Wasn't About Presidential Power

Obama has taken credit for his administration's deferred-action program. But legally speaking, this challenge was about something else.

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In her law-professor days, now-Justice Elena Kagan wrote a much-noted [article](#) arguing that presidents should, in effect, take ownership of their administrations' bureaucratic policymaking. EPA environmental regulation should be embraced as

presidential environmental regulation. FDA public-health regulation should be seen as presidential health regulation. Presidents should be encouraged to make regulation their own in both how they engage with the bureaucracy and how they discuss an administration's regulatory output. She argued: "[P]residential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power."

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United States v. Texas—a challenge to a Department of Homeland Security [program](#) to provide undocumented immigrant parents of U.S. citizen children temporary protection against involuntary removal—shows that the opposite is true. Both the media and the public appear confused about “the sources and nature of [DHS’s] power.” Far from promoting public comprehension, President Obama, no doubt abetted by his opponents, has muddled public understanding by aggressively branding the program as his own.

In the face of last week's 4-4 Supreme Court [punt](#), Texas's campaign to stall implementation of “Deferred Action for Parents of Americans and Lawful Permanent Residents,” or DAPA, lives on. Its challenge to DAPA presents questions of enormous political and human significance. In legal terms, however, the issues are utterly conventional. They fall within the usual range of administrative law questions that I saw regularly as a young attorney in the Justice Department's Office of Legal Counsel and about which I have been teaching law students for the last 35 years.

Yet the case is widely misperceived by the public, journalists, and perhaps even some judges as entailing significant constitutional questions. Recalling last April's oral arguments in the case, the legal scholar and former Justice Department official Walter Dellinger [wrote](#) last week, “Almost everyone who attended ... came away

with the impression that the eight-member court seemed evenly divided on whether the president had lawful authority to take this action.”

Here’s the thing: No one should have been confused about “whether the president had lawful authority to [promulgate DAPA].” The president did not—but that’s legally irrelevant. Obama’s legal authority is not at issue in the case. Really. Truly. Not even a little bit. Obama did not take the legally relevant action; Secretary of Homeland Security Jeh Johnson did. It’s a program of which he is the legal author and for which he, not the president, is legally accountable. Politically and institutionally, this is a critically important difference.

Johnson inferred that he had the authority to exercise this program from statutes enacted by Congress. The Homeland Security Act of 2002, for example, explicitly charges the DHS secretary with “establishing national immigration enforcement policies and priorities.” Other statutes suggest Congress approves of deferred-action policies. The arguments for and against the secretary’s use of his powers are complicated and technical, but they are arguments about statutory authority, not Article II of the Constitution or the scope of presidential prerogative. Put simply, the question is whether Johnson is reading statutes properly.

There are three other procedural questions in the case—and, technically speaking, these are the only questions the lower courts purport to have decided. One is whether Texas had standing to bring its lawsuits: Did DAPA threaten some injury to the state of Texas that would entitle the state to seek relief in a federal court? The second is whether Johnson should have waited to promulgate DAPA until he had followed what administrative lawyers call a notice-and-comment process. For certain rules, the federal Administrative Procedure Act requires agencies to issue their rules first as proposals, give members of the public an opportunity to respond, and then publish their final rules with a statement that explains how they have taken account of the issues the public has raised. Texas claims DAPA is one of those rules; Johnson disagrees. The third question is whether DHS’s implementation of DAPA should be held off pending final judgment. Unless you love administrative law, none of this probably sounds too racy. But these technical questions about

both agency and judicial process reflect “accurately the sources and nature of bureaucratic power” in our public law system—power typically rooted in statutes.

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In putting a public face to DAPA, however, the Obama administration has abetted a widespread misapprehension that this fight is an epic battle about the nature of the presidency. Not surprisingly, the president’s political opponents often echo this misconception because it fits the narrative of Obama as a monarchical wannabe.

To be sure, Johnson’s program followed intense collaboration involving the White House, DHS, and the Justice Department. In *Power Wars*, his account of the Obama presidency, the *New York Times* reporter Charlie Savage explains how the White House vetted a variety of policy options regarding deferred action for undocumented immigrants. The White House was directly involved in DAPA as a policy matter, and even the legal analysis published by the Justice Department—which rejected one of DHS’s major proposals as impermissible—was developed in consultation with White House counsel. What this points to, however, is only Obama’s political accountability for DAPA, not the secretary’s underlying legal authority. For political leadership, a president is accountable in the polls, but not the courts.

When Obama [says](#) he was “left with little choice but to take steps within my existing authority to make our immigration system smarter, fairer, and more just,” he is thus not promoting transparency about legal responsibility. He is intensifying confusion. As president, he no doubt has constitutional authority to consult with the secretary of homeland security, help shape DHS’s agenda, and inform the secretary of his strongly preferred policy outcomes. He could not have forced Johnson to promulgate a program, however; in the face of impasse, Obama would be able only to fire this secretary and try to appoint another. When Obama refers to “his” powers or “my” actions, he mainly insures that all the opposition to the

program, both legal and political, will get focused with laser-like intensity on him, rather than Johnson.

Conservative political vitriol against the president may have had some impact on the judiciary's involvement with DAPA prior to last week's Supreme Court vote. That tie did no more than affirm the United States district-court injunction against DAPA issued by Judge Andrew Hanen on the ground that DHS should have followed notice-and-comment processes in promulgating DAPA. On the way to issuing that order, however, Hanen offered a [123-page legal analysis](#) of a variety of issues, which has, to put it charitably, some unevenness in analytic clarity and persuasiveness. In faulting Johnson for bypassing notice-and-comment, Hanen placed considerable emphasis on Obama's informal comments about DAPA, giving them false legal significance and [interpreting](#) them as part of a lawmaking "initiative."

***U.S. v. Texas* is a case about ordinary administrative law, not free-floating anxieties surrounding presidential power.**

By a two-to-one vote, a Fifth Circuit [panel](#) upheld Hanen's injunction, but staked out an even broader rationale. The judges thought it unlikely that, with or without public comment, Johnson had statutory authority to implement DAPA at all. In agreeing to review the Fifth Circuit's decision, the Supreme Court—still with a cohort of nine Justices, at that point—requested that parties address whether DAPA violated the president's duty to faithfully execute the law. This was doubly bizarre: Neither court below had addressed this question, and, in any event, the Supreme Court [determined](#) over 20 years ago that even presidential errors in interpreting the scope of statutory authority are not constitutional claims. Administrative error does not amount to constitutional crisis.

Unfortunately, the Supreme Court's 4-4 tie, which affirmed the lower court's judgment "by an equally divided Court," leaves all of this legal confusion in place.

It offers no clues as to the justices' reactions to the wide-ranging analyses offered by both of the lower courts—analyses with implications going far beyond the immigration context to all of administrative regulation. The litigants in this case—and potentially in others yet to come—can reach no confident conclusions about the weightiness of the lower courts' lengthy legal pronouncements. Logically, the four justices who voted to uphold the injunction must have agreed that Texas has standing to bring its lawsuit. Presumably, they also agreed with the lower courts' determination that DAPA could not legally be issued without notice and comment. It would be useful, for the sake of a wide range of future cases, to know what arguments for these propositions the four justices found persuasive. It would certainly be helpful to know if any or all of them approved of the substantive doubts cast by the Fifth Circuit on Johnson's reading of his statutory authority to issue DAPA at all.

Because of the lack of detail in the decision, we also do not know the views of the four justices who would have voided the injunction, and we do not know their views about Johnson's statutory authority. They might simply think Texas lacked standing to sue. They might think Johnson was within his rights in not conducting a formal notice-and-comment process. Administrative lawyers—including the Obama administration's lawyers—really have no idea what to infer from these four justices' unexplained stance.

The point on which I hope all eight current Justices—and an eventual new colleague—might ultimately agree, however, is that *U.S. v. Texas* is a case about ordinary administrative law, not about free-floating anxieties surrounding presidential power. Justice Kagan should correct Professor Kagan's analysis. In the coming month, perhaps DHS could even reinforce public understanding about the legal nature of the case by conducting the public comment process Hanen thought was missing—a process organized by DHS, not the White House. The lower courts might or might not be legally correct that such a process was required for DAPA, but no law bars agencies from being more responsive to the public than is technically required. Staging the comment process now would remove that procedural issue from the suit and give DHS a major opportunity to clarify its

stance and the nature of the challenges at hand. It would give the administration the opportunity to make clear that, win or lose, the case is legally not about President Obama. While the 4-4 vote doesn't offer much in the way of clarity, it at least leaves room for that much of a teachable moment.

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