**Chapter IV**

**Immigration**

**Introduction**

**There are several ways to obtain permanent residence in the U.S. legally. Included among these are family ties; employment skills; obtaining asylum status; and winning a place in the diversity lottery. The family ties category is divided: if one, for example, is a spouse, minor child, or parent of a U.S. citizen one can obtain legal permanent residence (green-card status) without any numerical restrictions. On the other hand, there are numerical visa restrictions on other family members like adult children of U.S. citizens and on family members of U.S. permanent residents who are not U.S. citizens. The number of numerically restricted visas are determined annually, but they could and do involve waiting for years. Visas based on work skills involve annual quotas which require applicants to wait. However, some 50,000 diversity visas are allocated to residents of countries which have sent the fewest number of immigrants to the U.S. Additionally, one can claim asylum status on the grounds of fear of persecution (because of race, religion, political opinion, nationality, or membership in a social group), and if granted asylum status one can apply for a green card a year after asylum applications are made.[[1]](#footnote-1)**

**President Trump, in his May 16, 2019 proposal, noted that some 70% of permanent U.S. resident visas are granted on the basis of family ties or diversity. He urged a major reform of U.S. immigration law so as to give greater emphasis to work skills.[[2]](#footnote-2) (Giving greater attention to work skills was also a focus pursued by President Obama.[[3]](#footnote-3)) Both Presidents have insisted on greater border security, with Trump claiming that the Southern Border with Mexico is an open sieve allowing for the illegal entrance of drugs and other forms of crime, particularly the illegal and frivolous claim for asylum status—much of which he found to be a “scam.”[[4]](#footnote-4) The Trump Administration has committed itself to the deportation of undocumented though he granted the Dreamer/DACA young people a reprieve, calling for Congress to legislate a potential remedy (which it has not done). But as will be seen, the Trump goal was the reduction of immigration as a whole so as to permit broader employment for the existing American population. The transformative Trump immigration policies calling for the removal of illegal immigrants, stopping the surge at the U.S. Southern Border conformed well with the White Working Class (without college degrees) sentiment that immigration had dissipated American values and needed remediation.[[5]](#footnote-5) This White grouping was critical to Trump’s victory in 2016, and he adopted its aforementioned immigration view.**

**The asylum surge from Central America was met by the Obama Administration with detention and release for families, but that Administration aggressively sought the deportation of illegals to an extent not met by the Trump Administration. Obama also backed a Dreamer Policy which protected from deportation those brought to the U.S. illegally as youngsters. Absent congressional legislation, President Obama in 2012 took it upon himself to award the young people who came here illegally as children and who qualified, freedom from deportation, as well as providing them other benefits including the right to work legally. This action was called Deferred Action for Childhood Arrivals or DACA. During the second Obama Administration, the President backed a measure which would have provided a road to U.S. citizenry for millions of illegal residents. Failing to obtain such legislation, President Obama, on his executive authority, deferred the deportation of the Parents of U.S. citizens and permanent residents (called DAPA, or Deferred Action for the Parents of Americans).**

**Trump has not proposed a specific statute allowing citizenry for adults living illegally in the U.S. What he has done in his transformative immigration policies was to engage in affirmative action meant to appeal to a White Working-class. What President Obama did in his transformative DACA/DAPA policies, and in his emphasis on seeking citizenry for the multitude of illegal residents in the United States was to engage in Hispanic affirmative action meant to both enhance Democratic Party strength and to legalize the presence of millions of undocumented residents.**

**DACA, DAPA and Other Immigration Policies; the Faithful Execution of the Laws**

**Illegal-immigrant advocates see the large undocumented population in the U.S. as worthy of affirmative action in part because many, in effect, are invited to this country through American-offered economic opportunities. Affirmative action preferences are sought to thwart the negative treatment which American society imposes on them: e.g., discriminatory and exploitative working conditions; racial/ethnic profiling; and life in the shadows.**

**President Obama long promised help in connection with deportation. In the 2008 campaign, he attacked deportation harshness and committed himself to making immigration reform a priority saying,**

**When communities are terrorized by ICE [Immigration and Customs Enforcement agency] immigration raids, when nursing mothers are torn from their babies, when children come home from school to find their parents missing, when people are detained without access to legal counsel, when all that’s happening, the system isn’t working.[[6]](#footnote-6)**

**But the Obama Administration deportation policy has been quite aggressive, and during his first term he was condemned as “Deporter in Chief.” At its peak in FY 2012, some 400,000 were deported. DACA was designed to cater to the Hispanic outcry that the Obama Administration was insensitive, and not worthy of the Hispanic vote in the presidential election of 2012.[[7]](#footnote-7) Obama succumbed to this outcry, but his action raised the Constitutional issue as to the capacity of the President’s executive authority. What we have in the Obama DACA and DAPA deportation policy is a challenge to the Constitution’s Article I delegation of “all” legislative authority to the Congress. Such challenges are quite common in this “age of the executive” where much or most of the law is made not by the legislature, but by administrators in the executive branch.[[8]](#footnote-8) To what degree may the executive branch distance itself from the separation of powers dictated by the U.S. Constitution where lawmaking is allocated to Congress, and where the President is required to bind the executive branch to the “faithful execution of the laws.”[[9]](#footnote-9) Do modern circumstances require the abandonment of the Constitution’s separation of powers scheme? If not, what is the role of the Congress? These are old questions. Here we will be restricted to deportation policy in DACA and DAPA which were supplemented late in the Obama second term by a policy of leaving the undocumented living in the U.S. alone unless they were guilty of very serious crimes. Not so for families trying to cross the border from Mexico seeking asylum in the U.S. These were placed in detention facilities, and when released to await immigration court appearances often disappeared. Not so also for unaccompanied children who come to the U.S. Southern Border seeking asylum in the U.S. (Some 51,000 in 2014 alone.) These unaccompanied children are protected by a judicial consent decree (The Flores Agreement[[10]](#footnote-10)) which was meant to guarantee that the youngsters are placed in the least restricted environments. These places are administered by the Health and Human Services Department. The youngsters are held there until they are placed (in the U.S.) at the homes of guardians (who are often illegal residents) until their asylum petitions are heard by immigration judges.[[11]](#footnote-11)**

**Presidents and their executive-branch officers (using the President’s authority) have been allocated very broad discretion to prosecute the violation of U.S. criminal and civil laws. This prosecutorial- clemency capacity is authorized by the Constitution’s Article II authorization for Presidents to grant reprieves for all offenses against the U.S., and also supported by the Article II requirements that the President supervise the bureaucracy, and “take care the laws be faithfully executed,”[[12]](#footnote-12) meaning in part that Presidents and their executive officers are given considerable discretion to determine what good faith requires in the way of executing the laws. (Obama’s Attorney General Holder proclaimed this discretion in announcing his drug-charging policy discussed in Chapter V, only to be challenged as exceeding his authority.) Congress has extensively underwritten this discretionary authority in deportation law. This law makes deportable all noncitizens whose presence in the United States is not authorized,[[13]](#footnote-13) but the continual failure of Congress to provide funds for the deportation of all the unauthorized (which would involve the removal of some 11.5 million, about 30% of all noncitizens from the U.S.) invites the executive branch to set deportation priorities.[[14]](#footnote-14)**

**By September, 2014, some two million persons had been deported by the Obama Administration, establishing a record high for Presidential administrations.**

**Initially, the policy of the Obama Administration was quite hardline to assure cynics that the border was really secure. Among others, Congressional Republicans insisted upon border security as a precondition for a “comprehensive” immigration reform statute. After its first two years, the Administration’s deportation policy proclaimed that its prosecutorial discretion would be used to prioritize expelling hard-core criminals, but that policy has had limited success.[[15]](#footnote-15) The problem involved a failure of a large number of Federal immigration field officials to conform.[[16]](#footnote-16) The union representing the many thousand U.S. ICE (Immigration and Customs Enforcement) employees opposed the Administration’s felony, criminal-offender prioritization, arguing that it frustrated the ICE’s core mission of properly enforcing all of the nation’s immigration laws.[[17]](#footnote-17)**

**An extensive New York Times analysis of Governmental records published on April 7, 2014 argued that the Obama hard-core criminal deportation policy had not been honored. The analysis contended that two-thirds of the nearly two-million deportees during the Obama years involved individuals who had either no criminal records or incurred minor infractions on their records like traffic violations which included driving without a license. Only 20% of those expelled had been guilty of major felonies such as drug offenses.[[18]](#footnote-18) In a pointed rebuke, this New York Times analysis challenged the accuracy of the President’s insistence that his Administration was going after “criminals, gang bangers, people who are hurting the community, not after students, not after folks who are here just because they’re trying to figure out how to feed their families.”[[19]](#footnote-19)**

**Subject to severe criticism from immigrant-rights advocates, the President, in mid-June, 2012, during Rose Garden remarks, announced that some 800,000 to 1.76 million young, qualifying,[[20]](#footnote-20) overwhelmingly Hispanic illegals[[21]](#footnote-21) would be freed from the oppressiveness of statutorily required deportation through the exercise of the President’s prosecutorial discretionary/ reprieve power meant to prevent a disparate impact frustrating the capacity of a minority group’s youth to prosper. Skirting a deliberative-democracy opportunity, the President said:[[22]](#footnote-22)**

**In the absence of any immigration action from Congress to fix our broken immigration system, what we’ve tried to do is focus our immigration enforcement resources in the right places. . . . We've improved on that discretion carefully and thoughtfully. Well, today, we're improving it again. Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization. Now, let's be clear -- this is not amnesty, this is not immunity. . . . It is --**

**Q (Inaudible.) THE PRESIDENT: -- the right thing to do.**

**Q -- foreigners over American workers.**

**THE PRESIDENT: Excuse me, sir. It's not time for questions, sir.**

**Q No, you have to take questions.**

**It remains most difficult--politically and on humanitarian grounds-- to deport the hundreds of thousands (if not close to two million) younger people who have been authorized to stay (and acquire work permits and driver’s licenses) in this country as a result of the President’s non-enforcement/reprieve policy. (Formally titled DACA—Deferred Action for Childhood Arrivals.) The President’s policy--though dubbed temporary--is likely permanent. The growing Hispanic political potency, and the non-Hispanic support for illegal -immigrant leniency, are simply too strong to allow DACA’s demise. Another two-year DACA-reprieve has been authorized for DACA recipients whose deferrals were expiring.[[23]](#footnote-23) Constitutionally, there is a problem. Accepted Constitutional doctrine leaves basic and permanent domestic policies affecting large numbers of people to law-making by statute, and not to the executive branch operating through executive orders. This is particularly true of the immigration policy as Article I, Section 8 of the Constitution commands that Congress (and not the President) has the power to establish a “uniform rule of naturalization.” A 1983 U.S. Supreme Court opinion [*INS v. Chadha*, 462 U.S. 919 ] on separation of powers doctrine is that the Congressional Article I, Section 8 law-making power, including immigration, is plenary, and that executive regulatory authority is restricted to subordinate rule-making delegated by Congress.[[24]](#footnote-24) Nonetheless, the Obama Administration has--in addition to deferring the deportation of the DACA childhood arrivals--insisted on preventing the deportation of about half of the many millions of adult illegals in this country in a Presidential action titled, DAPA.[[25]](#footnote-25) This Presidential action-- Deferred Action for the Parents of Americans (DAPA) in so many respects meritorious-- would, as in the case of DACA, likely be permanent and not temporary. DACA and DAPA have been challenged as unconstitutional, and as a severe violation of the President’s Constitutional duty to faithfully execute the laws. *INS v. Chadha* could be cited as grounds for insisting that the President’s deportation/ reprieve power is restricted to what Congress allows, and Congress surely has not authorized the freeing of millions of illegals from deportation. But the only certainty about separation of powers doctrine is that it is uncertain. Radically different doctrinal views regarding immigration power have been expressed by the Supreme Court over the years—some even grounded in the view that the President has inherent power over immigration.[[26]](#footnote-26) Indeed, Congressional immigration Statutes have designated, in great detail, who may come and who may stay. Nonetheless, Presidents have exercised great authority over these matters irrespective of whether this enforcement discretion has been specifically delegated by Congress or not.[[27]](#footnote-27) Nevertheless, a Federal appellate-court DAPA injunction was maintained by the U.S. Supreme Court. DACA’s existence was maintained in 2020 by the Court on the grounds that President Trump’s ending of the program was not procedurally correct.[[28]](#footnote-28)**

**The President’s DAPA policy kindled a suit from 26 states calling for a DAPA injunction. It was granted by a Federal District Court in Texas,[[29]](#footnote-29) and upheld by the Fifth Circuit Court of Appeals.[[30]](#footnote-30) Both Federal court levels--avoiding a ruling on the issue of the President’s prosecutorial discretion-- supported the injunction on the grounds that the States would likely be successful when it later argued the merits of their positons for two reason: 1. The Secretary of Homeland Security in implementing the President’s policy legitimated the presence of the DAPA beneficiaries without the notice and comment provisions of the Administrative Procedures Act, denying the States the opportunity to be heard on the matter. 2. Legalizing the presence of the DAPA beneficiaries made them eligible for a number of National and State benefits (e.g., social security, driver’s licenses) contrary to the provisions of the Federal Statutes. These opinions did not question the President’s prosecutorial discretion to deport, and were limited to the question of executive legitimization of illegal presence in the United States. The U.S. Supreme Court was equally divided in its attitude towards the appellate court opinion, thus affirming the injunction enjoining DAPA operations.[[31]](#footnote-31)**

**Apart from Constitutional questions, authorizing millions of unauthorized immigrants to stay and work in this country raises severe questions about its policy appropriateness. Consider these excerpts from an August 5, 2014 letter to President Obama from United States Civil Rights Commissioner Peter Kirsanow:[[32]](#footnote-32)**

**It has been widely reported in the press that you are preparing to issue an executive order that purports to grant legal status and work authorization to millions of illegal immigrants. I write to remind you of the disastrous effect of illegal immigration on the employment of all Americans, but particularly black Americans. Any grant of legal status will serve as a magnet to prospective illegal immigrants and further depress employment opportunities and wages for African-Americans. …**

**In 2008, the U.S. Commission on Civil Rights held a briefing regarding the impact of illegal immigration on the wages and employment opportunities of African-Americans. The testimony at the briefing indicated that illegal immigration disproportionately impacts the wages and employment opportunities of African-American men. …**

**The briefing witnesses, well-regarded Scholars from leading universities and independent groups, were ideologically diverse. All the witnesses acknowledged that illegal immigration has a negative impact on black employment, both in terms of employment opportunities and wages. The witnesses differed on the extent of that impact, but every witness agreed that illegal immigration has a discernible negative effect on black employment. For example, Professor Gordon Hanson’s research showed that “Immigration . . . accounts for about 40 percent of the 18 percentage point decline [from1960-2000] in black employment rates.” Professor Vernon Briggs writes that illegal immigrants and blacks (who are disproportionately likely to be low-skilled) often find themselves in competition for the same jobs, and the huge number of illegal immigrants ensures that there is a continual surplus of low-skilled labor, thus preventing wages from rising. Professor Gerald Jaynes’s research found that illegal immigrants had displaced U.S. citizens in industries that had traditionally employed large numbers of African-Americans, such as meatpacking.**

**Illegal immigration has a disparate impact on African-American men because these men are disproportionately represented in the low-skilled labor force. The Census Bureau released a new report on educational attainment after the Commission issued its report. This report, released in February 2012, found that 50.9 percent of native-born blacks had not continued their education beyond high school. The same report found that 75.5 percent of foreign-born Hispanics had not been educated beyond high school, although it does not disaggregate foreign-born Hispanics who are legal immigrants from those who are illegal immigrants. However, Professor Briggs estimated that illegal immigrants or former illegal immigrants who received amnesty constitute a third to over a half of the total foreign-born population. Foreign-born Hispanics who are in the United States illegally are disproportionately male. African-Americans who have not pursued education beyond high school are also disproportionately male. These poor educational attainment levels usually relegate both African-American men and illegal immigrant men to the same low-skilled labor market, where they must compete against each other for work.**

**Your proposed executive order will also have a negative effect on young African-Americans at the outset of their working lives. Young, low-skilled workers are facing enormous difficulties in this economy. A recent study from the Brookings Institution found, “Only about half of high school graduates not enrolled in post-secondary education and less than 30 percent of high school dropouts worked in a given month in 2011.” Black teens had the highest labor underutilization rate (defined as encompassing the unemployed, the unemployed who desire employment but are not actively looking, and the underemployed) of any ethnic group – 60 percent. Furthermore, “Several variables were negatively associated with teen employment rates in a given metropolitan area. … [including] the presence of immigrants with less than a bachelor’s degree.” This will affect young people for the rest of their lives, as those who work during their teenage years have more successful careers than those who did not.**

**Granting legal status to millions of people who are in the United States illegally will continue to depress the wages and employment opportunities of African-American men and teenagers. It also will depress the wages and employment opportunities of African-Americans going forward. Since 1986, we have seen that granting legal status to illegal immigrants, or even mere rumors that legal status will be granted, increases illegal immigration. …**

**The irony is that your administration’s policies operate at cross-purposes. In 2013, the EEOC issued guidance regarding the use of criminal background checks as part of a prisoner re-entry effort. The guidance was premised on the fact that African-American males are more likely to have a criminal record, and therefore, according to the EEOC, are more likely to be harmed by the use of criminal background checks. Yet you are planning on issuing an executive order that will harm the employment prospects of African-American workers now and for years to come. In one part of the executive branch, the EEOC issues misguided policies in an attempt to increase employment opportunities for African-American men, and in another part of the executive branch, you prepare to issue an executive order that will decrease employment opportunities and wages for those very same African-American men.**

**Additionally, your proposed executive order will have a disparate impact on the basis of national origin. As you know, disparate impact theory holds that a facially neutral policy can nonetheless constitute unlawful discrimination if it disproportionately affects a particular group. The proposed executive order will do just that. It will necessarily disproportionately benefit people who are Mexican and Central American, which means that it will disproportionately disadvantage other ethnic groups. In other contexts, this would be considered a violation of Title VII. …**

**Some Academic Views on the Obama Deferred Deportation Policy and Presidential Power**

**In summary, President Obama, expressing great compassion for the plight of the many million-membered U.S. illegal community undertook unilateral affirmative action to help remedy the plight of that primarily Hispanic population. One such undertaking was the June, 2012 Deferred Action for Childhood Arrivals (DACA) policy which provided a renewable two-year security against deportation and work authorization for the young undocumented who had been brought to the United States before 2007 under the age of 16; had been here continuously for the last five years; and had not been involved in serious crimes.[[33]](#footnote-33) Likewise, in November, 2014, illegal-alien parents, of both American citizens and permanent residents, who had been in America continuously for the last five years, and who had not been involved in serious criminal activity, were to be granted security against deportation and provided work authorization for three years through President Obama’s executive action called DAPA--Deferred Action for Parents of Americans.[[34]](#footnote-34) This action also extended the DACA policy of 2012 by granting three years of further immunity against deportation, and removing its 31-year-age limit.[[35]](#footnote-35) These Presidential policies--undertaken without congressional statutory authorization--are hugely controversial, prompting charges that President Obama had operated illegally and contrary to his Constitutional obligation that “he shall take Care that the Laws be faithfully executed.”[[36]](#footnote-36) The Constitutional scholars reviewed here have concerned themselves with the obligations imposed on the President by this ambiguous “*Take Care Clause*” and their conclusions vary dramatically. Professors Cox and Rodriguez conclude that the President has an abundance of authority to govern deportation as a consequence of *de facto* Congressional delegation of authority, a view adopted by President Obama. Professors Yoo and Delahunty assert, to the contrary, that the unilateral Obama DACA action and, by extension of their reasoning, his deportation-deferral action affecting the alien parents of American citizens and permanent residents (DAPA), are inexcusable breaches of the Take Care Clause. Professor Price argues that the limited Congressionally allocated financial and administrative resources provided the executive to implement immigration law authorizes extensive executive discretion as to who is to be deported. Nevertheless, this scholar maintains, such discretion is to be guided by the acceptance of legislative supremacy, and this, as Price sees it, was not adhered to by President Obama. Professor Miller argued that Presidential approaches to *Faithful* *Execution* are governed by political needs determined by the executive. And one would doubtless find much in the way of political motivation in connection with the Obama deportation DACA and DAPA policies.**

**Professors Cox and Rodriguez: These Professors note that the abundance of statutory regulations controlling deportation would--if implemented completely--result in the deportation of some 11.5 million of the people living in the United States. The impossibility of deporting such a large number has resulted in a very broad *de facto* delegation of legislative authority to the executive branch to screen the illegal population in America and determine who is to be sent away.[[37]](#footnote-37) President Obama referenced this *de facto* delegation of legislative authority, and its grant of prosecutorial discretion to determine who among the multitude eligible for deportation would be subject to removal. In his announcement of deferred action affecting the deportation of the parents of American citizens and permanent residents (DAPA), the President insisted that the immigration system was broken; that it was impossible to remove all the illegals who by Statute could be deported; and that he would exercise the abundance of discretion afforded the executive branch to prioritize deportation.[[38]](#footnote-38)**

**President Obama on DAPA [[39]](#footnote-39)**

**[W]e’ll take steps to deal responsibly with the millions of undocumented immigrants who already live in our country.**

**I want to say more about this third issue, because it generates the most passion and controversy. Even as we are a nation of immigrants, we’re also a nation of laws. Undocumented workers broke our immigration laws, and I believe that they must be held accountable -- especially those who may be dangerous. That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.**

**But even as we focus on deporting criminals, the fact is, millions of immigrants in every state, of every race and nationality still live here illegally. And let’s be honest -- tracking down, rounding up, and deporting millions of people isn’t realistic. Anyone who suggests otherwise isn’t being straight with you. It’s also not who we are as Americans. After all, most of these immigrants have been here a long time. They work hard, often in tough, low-paying jobs. They support their families. They worship at our churches. Many of their kids are American-born or spent most of their lives here, and their hopes, dreams, and patriotism are just like ours. As my predecessor, President Bush, once put it: “They are a part of American life.” …**

**So we’re going to offer the following deal: If you’ve been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you’re willing to pay your fair share of taxes -- you’ll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That’s what this deal is. …**

**Are we a nation that tolerates the hypocrisy of a system where workers who pick our fruit and make our beds never have a chance to get right with the law? Or are we a nation that gives them a chance to make amends, take responsibility, and give their kids a better future?**

**Are we a nation that accepts the cruelty of ripping children from their parents’ arms? Or are we a nation that values families, and works together to keep them together? …**

**Over the past few years, I have seen the determination of immigrant fathers who worked two or three jobs without taking a dime from the government, and at risk any moment of losing it all, just to build a better life for their kids. I’ve seen the heartbreak and anxiety of children whose mothers might be taken away from them just because they didn’t have the right papers. I’ve seen the courage of students who, except for the circumstances of their birth, are as American as Malia or Sasha; students who bravely come out as undocumented in hopes they could make a difference in the country they love.**

**These people –- our neighbors, our classmates, our friends –- they did not come here in search of a free ride or an easy life. They came to work, and study, and serve in our military, and above all, contribute to America’s success. …**

**Professors Yoo and Delahunty: In their Texas Law Review article[[40]](#footnote-40) attacking DACA, Professors Yoo and Delahunty insist on legislative supremacy and the presumptive unconstitutionality of unilateral executive action such as that undertaken by President Obama in connection with childhood arrivals. The Take Care Clause requires the implementation of the laws and not their creation which--to these scholars-- is what the President did in granting security against deportation for some 800,000 to 1.76 million young unauthorized individuals. DACA is dangerous! It invites future Presidents to abolish the law on a broad-scale basis such as eliminating a portion of the tax code or environmental regulations.[[41]](#footnote-41)**

**Of course, Yoo and Delahunty point out, much discretion is granted the executive departments as to how to implement the law. This is true of the immigration area where financial and administrative resources granted by Congress are extremely limited. Here prioritization is permissible, and non-implementation of the law can be ignored, but it is not Constitutional even though it can be at times justified.[[42]](#footnote-42) DACA cannot be justified: Presidential inherent-prerogative power cannot be invoked because prerogative power is restricted to foreign affairs and their emergencies.[[43]](#footnote-43) It cannot be argued that Congress has provided broad-gauge regulatory authority to immunize childhood arrivals because Congress was Constitutionally required to enact a regulatory delegation-standard governing DACA which it has not done. The President’s invocation of equity and fairness is legally not appropriate because equity law dictates that exceptions to legal requirements are to be implemented on a case-by-case basis, and not on a massive DACA-like scale.[[44]](#footnote-44) Presidents have claimed non-enforcement power on the grounds that Congressional Statutes are unconstitutional, but there is no claim of Congressional unconstitutionality in connection with DACA.[[45]](#footnote-45)The implicit argument of the President that DACA will help prioritize the removal of criminal aliens was not supported by cost-effective analysis[[46]](#footnote-46) as DACA involves the costly addition of some 1,400 new civil servants to the salary, health and pension rolls of the Federal Government. This Yoo and Delahunty questioning of DACA is clearly and strikingly applicable to DAPA which in its existence cost the Federal Government some fifty million dollars to hire and house one thousand additional workers to process DAPA claims.[[47]](#footnote-47) The Obama Administration did not supply a statistical cost-analysis supporting its claim that fees paid by DACA and DAPA will pay for the costs of those programs.**

**Professor Price: In his extensive review of the Take Care Clause,[[48]](#footnote-48) Professor Price argues that the text of the Constitution along with the nation’s normative values and its early historical practice require Congressional supremacy in the making of Federal regulations. As the role of the National Government grew to Leviathan proportions, so did the discretionary role of those administering the implementation of its laws. Executive discretion as to how the Leviathan is to be administered is essential. Price insists that the executive branch is required by the text of the Constitution and its normative underpinnings to respect legislative supremacy in the making of rules. This prohibits foreclosing the operations of Federal lawmaking which is what DACA did. Professor Price notes[[49]](#footnote-49) that:**

**Under the DACA program, such [qualified] individuals may apply to receive, for a renewable two-year period, [which is] not only a promise to decline to initiate removal proceedings against them but also authorization to work in the United States.**

**Within the framework developed here, this policy amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization. The action thus is presumptively beyond the scope of executive authority: to be valid, it requires a delegation from Congress. Yet no statute specifically authorizes the status - "deferred action" - conferred on immigrants under the policy; the program, rather, depends on an exercise of prosecutorial discretion, in the form of a promise not to enforce immigration laws for a specified period.**

**DAPA was also designed to foreclose Congressional lawmaking. The President’s thinking was that if many millions of parents of American citizens signed up for security against deportation, political pressure emanating from those many millions would prevent Congressional interference.[[50]](#footnote-50) And administrative leaders were sent barnstorming around the country to promote the President’s DAPA policy and foment that political pressure. [[51]](#footnote-51)**

**Professor Miller: Miller underscored the existence of both a *written* and *unwritten* constitution for Presidents. Critical to the unwritten law guiding Presidents is to do what is politically necessary to promote both an administration’s potency, and the general welfare[[52]](#footnote-52)-- including pluralistically deferring to the interests of as many legitimate interest groups as is prudently possible. President Obama appears supportive of the need to mitigate the burdens of the undocumented. The political pressure for the existence of such concern was also quite evident. DACA was announced in June, 2012 by the President in the midst of his reelection campaign just two days after the National Immigrant Youth Alliance (which included the “Dreamers”) announced plans for civil disobedience demonstrations at Obama reelection offices across the land. The Alliance objective was to have visuals of young Hispanics dragged away, making for a marked contrast to the President’s other youthful supporters. And DACA helped convert Obama’s lagging Hispanic electoral support in the 2012 campaign to one which became overwhelming.[[53]](#footnote-53) Support among this Democratic-coalition group was again extraordinarily strong in connection with DAPA which was proclaimed after the devastating Democratic losses of early November, 2014. And this support was well-designed to buttress Democratic party electoral chances in 2016.[[54]](#footnote-54)**

**The Trump Administration and Immigration Policy**

**Professor Miller’s notion as to the nature of the faithful execution of the laws requirement seems to have been important to the immigration-limiting efforts of the Trump Administration. White working class Americans were critical to Trump’s 2016 victory, and this group fears that it and American values have been threatened partly by foreigners and their immigration to the U.S.[[55]](#footnote-55) President Trump’s immigration stance has tried to cater to this group through efforts to limit immigration.**

**The White working-class is of the view that the “American Dream” that hard work will operate to produce a good life has been greatly dissipated. [[56]](#footnote-56) Trump’s commitment to making America Great Again brought hope that the Dream could be revived. Making America Great Again, to Trump, meant an America where jobs were plentiful. In Trump’s ideology, jobs are central to the good life.[[57]](#footnote-57) Immigration challenged job opportunities for Americans.[[58]](#footnote-58) He repeatedly and proudly emphasized the reduction in minority unemployment throughout his presidential years.[[59]](#footnote-59) And he worked hard to stop the immigration of asylum seekers at the U.S. southern border because of their threat to minority job acquisition.[[60]](#footnote-60) Presumably, Trump supported the job-oriented affirmative action conducted by the EEOC and the OFCCP because this form of affirmative action helped people who had been discriminated against get work.**

**The White working class feels that discrimination against Whites is equally virulent as that against minorities.[[61]](#footnote-61) Foreigners and minorities are given preferences over Whites enabling them to get ahead without merit. Consequently, affirmative action does not go over well within the White working class.[[62]](#footnote-62) Nevertheless, this class has demonstrated an enlightened capacity to work alongside minorities in peace and harmony. Given this enlightenment, it is doubtful that overt discriminatory treatment affecting minorities is more than marginal, and that disparate impact theory is accepted. Besides—rather than racist mumbling-- most White working class members say that Blacks, transsexuals, gays, and lesbians are subject to substantial discrimination. However, this grouping was and is suspicious of welfare recipients[[63]](#footnote-63) which helps explain the Trump emphasis that those allowed to immigrate to the U.S. be self-sustaining, and not dependent on public aid.[[64]](#footnote-64)**

**Trump catered to these “commoner” resentments and beliefs about the impact of immigration on American values, promising, among other[[65]](#footnote-65) things, an end to illegal immigration, a ban on travel to the U.S. from threatening areas, and a reduction in immigration overall.[[66]](#footnote-66) Immigration challenged job opportunities for Americans, and here President Trump was committed to promoting job opportunities which he feels are critical to a good life, and making America great again. He repeatedly and proudly emphasized the reduction in minority unemployment throughout his presidential years.[[67]](#footnote-67) Presumably, Trump supported the job affirmative action conducted by the EEOC and the OEEOC because this form of affirmative action helped people who had been discriminated against get work.**

**President Trump interpreted the laws in a fashion that faithfully executed his notions that immigration be limited or stopped. But the Federal courts, exercising nationally-injunctive relief, impeded the President’s efforts. For example, shortly after his inaugural ban on people coming from several predominantly Muslim countries, a District Court Judge nullified this effort by an injunction based on the idea that the ban violated the religious establishment clause of the Constitution’s First Amendment.[[68]](#footnote-68) Likewise, an effort to stop some federal funding to locales providing sanctuary protection to illegals failed. A Federal District Court imposition of a nation-wide injunction based, among other reasons, on the grounds that the national government could not force the states to assist in rounding up criminal aliens.[[69]](#footnote-69) So too the Trump efforts to phase out DACA were denied by national injunction where the District Court reasoned that the Trump Administration failed to recognize the legitimacy of the Obama policy.[[70]](#footnote-70) Later Supreme Court decisions, among other things, permitted the Trump travel ban.[[71]](#footnote-71) However, the Court upheld the Obama DACA order by telling President Trump that his rescission of DACA order had not been properly performed because of procedural error.[[72]](#footnote-72) The response by the Trump Administration was not to accept new DACA applications.[[73]](#footnote-73) But this refusal was overuled by a Federal District Court judge. DACA was resumed, and new applications were accepted. [Michelle Hackman, *Judge Orders Full DACA Restoration*, The Wall Street Journal, December 5-6, 2020, p. A3.]**

**If one accepts the legitimacy of the presidential election scheme and its Electoral College mechanism, one must wonder about the merit of a single unelected Federal judge stopping the implementation of the policy of an elected President. It should be noted that nation-wide injunctions were not used until the 1960s with their “heyday” starting near the end of the Obama years. [A prominent example is the DAPA stoppage through District Court injunction.][[74]](#footnote-74) President Trump’s immigration policies were very much affected by District Court prohibitions. Perhaps the answer, as suggested by the U.S. Solicitor General, is to restrict the injunctive capacity of lower federal courts to cover only the geographical areas associated with plaintiffs who bring the cases.[[75]](#footnote-75)**

**The Trump Administration: Asylum and Some Other Immigration Issues**

**While DACA was rejected by candidate Trump during the 2016 presidential campaign, it was announced in September, 2017, that the DACA policy was to end in March, 2018. Thereby, Congress was allocated six months to embrace some version of DACA or reject it.[[76]](#footnote-76) But this compromise “reprieve” was preempted by Federal Court judicial actions which barred the abolition of DACA, permitting existing beneficiaries to reapply for an extension, and even allowing new DACA applications. The U.S. Supreme Court declined to address the DACA issue during its term ending in mid-2019, leaving its beneficiaries to stew in anxiety. [[77]](#footnote-77)**

**Concurrent with the DACA issue, the southern border of the U.S. continued to witness large numbers of Hispanic individuals, family units and unaccompanied children seeking United States asylum. The height of asylum seekers cane in 2014 when there were 61,000 family units and 51,000 unaccompanied children asylum-seekers (primarily from Central America).[[78]](#footnote-78) Asylum and refugee status are covered by the Refugee Statute of 1980 which allows legal presence in the U.S. for those who are persecuted because of their race, nationality, political opinion, or membership in a particular social group.[[79]](#footnote-79) Major reasons for asylum requests in recent years have been domestic abuse or gang violence.[[80]](#footnote-80) During the Obama Administration children and their parents (family units) were detained (jailed), or released, with release being the usual mode starting in June, 2015. However, when asylum-seeker spike occurred in the Obama second term, there was a reemphasis on widespread detention of family units.[[81]](#footnote-81) When it was judicially determined in 2015 that a previous court ruling (the Flores consent decree) prohibited the detention of children with their parents for lengthy periods, the Obama Administration ordered that family detention was to be used only for short term-processing,[[82]](#footnote-82) with release following thereafter. At times, moreover, children reportedly were sometimes removed from their parents by Obama Administration personnel and placed in separate detention facilities.[[83]](#footnote-83)**

**Asylee status permits permanent status (Green Card) applications after one year, and asylees are permitted to work legally after 150 days of residence in the U. S. [[84]](#footnote-84) But according to former Attorney General, Jeff Sessions, large numbers who claimed to seek asylum never applied for that status, and simply disappeared.[[85]](#footnote-85) For those parents in family units who did not disappear, immigration courts often imposed a monetary bond (as a precursor to release) to help ensure attendance at court hearings.[[86]](#footnote-86)**

**Recent years have also witnessed large numbers of unaccompanied children under 17 (the high point was 51,000 in 2014) at the border who are asylum applicants. They have often been brought there by smugglers (coyotes) and are treated by Federal agents as protected by statutes and a judicial order.[[87]](#footnote-87) It is estimated that some 75-80% are trafficking victims—forced into coerced labor, criminality, or prostitution.[[88]](#footnote-88) Consequently (if from countries which are non-contiguous to the U.S.), they are detained by the Office of Resettlement in the Department of Health and Human Services until released to parents, relatives or sponsors to await immigration judge determination of their asylum petitions. (The average wait for an immigration asylum hearing is two years.) If from non-contiguous countries to the U.S. (like Honduras, Guatemala, and El Salvador which is so often the case), the children are guaranteed a hearing before an immigration judge to determine the merit of their asylum claims. Children from Mexico and Canada have no such guarantee, and they are subject to expedited removal from the U.S. if they do not pass the credible-fear test.[[89]](#footnote-89)**

**The Trump White House has requested Congress to end the Flores decree; end the distinction between children from contiguous and non-contiguous countries; and require proof of domestic abuse /and/or trafficking victimization before children receive “special immigrant” permanent-residence visas available (but in short supply) to children who suffer from the aforementioned trafficking maladies.[[90]](#footnote-90)**

**The Trump Administration has called for congressional help for the following: eliminating the abuse of phony asylum claims;[[91]](#footnote-91) increasing and clarifying the reasons for rejecting alien admissibility (like specifying the meaning of “aggravated felony” which the U.S. Supreme Court has voided for vagueness);[[92]](#footnote-92) increasing the number of immigration judges by some 370 to reduce the enormous backlog of asylum cases in the immigration courts numbering about one million in 2020; increasing the number of U.S. immigration lawyers (by 1,000) to ensure expedited return of aliens to their native lands; and building a wall on the U.S. southwestern border to limit illegal entry.[[93]](#footnote-93)**

**The aforementioned congressional requests were classified under border immigration security. To this end, President Trump has also requested sizeable increases in the number of Border Patrol agents who work at the borders of the U.S.[[94]](#footnote-94) But much of the immigration problem involves internal security. (Thus, about 40% of illegal immigrants in this land are visa overstays.) To promote interior security, the Trump White House has requested congressional assistance to: make visa overstays a misdemeanor; increase the number of ICE (Immigration and Customs Enforcement responsible for internal immigration control) by 10,000 along with 300 ICE attorneys; require the compulsory use of E-Verify to prevent illegals from obtaining jobs; increase penalties imposed on employers who employ illegals; restrict family-preference visas to spouses and minor children; end the Diversity Lottery visa system; and establish a new “points-based system for the awarding of Green Cards…based on factors that allow an individual to successfully assimilate and support themselves financially.”[[95]](#footnote-95) Currently, immediate family preference visas (Green Cards) are not numerically limited. Immediate family members are defined as including spouses, parents, and unmarried children of U.S. citizens while the Diversity Lottery provides 50,000 Green Cards annually to people from countries that provide limited numbers of immigrants.[[96]](#footnote-96)**

**President Trump would also restrict Federal grants to sanctuary states and localities. These sanctuary places restrict the cooperation by state and local officials with Federal officers seeking to control illegal immigration. Thus, sanctuary places often refuse to detain criminal illegals after their official release from non-Federal prisons so that they can be handled by ICE agents.[[97]](#footnote-97) Such detainment was shelved by the Obama Administration and replaced by a scheme which involved informing ICE about alien releases but not detaining illegals until ICE arrived. President Trump regarded this change as a miscarriage of justice as he did the Obama-abolition of the 287(g)[[98]](#footnote-98) cooperative ties between ICE and non-Federal governments. The aforementioned cooperative-ties program was ended by the Obama Administration when there were complaints that too many long-term undocumented aliens were being deported as a consequence of the 287(g) cooperative activities.[[99]](#footnote-99)**

**As noted, President Obama changed his deportation policy in 2014, restricting such removals to recent illegal border crossers and egregious criminals. Law-abiding long-term undocumented residents were to be left alone.[[100]](#footnote-100) President Trump has called for the removal of all illegals, but actual ICE deportations from the U.S. were higher in the Obama years than in the first two years of the Trump Administration. At its height (Fiscal Year 2012), deportations amounted to 409,000 while in Fiscal Year 2018 the number was 256,000.[[101]](#footnote-101) For both administrations, in recent years, the majority of those deported were of Hispanic origin.[[102]](#footnote-102) And President Trump continually says that he will deport millions of illegals who reside in this country. But in FY 2018, ICE officials arrested 10% fewer people than the previous fiscal year.[[103]](#footnote-103)**

**Where Trump has been successful is in the reduction of legal immigration/permanent residents in the U.S. This reduction has allowed for an increase in job opportunities for Americans. In FY 2016, there were 1,063,287 new permanent residents in the U.S. as compared with 940, 897 in FY 2018. A new travel ban extending restrictions to 13 countries is expected to deny Green Card status to 28,000, and new public charge restraints are expected to deny even more.[[104]](#footnote-104)[Id,]**

**What additionally is responsible for the immigration decline? Requiring asylum seekers to stay in Mexico or Guatemala has frustrated many from seeking to immigrate, as has increased vetting of asylum applicants.[[105]](#footnote-105) Other reasons include greater difficulty for skilled workers and to obtain visas.[Nelson D. Schwartz and Steve Lohr,  *U.S. Curbs Visas*. ..., The New York Times, September 3, 2018, p. A1 ff.] Travel bans resulting from the coronavirus pandemic can also be cited. [Molly O’Toole,  *Citing Virus, Mass Expulsion at the Border*, The Los Angeles Times, April 10, 2020, p, A1 ff.]**

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