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The essays in this symposium volume were presented at the 2015 Association of American Law Schools (AALS) Annual Meeting as part of an academic program titled *Congressional Dysfunction and Executive Lawmaking During the Obama Administration.* The inspiration for the title came from the simultaneous reactions of tamed enthusiasm[2] and anger to a memorandum issued by Secretary Jeh Charles Johnson of the U.S Department of Homeland Security on November 14, 2014, titled *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children [(DACA II)] and With Respect to Certain Individuals Who are Parents of U.S. Citizens and Permanent Residents [(DAPA)]*.[3] The memorandum expanded on an earlier one adopted by then Secretary of the U.S. Department of Homeland Security on June 15, 2012, titled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children [(DACA I)].*[4] Combined, these memoranda constituted executive actions that would potentially defer the

1. Associate Dean for Faculty Scholarship and Professor of Law, McGeorge School of Law, University of the Pacific. I thank Professors Jennifer Chacón and Alina Das for co-organizing with me the AALS academic program. Thanks also to Tania Dominguez for her great research assistance. I congratulate the Chicago-Kent Law Review editors for their incredible professionalism.

2. Enthusiasm came from pro-immigrant groups and from the beneficiaries of deferred action. Enthusiasm was tamed because some felt deferred action came too late or was too limited or did not compensate for the aggressive enforcement policies during the Obama administration. *See, e.g.,* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 124 YALE L.J. 2 (forthcoming 2015).

3. Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

4. Memorandum from Janet Napolitano, Sec'y, Dep't of the Homeland Sec., to David V. Aguilar et al., Acting Comm'r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf).

removal of an estimated four to six million[5] eligible undocumented persons for a few years.[6] Those granted the deferral would also obtain work authorization[7] and with it social security numbers and driver's licenses.[8] To date, however, just over one million applicants have been granted deferred action under these memoranda.[9] The explanation for this is two-fold. First, the anticipated number of applicants were either over estimations or fewer than those eligible actually applied.[10] Second, twenty-six states immediately challenged the legality of the November 14 memorandum in a federal district court in Brownsville, Texas, which granted the preliminary injunction in February 2015.[11] The suit alleged that the memorandum violated, *inter alia*, the Take Care Clause of the U.S. Constitution and the Administrative Procedure Act (APA) by not following the required procedures (namely, the notice and comment period), and by exceeding statutory authority.[12] In May 2015, the Fifth Circuit refused to lift the

5. *County Level DACA-DAPA Estimates by Country or Region*, MIGRATION POLICY INST. (2014), http://www.migrationpolicy.org/sites/default/files/datahub/DACA-DAPA-2013State%20Estimates-Spreadsheet-FINAL.xlsx.

6. The deferred action program as adopted in 2012 was originally for two years, renewable for another two. In 2014, deferred action contemplated three additional years attached to the original DACA grant.

7. Eligibility is to three subgroups: DACA I, created by the June 12, 2012 memorandum and expanded in 2014, applied to children who arrived in the U.S. prior to June 12, 2007 at the age of 16 or younger; who either crossed the border without authorization or with visas since expired; who had resided continuously in the U.S. since that date; who had graduated from high school or were enrolled in high school or in military service; who were not over 31 at the time of the application; and who were not disqualified based on the commission of certain crimes. *See* Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 4. DACA II, created by the November 14, 2014 memorandum, expanded the DACA I program to eliminate the 31-year cap and to extend the date of eligibility arrival as of November 14, 2010. Finally, DAPA, created by the November 14, 2014 memorandum, extended deferred action to undocumented parents of children born in the United States or those who had LPR status and who also satisfied the requirements of a minimum of five-year residency in the U.S. and no significant criminal record. *See* Memorandum from Jeh Charles Johnson to León Rodríguez, *supra* note 3.

8. *Frequently Asked Questions: The Obama Administration's DAPA and Expanded DACA Programs*, NAT'L IMMIGRATION LAW CTR. (Mar. 2, 2015), https://www.nilc.org/dapa&daca.html.

9. *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (June 30, 2015), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr3.pdf.

10. *Two Years and Counting: Assessing the Growing Power of DACA*, AM. IMMIGRATION COUNCIL (June 15, 2014), http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca.

11. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

12. Amended Complaint for Declaratory and Injunctive Relief, State of Texas et al. v. United States et al., No. 1:14-cv-254 (5th Cir. Dec. 9, 2014), https://www.texasattorneygeneral.gov/files/epress/files/ImmigrationStatesFirstAmendedLawsuit12092014.pdf.

injunction issued by the Brownsville federal district court, and in November 2015, a divided Fifth Circuit panel upheld the district court's order.[13] As a result, the November 14 Deferred Action for Childhood Arrivals extension (DACA II) and the Deferred Action for Parents of Americans (DAPA) programs have yet to be implemented. In contrast, the June 2012 DACA I program survived a similar legal challenge—also in the Fifth Circuit[14]—leading to a Circuit split.

In this symposium issue,[15] the essays discuss the Obama administration's immigration deferred actions,[16] but also expand the conversation of alleged executive overreach to other areas, including immigration enforcement,[17] climate change,[18] women's rights,[19] employment discrimination,[20] environmental justice,[21] affirmative action,[22] and national security.[23] The AALS program sought to bring together scholars writing in these various areas to critically examine important themes of separation of powers, federalism, and rights. Was the accusation of executive overreach even correct? If so, was the accusation unique to the Obama administration, at least as compared to previous administrations? Was the Obama administration justified in acting alone in a climate of congressional gridlock and partisanship? How might legitimacy be assessed during the Obama administration in these areas of law? Should the lens for measuring

13. Texas v. United States, 787 F.3d 733 (5th Cir. 2015); Texas v. United States, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015).

14. Crane *ex. rel*. Gov. Bryant v. Johnson, 783 F.3d 244 (5th Cir. 2015).

15. Other important topics not covered in these essays concerned the Obama administration's actions in the area of gay rights, clean energy and health. Other examples where the Obama administration allegedly has abused its executive power include welfare laws, and drug policy. *See, e.g*., Ted Cruz, *Lawless: The Obama Administration's Expansion of Executive Power*, 19 TEX. REV. L. & POL. 2, 5–16 (2014).

16. Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59 (2016); Catherine Y. Kim, *Presidential Legitimacy Through the Anti-Discrimination Lens*, 91 CHI.-KENT L. REV. 207 (2016).

17. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cites After Secure Communities*, 91 CHI.-KENT L. REV. 12 (2016).

18. Hari M. Osofsky & Jacqueline Peel, *The Grass is Not Always Greener: Congressional Dysfunction, Executive Action, And Climate Change in Comparative Perspective*, 91 CHI.-KENT L. REV. 139 (2016).

19. Pat Treuthart, *Feminist-In-Chief? Examining President Obama's Executive Orders on Women's Rights Issues*, 91 CHI.-KENT L. REV. 171 (2016).

20. *Id*.; Kim, *supra* note 16.

21. Rachael E. Salcido, *Reviving the Environmental Justice Agenda*, 91 CHI.-KENT L. REV. 115 (2016); Kim, *supra* note 16.

22. Kim, *supra* note 16.

23. Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91 (2016).

legitimacy be legal or procedural fairness over outcome; that is, irrespective of the pragmatic necessity to govern despite all odds, should considerations of checks and balances and federalism trump? Alternatively, should the ends of doing justice or the urgency of the problem justify the means? Was the perception of President Obama furthering a "progressive" agenda largely through his administration even accurate? The essays in this issue offer great insights into these questions.

Empirically, it is no easy task to decipher whether the Obama administration was any more or less active in exercising sole executive powers to govern in comparison to other administrations. This inquiry is at least important because the critics of the Obama administration start from the untested premise that the Obama administration has been worse in abusing the office of the U.S. presidency.[24] One imperfect measurement has been to consider the number of executive orders issued during this administration as compared to past administrations. As it turns out, sixteen presidents have issued more executive orders than President Obama. Moreover, President Obama's number of executive orders to date—216—pale in comparison to the top five presidents whose executive orders range from 907 (Harry S. Truman) to 3,721 (Franklin D. Roosevelt).[25] However, as the essays in this issue demonstrate, presidents govern not principally through executive orders but rather through mechanisms or tools available to them through the administrative state. The essays in this issue discuss executive orders issued during the Obama administration, but they also focus on agency internal memoranda such as the deferred action programs; inter-agency collaboration agreements; memoranda of understanding or collaboration agreements with local governments; funding initiatives; and agreements with international inter-governmental entities. Further, comparative numbers of executive orders alone do not tell us much absent a deeper analysis of the nature and scope of each executive action. Not all executive orders, memoranda, or initiatives are created equal, even from the narrow inquiries regarding the legal authority to issue them or proce-

24. Jessie Hill, *Executive Discretion and the Administrative State Symposium: Introduction*, 65 CASE W. RES. L. REV. 891, 891–92 (2015).

25. Gerhard Peters, *Executive Order: Washington-Obama*, AM. PRESIDENCY PROJECT (Sept. 20, 2015), http://www.presidency.ucsb.edu/data/orders.php.

dural fairness, much less in terms of the broader legitimacy considerations that might take into account such factors as urgency and moral imperatives.

This issue's essays illustrate the complexity of assessing legitimacy for sole executive actions—whether legal, procedural or moral—and the need to do so on a case-by-case basis. Professor Ming H. Chen's essay titled *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities* provides a strong theoretical framing of the legitimacy inquiry. As she explains, "[t]he concept of legitimacy is defined as the recognition of the executive branch's authority to govern is appropriate, proper, and just."[26] In the case-by-case assessment, the essays illustrate how legitimacy might be tested through several lenses. For example, one important lens pertains to procedural fairness. In Professor Jill Family's essay titled *The Executive Power of Process in Immigration Law*, she does not focus her analysis on the more commonly-posed question of whether the Department of Homeland Security (DHS) acted within the permissible scope of prosecutorial or statutory discretion when issuing the DACA and DAPA memoranda. Instead, her focus turns to procedural fairness in administrative lawmaking, as these standards are codified in the Administrative Procedure Act.[27] Under the APA, an agency's rulemaking is governed by notice and comment procedures,[28] which are supposed to function—at least in theory—to improve transparency and public participation.[29] Yet, not only with regard to DACA and DAPA,[30] administrative agencies, including immigration agencies, generally prefer to govern through memoranda over rulemaking, which does not require the same transparency and public participation under the APA.[31] As Professor Family explains in her essay, however, there are procedural concerns with agencies opting out of the rulemaking process that should be examined more closely.

Another important procedural consideration is respect for important structural principles designed to curb abuses of power, such as checks and balances. These checks and balances can occur horizontally, through interventions by the other branches of government,

26. Chen, *supra* note 17, at 14.

27. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2011).

28. *Id*. at § 553.

29. *See, e.g.*, J. Brad Bernthal, *Procedural Architecture Matters: Innovation at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615 (2014).

30. *Id*.

31. Administrative Procedure Act § 552.

or vertically, through the relationship of the federal government with localities. Horizontal checks and balances would include robust judicial review or congressional participation. Here, important initial analysis has to happen on a case-by-case basis to decide two distinct types of questions: (1) Does the U.S. Constitution permit the president to act alone? (i.e., is this an area of legal exceptionalism?); and (2) Whether the president is, in fact, acting without congressional approval, in the face of congressional approval, or against congressional mandate. Predictably, there is disagreement even on these preliminary questions. As these essays suggest, President Obama has resorted to three types of sole executive powers to act alone: immigration prosecutorial discretion, foreign affairs, and national security. Whether President Obama has the legal authority to act alone, however, deserves scrutiny, which Professor Sudha Setty powerfully executes in his essay titled *Obama's National Security Exceptionalism*. Professor Setty's article offers perhaps the most damning critique of the Obama presidency for three related reasons: first, it questions whether President Obama is legitimately resorting to national security powers to continue, *inter alia*, to detain indefinitely those accused of terrorism; second, it challenges the assumption that the Obama presidency has largely acted to preserve rights; and third, it highlights the abuses that can occur when checks and balances—here, the absence of judicial scrutiny—are non-existent.[32]

Checks and balances are not only offered through judicial oversight. It can also occur in the dynamics between the federal government and states in the implementation of policies—a vertical checks and balances.[33] The Obama presidency has also been singled out for allegedly trampling on state rights.[34] However, one theme of the AALS session on federalism, which is also revealed in these essays, is that claims of the Obama administration's disregard for state rights have been largely overstated. In his relationship with states, President Obama has found more success in promoting his policy agenda through cooperative federalism models (instead of coercive methods) than he has with Congress. Moreover, the administration has been more willing to shift its practices in response to state pressure. In this

32. Setty, *supra* note 23.

33. *See* Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM L. REV. 4, 13 (2015).

34. Rich Tucker & Elizabeth Slattery, *Morning Bell: 5 Ways Obama Has Trampled the Constitution*, DAILY SIGNAL (Sept. 17, 2013), http://dailysignal.com/2013/09/17/morning-bell-5-ways-obama-has-trampled-the-constitution/.

sense, the evidence suggests that there have been more robust vertical checks and balances during the Obama administration than is otherwise acknowledged. Several essays in this issue illustrate these points. For example, Professor Rachael E. Salcido's essay titled *Reviving the Environmental Justice Agenda* documents the methodology employed by the Obama administration to promote environmental justice as largely consisting of federal inter-agency collaboration with the public in order to document the needs of communities, produce data that can be useful in understanding the nature and scope of the environmental justice gap, and ameliorate problems with the provision of federal grants.[35] Professor Chen describes a more elastic cooperation continuum in the area of immigration law that extends from "willing embrace of federal policy and national standards to uncooperative behavior that can revise, reshape or reject national standards."[36] The key is that states and other localities, by choosing not to cooperate with federal policy, can weaken, slow, or redirect the federal mandate.[37]

In the area of DACA and DAPA, both cooperative and uncooperative federalism dynamics have been at play. The twenty-six states that sued the federal government for the extended DACA and DAPA programs have a more nuanced story to tell. Many of the states who opposed DACA and DAPA, on their own volition, adopted favorable policies toward the benefitted undocumented populations—i.e., by granting in-state tuition or issuing driver's licenses—even prior to the recent orders.[38] Moreover, over fifteen states and the District of Columbia, and more than seventy city officials, joined an amicus brief in support of the DACA expansion and DAPA arguing that these programs offered economic benefits to the local communities.[39] Professor Chen's article documents the rise and fall of Secure Communities

35. Salcido, *supra* note 21, at Part III A & B. The article also discusses the Obama administration's greater use of its enforcement authority under the the existing statutory framework to advance environmental justice initiatives. These enforcement actions, however, are contemplated under existing statutes, such as the Clean Air Act, and do not involve sole executive actions. *Id.* at Part IIC.

36. Chen, *supra* note 17, at 20.

37. *Id*.

38. Ming H. Chen, *Understanding the Legitimacy of Executive Action in Immigration Law*, INST. OF HIGHER LEARNING 34–35 (2015).

39. Brief for the Mayors of New York and Los Angeles et al. as Amici Curiae Supporting Appellants, Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238); Brief for the States of Washington et al. as Amici Curiae in Support of the United States, Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238).

also as a direct result of state noncooperation.[40] Secure Communities is yet another controversial sole executive immigration program that began under President George W. Bush's administration, but which was fully implemented during the Obama administration.[41] Secure Communities is the foil of DACA and DAPA since it secures removal of undocumented persons arrested through a mechanism of fingerprinting at booking and information-gathering with immigration databases that function in every local jail as of 2013.[42] As Professor Chen describes in her essay, state and local resistance to Secure Communities has now discontinued the program and yielded a new program instead, known as Priority Enforcement Program, as of November 2014.[43] Largely, this significant shift is a direct result of strong upward vertical pressures of resistance on the federal government.

The legitimacy discussions above cannot be disengaged from other important contexts: one is the political, the second is the moral. With regard to politics, the question is whether legitimacy inquiries over the Obama administration's sole acts alone should alter when considering Congress' fervent refusal to facilitate almost all policies of the Obama administration—seemingly for political rather than substantive reasons.[44] *Congressional Dysfunction*, the beginning title of the AALS program and of this preface, certainly implies that congressional inaction constitutes a dysfunction that enhances the legitimacy of the Obama administration's response to act alone. DACA and DAPA after all are the by-product of at least a decade of repeated attempts to pass the Dream Act;[45] similar stories of congressional gridlock can also be told of women's rights to equal pay[46] and climate change,[47] to name a few. Professors Hari Osofsky and Jacqueline

40. Chen, *supra* note 17, at Part II.

41. *See* Christine N. Cimini, *Hands Off Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 120 (2014).

42. Chen, *supra* note 17, at 21–22.

43. *Id*. at 40–41.

44. Ezra Kein, *14 Reasons Why This is the Worst Congress Ever*, WASH. POST (July 13, 2012), http://www.washingtonpost.com/news/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/.

45. Marisa Bono, *When a Rose is Not a Rose: DACA, The Dream Act, and the Need for More Comprehensive Immigration Reform*, 40 T. MARSHALL L. REV. 193, 207–08 (2015).

46. Deborah J. Vagins, *Equal Pay by the Numbers*, AM. CIVIL LIBERTIES UNION (Apr. 4, 2014, 12:02 PM), https://www.aclu.org/blog/equal-pay-numbers.

47. Sarah Binder, *Polarized We Govern?*, BROOKINGS INST. (May 27, 2014), http://www.brookings.edu/research/papers/2014/05/27-polarized-we-govern-congress-legislative-gridlock-polarized-binder.

Peel, in their essay titled *The Grass is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspectives* remind us, however, that legislative gridlock is not a structural flaw of our form of government; rather, it is simply the result of what happens in a strong system of checks and balances when the country is closely divided on issues along partisan lines.[48] The United States as a nation has experienced a worsening of partisanship across the board in the past two decades.[49] This, and not "congressional dysfunction," is at the core of the governing challenge. An alternative form of government such as that of Australia in which the legislative body and the Prime Minister share the same political party results in different expression of the system that is in the end not much better; namely, flip flop (where policies change from administration to administration) over gridlock.[50] Either case results in policies and practices not guaranteed to last beyond the administration, despite the best of intentions. If we agree with the Obama administration's policies, our inclination might well be to perceive sole administrative acts as necessary and good to move the country forward. Nevertheless, Professors Osofsky and Peel insightfully remind us that the costs to this is its very temporariness. The arduous and long task of bringing the nation closer is still necessary to effectuate lasting change.

Finally, the legitimacy of the Obama administration's acts cannot be disengaged from perceptions over their moral imperative. The moral inquiry asks whether the end justifies the means insofar as the administration must act either to avoid a great harm or to remedy a terrible injustice. Here, however, there will inevitably be disagreements over the urgency or the justice of the measures. In general, the Obama administration's actions have been to push for rights or for environmental justice, with notable exceptions.[51] Professor Mary Pat Treuthart in her essay titled *Feminist-In-Chief? Examining President Obama's Executive Orders on Women's Rights Issues*, for example, documents how, by and large, the Obama administration has fared well in terms of the promotion of the rights of women, such as in the

48. Osofsky & Peel, *supra* note 18, at 143.

49. *Id*. at 143-44.

50. *Id*. at Part II(C).

51. The notable exceptions include President Obama's national security and immigration enforcement measures, which are discussed in this volume in the essays by Professor Sudha Setty and Ming H. Chen, respectively.

areas of gender-based violence, reproductive rights, and employment.[52] This preface has also alluded several times to the significant benefit from a rights-based perspective that DACA and DAPA have represented to thousands of immigrants. In each of these areas, although, the Obama administration has had to weigh or bear the political costs of furthering a particular policy that is too controversial in the context of a deeply divided nation. For example, Professor Treuthart raises two exceptions to the Obama administration's otherwise favorable assessment with regard to women: the treatment of abortion funding under the Affordable Care Act and the issue of sexual assault in the military.[53] In the area of immigration, the "deporter-in-chief" label given to President Obama for his role in deporting more immigrants than any other president of the United States,[54] did not shield him from the fury against his DACA and DAPA measures. This phenomenon is documented well in Professor Catherine Y. Kim's essay titled *Presidential Legitimacy Through the Anti-Discrimination Lens.* Professor Kim makes the important point that the pro-immigration measures had a greater political cost for the Obama administration than other less-controversial measures (such as in the areas of environmental justice and women's rights) even when these measures also raised equivalent concerns over the structural problems of separation of powers and checks and balances.[55]

52. Treuthart, *supra* note 19.

53. *Id*. at 197-200.

54. Anna Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RESEARCH CTR. (Oct. 2, 2014), http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/.

55. Kim, *supra* note 16.