**Arguments for Obama’s Executive Order**

**Deferred Action for Parental Authority (DAPA)**

**Deferred Action for Childhood Arrivals (DACA)**

DAPA and DACA were a set of instructions from the Department of Homeland Security, which is under the executive branch, to guide officials in deciding which illegal immigrants should receive top priority for deportation. They explained the priorities should be national security, border security, and public safety. Officials should focus on violent criminals instead of parents or children who were law abiding and working.

The case before the Supreme Court is asking whether President Obama had the authority to do this. The answer is clearly yes for two constitutional reasons: (1) Congress gives the executive branch discretion in deciding how to implement a law and (2) the order did not create a new law.

**Congress gives the executive branch discretion in implementing laws**

First, by setting these priorities and providing guidance regarding how those priorities should be implemented, the Obama administration was simply doing what presidents of both parties have done for decades – exercising the substantial discretion[[1]](#footnote-1) Congress has given the executive branch to make decide how best to enforce the nation’s immigration laws. Moreover, the tool the administration was using to implement those priorities – deferred[[2]](#footnote-2) action on removal – is one that has been consistently employed by administrations of both parties and repeatedly endorsed by Congress on a bipartisan[[3]](#footnote-3) basis.

A bipartisan group of former members of Congress explained that it is impossible for Congress to anticipate in advance every situation to which a law must apply. That is particularly true in a context like immigration, which touches on the nation’s foreign affairs and must adapt to frequently changing conditions on the ground.

This discretion is essential in the immigration context because Congress’ laws have made millions of people deportable, but has never required every single undocumented immigrant be removed. Further, and perhaps more important, Congress hasn’t made available the funds that would be necessary to execute such a mass removal. Currently, there are roughly eleven million undocumented immigrants, but Congress has designated funds sufficient to deport only 400,000 per year. The executive branch thus has no choice but to exercise their discretion because Congress expects the executive branch to determine how best to use those limited funds.

**Did President Obama write a law?**

The second question is whether or not the DAPA or DACA program wrote a law creating a new class of people with legal status. The answer is no. A grant of deferred action does not give any other type of lawful immigration status, enforceable legal rights, or an ability to remain permanently in the United States. By definition, people benefitting from the expanded DACA and DAPA have not maintained lawful status and typically would not qualify to apply for permanent residence.

What does allow them to work legally under this program are laws passed by Congress in 1986. The Immigration Reform and Control Act (IRCA) states that deferred-action beneficiaries are eligible for employment authorization if they can show economic need.

Granting “deferred action” is not new to President Obama. When IRCA left parents of children vulnerable to deportation, the Reagan administration announced a blanket deferral of deportation for children under eighteen who were living in a two-parent household with both parents legalizing, or living with a single parent who was legalizing, called “Family Fairness.” The first Bush administration expanded this program in 1990 to cover all ineligible spouses and children under eighteen of legalizing family members, assuming they met certain criteria. Publicly available estimates at the time were that “Family Fairness” could cover as many as 1.5 million family members, which was approximately forty percent of the then-undocumented population. Beneficiaries of that program were also eligible to apply for employment authorization. Therefore, prior Presidents have deferred action on similar groups of people in enforcing an immigration law passed by Congress in order to set priorities and spend the resources Congress gave them wisely.

Therefore, the DAPA and DACA executive orders do not violate the Constitution because Congress gives the executive branch wide discretion in deciding how to implement the nations’ laws, especially immigration laws, and the benefits of deferred action are authorized by laws and regulations that were created long before DAPA and expanded DACA. President Obama did not write a law or create a new class of immigrants.

Arguments developed from briefs submitted to the Supreme Court:

* Symposium: Back to immigration basics – Why the DAPA/DACA case is simpler than it seems. Melissa Crow is Legal Director at the [American Immigration Council](http://www.americanimmigrationcouncil.org).
* Symposium: Why it’s time to unfreeze DAPA. Brianne Gorod is Chief Counsel at the Constitutional Accountability Center. She co-authored a cert.–stage [amicus brief](http://www.scotusblog.com/wp-content/uploads/2015/12/Texas-v-US-Cert-Amicus-FINAL.pdf) on behalf of a bipartisan group of former members of Congress in support of the Obama administration in [United States v. Texas](http://www.scotusblog.com/case-files/cases/united-states-v-texas/?wpmp_switcher=desktop).
1. freedom and responsibility to decide how to proceed [↑](#footnote-ref-1)
2. delayed [↑](#footnote-ref-2)
3. agreed to by members of both Democrats and Republicans [↑](#footnote-ref-3)