

# Executive Actions in the Balance of Power: Their Historical and Political Meanings

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## INTRODUCTION

The 45th President of the United States, Donald J. Trump, had signed 32 executive orders by the end of April, that is, during the first three months of his term. The first order, E.O. 13765, announced on the very day of inauguration, stated that the Trump Administration seeks “the prompt repeal of the Patient Protection and Affordable Care Act.” He continued to sign executive orders, both on domestic and foreign policy matters, focused mostly on the issues that he had criticized during the election campaign.

Among the orders were Border Security and Immigration Enforcement Improvements (E.O. 13767, January 25, 2017), referring to the immediate construction of a physical wall on the southern border, and Protecting the Nation from Foreign Terrorist Entry into the United States (E.O. 13769, January 27, 2017), blocking the entry of people from seven Middle Eastern nations, including Iraq, into the United States. The latter invited legal challenges, and a nationwide temporary restraint was ordered by district and appeal courts. The Administration therefore repealed the first order by superseding it on March 6 with another executive order that dropped Iraq from the list (E.O. 13780). This new order was also challenged by federal district and appeal courts, while the Supreme Court is to hear the case in the upcoming fiscal year.

Despite his front-loaded issuance of executive orders, President Trump may end up

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with the normal number of executive orders in the end, despite their controversial contents, because previous Presidents, including his immediate predecessor, President Barak Obama, also issued numerous executive orders or took other types of executive actions, and some of them have had significant political impacts even though they bypassed congressional legislation.

In the following, let us first trace the historical development of executive initiatives, mainly that of executive orders but also other types of executive initiative. Examination of executive initiatives will be made within the framework of the balance of constitutional power in the process. On the basis of the historical background, recent executive initiatives taken under the Obama and Trump Administrations are focused on as case studies.

Responses from the other two branches of the government to such expanding executive initiatives will be discussed in the next chapter. The cases to be focused on are in the policy area of immigration reforms. In conclusion, let us discuss the implication of the active use of executive power in the American political system.

## **1. HISTORICAL BACKGROUND**

### **a. Constitutional Implication**

The United States Constitution became effective in 1779 and thus is among the oldest existing written constitutions in the world. During the Constitution's more than 200-year existence, its language has kept up with the geographic, demographic, and value-wise changes in American society, either through formal amendments or by the interpretations of the Supreme Court. What is more, for a long-lasting Constitution to constantly meet the needs of on-going political situations, certain spaces for maneuvers have been created even though they are not found in the constitutional languages.

One of these creations is the range within which presidential power can be exercised. The Constitution stipulates that Congress legislate laws that are to be signed by the President. It also stipulates that executive power resides in the President, thus bestowing a single-handed authority upon the President to direct the daily management of the executive branch. This means that within the limits that the Constitution or legislated statutes have given, or in the absence of specific restrictions, the daily implementation of laws or the creation of internal sub-rules are left to the initiative of the President.

This, however, does not mean that the President can act above the law. As the record of American nation building has specifically discussed, in the United States, the law is the king and not the other way around, as was the case in England at that time. Having said that, the need to maximize the effectiveness of executive powers within the limit of law has faced difficult challenges over the years. Examples of such executive initiatives that have been constantly used in American political history without being specifically stipulated in the Constitution are "executive orders" and "proclamations."

The first executive order was issued by President George Washington in 1797, and the following Presidents continued to issue them to manage business within the executive branch, although the frequency of use varied among them. Executive orders are legally binding, and no executive order may direct the agencies to conduct illegal or unconstitutional activities. The legislative and judiciary branches can challenge and reverse the executive orders, but Congress may sometimes reinforce the presidential initiatives through follow-up legislation.

One congressional report specifically discussed the difference in nature of the two kinds of presidential document, namely, executive orders and proclamations, as below:

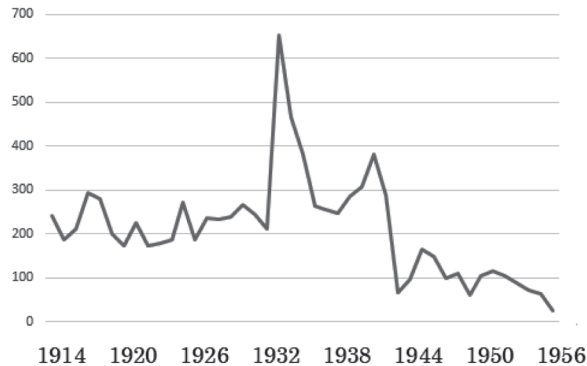
Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.

Proclamations in most instances affect primarily the activities of private individuals. (United States. House of Representatives. Committee on Government Operations 1957, 1)

The same report added that since the President does not have any power or authority over individual citizens unless the Constitution or statutes specifically grant them to him, proclamations are not legally binding and remain hortatory.

Historically, not only the frequency of their issuance but also the level of authority of executive initiatives varied, depending on the President as well as the political situation of the time served. For example, at the time of the Civil War, President Lincoln even authorized the suspension of the writ of *habeas corpus* in his proclamation. As the court challenged the legality of the presidential authority to suspend the writ of *habeas corpus*, Congress later passed legislation to specifically authorize the President to do so in cases where public safety may require it. Other than such war-time existential crises, though, Congress tends to keep a tight control over the executive branch's initiatives through regulatory legislation.

The earlier executive orders did not even have any numbers; they came to be numbered in 1907. The first several decades of the 20<sup>th</sup> century observed the increased use of executive initiatives, as shown in Figure 1 below. This was a period when American society went through successive challenges, starting with the First World War, the Great Depression, and the Second World War. When President Franklin D. Roosevelt faced a series of national crises, he relied heavily on executive actions. For example, he issued 3,522 executive orders in total during his 12 years in office, with the highest annual issuance of 657 and 467 in 1933 and 1934, respectively, coinciding with his struggle against the Great Depression.



**Figure 1 Executive Orders Issued**

Source: United States House of Representatives Committee on Government Operations (1957, 36).

It was against such heavy usage of executive orders that Congress decided to make a law, the Federal Register Act (44 U.S.C. Chapter 15) in 1935, and formally stipulated that executive orders and proclamations should be as follows:

(a) Proclamations and Executive Orders; Documents Having General Applicability and Legal Effect; Documents Required To Be Published by Congress. There shall be published in the Federal Register —

- (1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;
- (2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and
- (3) documents or classes of documents that may be required so to be published by Act of Congress. For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

As the nation recovered its normal stance to respond to the extending crises, however, Congress began to take back the rule-making responsibility from the executive, and the number of executive orders President Roosevelt utilized declined to less than a hundred. By the time his successor, President Truman, tried to meet the crisis caused by the Korean War using his presidential power, the checks and balances among the branches were much stronger than before. When the steel workers announced a nationwide strike, President Truman issued an executive order and authorized the Secretary of Commerce to take

possession of the steel mills. He claimed that he was responsible, as the Commander-in-Chief, for securing the production of steel in times of war. Against this executive order, the court ruled that the President acted without any statutory or constitutional authority to do so (*Youngstown Sheet & Tube Co. v. Sawyer*).

In this Steel Seizure Case, Justice Jackson provided a tripartite test that stands as the baseline for the balancing of power regarding executive orders and proclamations. An executive initiative has the strongest power if issued in pursuant to an express or implied authorization of Congress. Its power somewhat declines if the President acts only on his own power while Congress remains silent. Its power is weakest if the initiative is incompatible with the expressed or implied will of Congress.

The court tends to defer to executive orders when political issues are involved, especially when the issues relate to foreign policy or national security. Presidents can also issue executive memoranda, which are similar to executive orders in that they carry legal weight allowing the President to direct government officials and agencies, but executive memoranda are typically not published in the Federal Register unless the President determines that the rules have general applicability and legal effect, meaning that it serves the interest of the public to be aware of the content of the memoranda.

During the Cold War, however, the President issued numerous executive orders under various titles, especially in the foreign and military policy areas. Besides executive orders, recent Presidents have started to make use of diverse types of executive initiative to expand their authority. One of these is the use of a “signing statement,” which is issued by the President when he signs the bills sent from Congress. The President, according to the constitutional stipulation, can either sign a bill and make it enacted, or veto it and wait for Congress to successfully override his veto or fail to do so. Thus, signing statements served merely as formalistic statements accompanying the enacted law.

President George W. Bush, from time to time, did not follow this tradition but used his signing statements to announce that he would not faithfully implement the law, thus denying the effectiveness of the law he was signing. In other words, President Bush expanded his power to ignore the law, i.e., making a new law with an opposite intent through his executive power alone, which is against the stipulation of the Constitution. Such behavior, not vetoing but signing with disagreement, bypasses the constitutional checks and balances and deprives Congress of the chance to re-challenge the President by voting with two-thirds in both houses, just as the Constitution stipulates.

During the year 2001, i.e., his first year in office, President Bush issued 24 signing statements, including one on the “Authorization for Use of Military Force” on September 18, 2001:

In signing this resolution, I maintain the longstanding position of the executive branch regarding the President’s constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War

### Powers Resolution. (Bush 2001, 1334)

President Bush thus reconfirmed his inherent authority over starting military actions on his own, even as he was signing the authorization granted through the congressional resolution (PL107-40), because the resolution he was signing contained the phrase, “Nothing in this resolution supersedes any requirement of the War Powers Resolution,” and thus put conditions on the presidential use of war powers.

During the following years, President Bush issued 34, 27, 24, 14, 23, 8, and 5 signing statements, respectively, between 2002 and 2008, totaling 159, during his two terms. President Obama, in contrast to his predecessor, issued 37 signing statements during his two terms in office (Presidential Signing Statements, Presidents Bush and Obama), thus returning presidential signing to its traditional role, as stipulated in the Constitution.

President Obama, however, is said to have been the first modern President to utilize a new category of executive initiative to expand presidential authority, namely “executive actions,” in place of executive orders or memoranda. Executive actions are not based on the constitutional presidential power nor on legislation by Congress, and thus they are legally nonbinding. In the following section, let us focus on the use of executive powers by President Obama during his eight years in office, especially focusing on the ones that invited controversy in the context of checks and balances.

### **b. Cases under the Obama Administration**

As a constitutional scholar himself, President Obama was expected to follow the spirit of the Constitution, and he started his term in 2009 by rectifying the wrong measures implemented by his predecessor during the War on Terror. On his first day as President, Obama issued Executive Order 13489, revoking Bush’s Executive Order 13233, which loosened the rules for recording official documents. He also issued Executive Order 13490 on the same day to supersede Bush’s Executive Order 13770, and strengthened the ethical standards of executive branch personnel. During his eight years in office, President Obama issued 276 executive orders (National Archives, Barak Obama), while the nature of the orders varied, reflecting the domestic and international situations.

During his first two years, President Obama was supported by the Democratic majority in both houses of Congress, and many of his earlier priorities went through the legislative process. In this two-year period, the Obama Administration spent most of its energy on health care reform, commonly named “Obamacare,” at the cost of other pressing programs (BBC 2017). His attempt to influence the health care policies of every American, not just poor or elderly people, as before, invited politically natured opposition among the Republican base. For those Americans who were able to cover their health costs on their own, it was regarded as a private matter in which the government should not intervene. Those who opposed Obama’s seeming expansion of government power formed a protest movement, the “Tea Party.” This movement was named after the colonial-era opposition

movement against the British taxation on tea, which was regarded as interference by a remote government into Americans' daily lives. The modern-day Tea Party was at first believed to be a collection of individually run grassroots activities, but it was later revealed that the libertarian Koch Brothers financially supported this nationwide movement, while maintaining its appearance as a spontaneous revolt (Mayor 2010).

In his first mid-term elections, President Obama was challenged by Tea Party candidates who were backed by the opposition movement targeting Obamacare, and the Democrats lost the majority in the House. This made it quite difficult for him, from 2011 onward, to follow through on his promised agenda. Even though he won his second term in 2012, he never recovered the House majority for the rest of his term, and what was worse, the majority of the Senate was also taken by the Republicans in his second mid-term elections, in 2014.

It was under such adverse political conditions that President Obama tried to touch upon the task of immigration reform, since many Latino voters who supported him in the 2008 elections were not satisfied with Obama's choice of health care reform over immigration reform. During his first campaign in 2007, then-Senator Obama had appealed to Latino voters in the following way:

I think it's time for a President who won't walk away from something as important as comprehensive reform when it becomes politically unpopular. And that's the commitment I'm making to you. I marched with you in the streets of Chicago. I fought with you in the Senate for comprehensive immigration reform. And I will make it a top priority in my first year as President—not just because we need to secure our borders and get control of who comes into our country. And not just because we have to crack down on employers abusing undocumented immigrants. But because we have to finally bring those 12 million people out of the shadows. (Obama 2008)

The question of immigration reform, Obama well understood, was of vital interest to Latino voters, but no comprehensive reform had been enacted since 1986, and greater restrictiveness, rather than expansiveness, had gained political force (Kitagawa Otsuru 2016, 9-10). President Bush had originally tried to streamline immigration policies in 2001, but the 9-11 incident made it impossible for him to touch upon immigration reforms for some time. Although President Bush restarted work toward a temporary-worker program in 2004, it was only in 2005 that Sens. Edward M. Kennedy (D-MA) and John McCain (R-AZ) managed to have the Secure America and Orderly Immigration Act of 2005 (S. 1033) passed in the Senate. The House, however, led by the Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-WI), not only refused to act upon the Senate-passed bill but instead passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, a hash anti-immigration bill.

Against the harsh anti-immigrant stance shown by his own party members, President Bush delivered the message that he still believed that “America can simultaneously be a lawful, economically dynamic, and welcoming society” (Bush 2007, State of the Union). In May 2007, a bipartisan bill was again introduced by Sens. Kennedy and McCain, the Secure Borders, Economic Opportunity, and Immigration Reform Act of 2007 (S. 1348). The passage of the bill was blocked by filibuster, and repeated cloture votes failed, thus leading to the end of this attempt. The Republican side strongly opposed the inclusion of any “amnesty” in the bill, reflecting the negative memory of the legalization of undocumented immigrants by President Ronald Reagan, which, they believed, had invited chain migration from the south.

Aside from the comprehensive immigration reform, attempts had been made to rescue a certain group of immigrants, namely, young undocumented immigrants who had been brought into the United States by their adult family members. Bills aiming to prevent their deportation had been introduced since 2001, but it was the Development, Relief, and Education for Alien Minors Act, or the “DREAM” act, introduced in 2002, that symbolized the cause to secure the future of the young undocumented immigrants. As his re-election approached, while Congress continued to fail with immigration reform bills, President Obama decided to resort to the use of presidential executive power rather than wait for Congress to achieve any legislation. On June 15, 2012, President Obama issued Deferred Action for Childhood Arrival (hereafter, DACA) as an executive action and temporarily legalized certain young undocumented immigrants.

The way in which President Obama recognized the role that executive action should play is well demonstrated by the following occasion. In January 2013, President Obama issued a group of 23 executive actions to secure the children’s safety, trying to meet the pressing need to deal with gun violence, while Congress under the control of the Republican Party continued to show no action. The Director of Digital Content for the Office of Digital Strategy, on that occasion, explained the executive actions’ implication as follows: “While President Obama will sign 23 Executive Actions today that will help keep our kids safe, he was clear that he cannot and should not act alone: The most important changes depend on Congressional action” (White House 2013). As stated, the use of executive actions was not to replace the legislating function of Congress but intended to serve as a precursor to the legislation Congress was expected to follow through. It was the lack of action by Congress, according to the Obama Administration, that made the President resort to an executive power that he could singularly control.

The impact of DACA was mixed at the beginning. Since DACA was set up by an executive action, not by legislation, undocumented youth naturally thought twice before giving their identity, as well as that of their family, to the government, especially when they did not know who would be the next President before the 2012 elections. Against this negative expectation, though, DACA had a positive impact during the election campaign in the support for President Obama among Hispanics (or Latinos, in this poll), especially



among those who were from Mexico or naturalized citizens themselves (See Table 1). Among Hispanics, the 2012 votes were divided 71 percent for President Obama and 27 percent for Willard Mitt Romney, the Republican candidate. The vote share for Obama in 2012 increased from 67 percent, which he gained in 2008 when he fought against Sen. McCain, who had played a leading role among Hispanics as a senator from Arizona.

**Table 1. 2012 Latino Election Eve Poll (%)**

Questions	Answers	Total	Mexican	Naturalized
DACA's impact	More enthusiastic to Obama	58	61	62
	No Impact	32	29	28
Know Undocumented Immigrant	Yes	60	64	66
	No	36	33	31

Source: Compiled by the author based on ImpreMedia/Latino Decisions (2012).

After Obama's re-election, an increased number of the undocumented youth responded positively to DACA, as shown in Table 2, in contrast to the previously held low expectations. DACA, however, was not supposed to be the final measure to solve the problems of undocumented immigrants staying in the United States, and President Obama continued to expect Congress to adopt a permanent measure.

**Table 2. Number of DACA Approvals and Renewals (persons)**

	2012	2013	2014	2015	2016	2017*	Total
Approved	1,684	470,521	158,397	510,289	198,916	246,850	787,580
Renewal			22,236	419,543	146,034	211,264	

\*As of March 2017.

Sources: Compiled by the author based on US Citizenship and Immigration Service (2012-17) and Uhrmacher and Granados (2017).

On June 27, 2013, the Senate passed the immigration reform bill, Border Security, Economic Opportunity, and Immigration Modernization Act by 68 votes (D 52, R 14, I 2) to 32 (D 0, R 32, I 0), and in the following year, the bill was expected to have secured majority support in the House as well. However, then-Majority Leader Eric Cantor lost in the Republican primary to a Tea Party candidate, which led House Speaker John Boehner to decide not to push the bill any further. On June 30, the very day that House inaction became clear, President Obama announced that he would "fix as much of our immigration system as I can on my own, without Congress" (White House 2014).

On November 20, 2014, after President Obama had lost the majority in both houses of Congress to the Republicans, he followed through on his earlier position and

announced the expansion of the coverage of DACA beyond the current age groups. He also announced the introduction of a new program, Deferred Action for Parents of Americans (hereafter, DAPA), which expanded temporary legalization coverage to the parents of American citizens and lawful permanent residents.

Expanding temporary legal status to new groups of undocumented immigrants met with resistance from numerous state governments, and they brought the issue to court. Finally, the Supreme Court terminated the expanded programs in *United States, et al., Petitioners v. Texas, et al.*, as discussed in Chapter 2 below. After President Trump took office, the original DACA, which was temporarily continued, also received challenges from some states, and President Trump decided to terminate it on September 5, 2017, as discussed in the next section.

### c. Cases under the Trump Administration

President Trump, even before he assumed the office, had made public that he would terminate many of the Obama Administration's policies upon his inauguration, and, as stated, he issued a number of executive orders within a month of his presidency (See Table 3). President Trump mainly challenged the continuing policies from the Obama Administration in two areas: Obamacare and immigration control. The latter consisted of two target groups: undocumented immigrants from Central and Latin America and immigrants and refugees from certain Middle Eastern countries.

**Table 3. Executive Orders during the First Three Months of the Trump Administration**

Date	Title
0120	Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal
0124	Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects
0125	Executive Order: Enhancing Public Safety in the Interior of the United States
0125	Executive Order: Border Security and Immigration Enforcement Improvements
0127	Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States
0128	Executive Order: Ethics Commitments by Executive Branch Appointees
0130	Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs
0203	Presidential Executive Order on Core Principles for Regulating the United States Financial System
0209	Presidential Executive Order on a Task Force on Crime Reduction and Public Safety
0209	Presidential Executive Order on Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers

0209	Presidential Executive Order on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking
0209	Providing an Order of Succession within the Department of Justice
0224	Presidential Executive Order on Enforcing the Regulatory Reform Agenda
0228	Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule
0228	Presidential Executive Order on the White House Initiative to Promote Excellence and Innovation at Historically Black Colleges and Universities
0306	Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States

Source: Compiled by the author based on data on the White House site.

President Trump continued to issue numerous executive orders, but the frequency of executive orders declined as congressional Republicans started to take their turn and debate the issues President Trump had targeted. Some of these earlier executive orders invited vigorous challenges, both from the local governments and the judiciary branch.

The first challenge was made against Trump’s executive order “Protecting the Nation from Foreign Terrorist Entry into the United States,” issued on January 27, which banned the entrance of immigrants from seven Middle Eastern countries, including Iraq. President Trump claimed his authority to do so in the preface to the order thus: “By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States” (Trump 2017b).

This executive order suspended entry by all refugees for 120 days (Syrian refugees were suspended indefinitely), and stopped citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering for 90 days. This caused confusion not only in the targeted countries but also at American ports of entrance, for even those who had legal status in the United States or who were refugees in the process of resettlement were stopped from entering.

Lawyers immediately challenged the executive order, and judges of the federal district courts in Brooklyn and Virginia ordered the temporary rescue of some entrants. On January 30, the State of Washington, and then the State of Minnesota, filed suit that the executive order was unconstitutional and illegal and that its enforcement should be enjoined nationwide. As the court granted a temporary restraining order, the Administration appealed, but the Court of Appeal for the Ninth Circuit also denied the appeal.

Meanwhile, President Trump, under challenge, rescinded the earlier executive order and issued a modified one, “Executive Order Protecting the Nation from Foreign Terrorist

Entry into the United States” on March 6, deleting Iraq from the travel ban list, thus stopping immigration from six Middle Eastern countries. This executive order was again challenged in the district courts of Maryland and Hawaii, and the Fourth Circuit Court as well as the Ninth Circuit Court denied the Administration’s appeal, through different reasoning. Upon receiving a negative ruling from the Courts of Appeal, the President then appealed to the Supreme Court.

President Trump successfully filled the vacant seventh post of the Supreme Court with Judge Neil M. Gorsuch, and the new Supreme Court unanimously reversed the lower court decisions on the final days of the term. The court tentatively enabled President Trump to move forward with his executive order, based on the presidential authority to control the border, while giving room for certain categories of immigrant. The promised follow-up action, expected to take place in October, has shifted focus as the Trump Administration issued a presidential proclamation on September 24, restricting immigration from Iran, Syria, Libya, Somalia, Yemen, North Korea, Chad, and some governmental officials of Venezuela (Trump 2017b).

President Trump had also been critical of Obama’s DACA and has insisted on building a solid wall along the Mexican border to keep illegal immigrants away, and that he would stop allowing illegal immigrants to be legalized. However, upon assuming office, President Trump decided to continue DACA. On June 15, he rescinded the DAPA, which was intervened upon by the court and thus was not implemented, but he kept original DACA intact. President Trump was, then, challenged by conservative states concerned about illegal immigrants, among which were Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, Texas, West Virginia, and Idaho. If DACA would not be terminated by September 5, these states threatened that they would file a suit in court that may support their argument.

On the basis of the previous judicial case on an expanded DACA and DAPA, the Trump Administration anticipated that DACA would not sustain a court challenge and thus decided to terminate it. Processing the new application stopped immediately, and renewal applications were to stop after October 5; DACA will totally cease to exist after a six-month grace period in March 2018.

The announcement of the termination of DACA was made by Attorney General Jeff Sessions, who had been a critic of DACA since he was a congressional member, and his reasoning was as follows:

[T]he executive branch, through DACA, deliberately sought to achieve what the legislative branch specifically refused to authorize on multiple occasions. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch. (Department of Justice 2017)

By moving the responsibility from the executive to legislative branch, President Trump

insists that he set the situation to what it should be, i.e., the rule-making power should reside in Congress rather than in the President's hands. At the same time, though, realizing that no initiatives may take place in the Republican-ruled Congress, President Trump met with Democratic leaders of both houses of Congress and reportedly made a deal with them regarding the measure succeeding DACA as well as the pending deficit ceiling. This may be regarded as a practical action on the part of the President, but Republican members of Congress are placed in an awkward position by their own President and the opposition party leaders. Moreover, Republican members themselves are divided over whether and how to support the President's ever-shifting positions.

## **2. POLITICAL CONTEXT**

### **a. In the State vs. Federal Relation**

The Constitution divides policy areas into federal and state jurisdictions, but over the time of its history, the dividing line in the American political scene has often been crossed over. The main reason for this crossing over related to the source of funding for policy implementation. Since the federal government started to collect direct tax on individual income in the early 20<sup>th</sup> century, the resources for the federal government increased as the nation's wealth expanded. At around the same time, the integration and expansion of the national market invited social and economic problems, especially in urban areas, which required public services to ease them.

While different levels of government, namely, federal, state, county, and local, divide their responsibilities for policy implementation, sometimes they share the responsibilities by contributing different resources to the same projects. As the federal government faced a financial shortage in the 1980s, however, Congress started to cut funding but continued to make laws asking states to perform certain roles, so-called unfunded mandates. In the case of welfare, the deficit-ridden federal government decided to give block grants to the states with a set ceiling, instead of appropriating the welfare fund as necessary, reflecting the country's economic condition.

Another case that invited loud opposition from some states was the Affordable Care Act (or ACA/Obamacare). While the federal government set a nationwide rule, state governments shared financial responsibility in such cases as Medicaid expansion. From the moment of its implementation, Obamacare, which requires those Americans who are uninsured to buy health insurance, either through the state or federal exchanges, was challenged in the court. In the case of *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court decided on June 28, 2012, by 5-4 that the ACA was constitutional since the premium for coverage was not a mandate but a tax upon the individual. The ruling let the state opt out of expanding Medicaid, and left the poor uncovered by Obamacare. Another challenge was made against expanding the subsidies to insurance customers who had not bought their policies through state-

established exchanges. On June 25, 2015, the Supreme Court, in *King v. Burwell*, 576 U.S. \_\_\_ (2015), upheld the existing practices by 6-3. The Chief Justice added, “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them” (Liptak 2015). Candidate Trump attacked Obamacare throughout his campaign, promising to discontinue it as soon as he assumed office, and he issued an executive order on the very day of his inauguration, not to repeal it immediately but to minimize the expenses, as stated above.

A similarly controversial case is that of immigration control. While the responsibility for border control lies with the federal government, it was the state and local governments that initiated immigration regulation in the 19th century, although these acts were later found unconstitutional. With regard to the immigration issue, depending on the political characteristics of the area, relations between the federal and local governments can move into either direction. In conservative areas, for example, immigration control tends to be stricter, and undocumented immigrants are not welcome. One notorious case was the immigration control law of the state of Arizona in 2010, or S.B. 1070, part of which was found unconstitutional by the Supreme Court in the case of *Arizona v. United States*. In liberal areas, on the other hand, human rights are given more value than are strict legal arguments.

As the court case above shows, border control is strictly put under federal jurisdiction; even when local police discover by chance that particular immigrants are undocumented, they do not have any authority to catch and send them back to their countries. Faced with the increasing number of undocumented immigrants, though, the federal government, with limited resources, started to set up coordinated measures with state and local governments in the form of Section 287(g) of the Immigration and Nationality Act, which was added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (PL 104–208, Sec. 133). The agreement read as follows:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States enter into a written agreement with a State, or any political subdivision of a State....

Under this measure, relevant police officers are delegated to fulfil the federal responsibility; mostly, they search for undocumented immigrants hiding in the local community. Some local governments agreed not to be delegated the federal authority but to cooperate in sharing information. For example, if undocumented immigrants are caught for criminal cases and detained, the police will notify the federal official before they are released so that these officials come and arrest the undocumented immigrants just as they

move from the local government's responsibilities.

However, the number of the police that coordinate with the federal government showed a decline rather than an increase. The reasons identified include that the police officers lost the trust of residents, some of whom are undocumented or have undocumented family members or friends, which affected the effectiveness of the police's primary duty, namely, to ensure the safety of the community. On August 28, 2017, the Republican Governor of Illinois, Bruce Rauner, signed into effect a law restricting police cooperation with the federal immigration authorities, thus maintaining Illinois's status as a welcoming state (Tareen 2017). The State of California also passed a law to protect an estimated 2.3 million undocumented immigrants (New York Times 2017). These moves were contrary to the Trump Administration's aim of strengthening immigration control enforcement. For example, on January 25, 2017, President Trump issued "Executive Order: Border Security and Immigration Enforcement Improvements," and its Section 10 read as follows:

Federal-State Agreements. It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

Liberal cities also challenged President Trump's restrictions by protecting the undocumented immigrants within their jurisdiction. President Trump, upset with such defiance of his order, threatened to reduce the transfer of money from the federal government to such local governments, or so-called "sanctuary cities," which approach 500 in number as of March 2017 (Dinan 2017).

Members of the National Coalition of City Government, a 1,408-member non-partisan organization of cities with populations of 30,000, collectively appealed that they had a responsibility to protect their residents, legal or not, and on July 14, 2017, sent a letter to the President asking him to continue the DACA program. On August 29, 60 members across the nation hosted days of action on DACA, to protest the probable decision by President Trump to discontinue the executive action (United States Conference of Mayors 2017a; 2017b). A liberal mayors' organization, Cities for Action, with 153 cities and 23 counties, also made an appeal to President Trump, arguing that since he had not rescinded the original DACA when he took office, he should continue the DACA program while supporting legislation to give immigrants permanent relief (City for Action 2017).

#### **b. In Judicial vs. Executive Relations**

The judiciary branch functions as an important restrictive power over executive initiatives, both in the inter-governmental triangle of checks and balances and through two layers of federalism. The power of the court is predominantly reactive, rather than pro-active, however; that is, it needs to be initiated by litigation by another agent, rather

than being self-started policy-making. If society decides some overuse of power by the President is acceptable, given the goals to be achieved through that power, and nobody brings a case to court, the judicial branch does not have any case to present its position.

In the case of Obama's temporary legalization of undocumented immigrants, DACA, Immigration and Customs Enforcement (ICE) agents who themselves handled the immigration control, sued their boss, Department Homeland Security Secretary Janet Napolitano, in August 2012. In this *Crane v. Napolitano* case, the agents claimed that the President instructed ICE agents to behave as if Congress had passed the DREAM Act, even though Congress had explicitly rejected the bill, and thus the President had failed to perform his constitutional duty to faithfully execute the laws. Both the U.S. District Court for the Northern District of Texas and the 5th Circuit Court of Appeals dismissed their claim.

When President Obama issued executive action on November 20, 2014, to expand the coverage of DACA and to introduce a new temporary legalization measure, DAPA, further challenges were made by conservative states. Unlike in the case with the original DACA, the U.S. District Court in Brownsville, Texas, issued a preliminary injunction, keeping these two programs from being implemented. The 5th Circuit Court of Appeals in New Orleans denied the Obama Administration's request to stay the district court's injunction pending appeal. On November 9, 2015, the appeal court reaffirmed the district court's injunction, and thus the Obama Administration brought the case to the Supreme Court.

In *United States, et al., Petitioners v. Texas, et al.*, 579 U.S. \_\_ (2016), the ruling on June 23, 2016, was evenly divided, 4-4, since Justice Antonin Scalia had passed away and the Republican Congress had refused to fill the vacancy until after the Obama Administration. Since expanding DACA and introducing DAPA could not obtain majority support in the court, these programs were never implemented. The original DACA, however, continued to be effective under the Trump Administration, despite being based on similarly weak legal and constitutional standings.

President Trump rescinded the never-implemented DAPA in June 2017 but kept the original DACA until September 5, 2017, when he finally discontinued it. The decision to terminate DACA, which he had previously agreed to continue, was induced by the threat of a legal challenge from conservative local governments. Now, the challenges for undocumented immigrants are greater than before, since the federal government is in possession of the identities of undocumented immigrants who were covered by DACA, including information on their family members. If such information in the hands of the federal government is used against them, young people who were once under DACA will be unable to continue to study, work, or care for their families in the way they have been able to do during the past five years.

Right after the Trump Administration announced that DACA would be rescinded, liberal states, such as New Mexico, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, New York, North Carolina, Oregon, Pennsylvania,



Rhode Island, Vermont, Virginia, and Washington, responded and are currently challenging the Trump Administration in the courts. As of this writing, the prospect for the challenges is not yet clear, but it has become clear that executive actions lacking in legislation may be able to provide tentative protection, but not a permanent one. The lasting answer to the fate of undocumented immigrants should be determined by law in Congress, rather than depending on the discretion of the President.

From the very early days of his presidency, President Trump endured harsh relations with the courts over his executive order to block the entrance of immigrants, refugees, and even legal U.S. residents from certain Middle Eastern countries, either temporarily or, in some cases, permanently. As discussed in the previous chapter, federal courts intervened quickly, both at the district and appeal level, and put more value on the protection of human rights than on the national security considerations claimed by the Trump Administration. The Supreme Court allowed the President's travel ban but only for the case to be heard again in the following fall. It also prevented those who had "a credible claim of a bona fide relationship with a person or entity in the United States" from being denied entry.

The new proclamation of September 25, 2017, has replaced the earlier executive order while narrowing the window for the overall number of entries into the United States, both for immigrants and refugees. The American nation is wondering since then, where the national character of the United States has been lost, and whether executive power should be allowed to take the nation in a totally different direction without congressional approval.

## **CONCLUSION—IMPLICATIONS FOR THE BALANCE OF POWER**

A historical overview of the presidential exercise of power presents us with an interwoven relationship in which, in addition to the power balance between the President and Congress over rule making, different levels of the judiciary branch and diverse local governments take important roles. The federal and state governments increasingly have overlapping responsibilities for policy implementation, and judicial scrutiny over the making and implementation of policies functions quite actively to provide balance. This built-in system is supposed to guarantee that democratic politics functions effectively, but as seen above, partisan or personal conflicts of interest may influence each of the actors' behavior. The political context, in which a larger number of executive initiatives, not limited to executive orders, are taken to break the impasse under recent administrations, reveals how the divisiveness of American politics costs democratic governance.

The Trump Presidency may require an additional explanation, since it is run under a unified Republican government, and the difficulties of a divided government that all other recent Presidents have faced when resorting to executive authority is absent. As a Republican President, Trump has not been able to mobilize the base of Republican

members in Congress in support of the policies he had been propagating since the campaign period. Many of the policies advanced through executive orders will require appropriation, but that aspect remains untouched due to mal-coordination with the congressional leadership. We may have to come back to re-evaluating the function of the Trump Administration after the shape of its governance has become clearer.

The American political system has been based on two sets of balance, namely, one among the three branches of government and the other between the two levels of government. Even so, American global expansion since the late 19<sup>th</sup> century has been accompanied by the expansion of executive powers, one way or another. President Wilson faced strong opposition from Congress in the construction of the post-war world order, and President Truman was challenged by the court over the expansion of his authority in conducting the Korean War. In between these two events was the Second World War, which offered unlimited room for the expansion of power for President Roosevelt before congressional responses caught up with the development of the war. Students of the Vietnam War might have thought that the negative memory of the Imperial Presidency would have led American society to put a lasting restriction on presidential power. In its foreign and military policies, however, the War on Terror repeated the unlimited expansion of executive authority, more in secret ways than open ways, thus making it more difficult to control the presidential power than during the time of the Vietnam War.

On the domestic policy side, the continuous expansion of the daily responsibilities of the executive branch also created space in which the President could exercise his power without permission or in the face of disagreement from the other branches. Signing statements or executive actions were examples of this. We may have different judgments about how much power the chief executive should be permitted, depending on the specific policy objectives, the party affiliation, or even the personality of the President in question.

Any power bestowed without restriction, however, can be overused, even by a highly respected personality, during an unexpected crisis or even during less pressing situations. We should therefore refrain from simply replacing legal arguments with political arguments and from justifying the expansion of presidential power on the basis of the necessity of an individual policy, however keenly it might be needed in society.

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