

And That Is An Order

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Over the past couple of decades, legal and political discourse has focused on the legality of executive orders. But this intrigue is not new.

Executive orders are directives from the U.S. president, typically designed to direct the federal government's officers and agencies in their official actions on behalf of the federal government. While nearly every U.S. president has issued executive orders, some have been more controversial than others.

On January 19, the U.S. Supreme Court agreed to hear a challenge against the current administration's policy known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. Texas, Oklahoma and 24 other states challenged DAPA, arguing that it attempted to change federal law without statutory or constitutional authority.

In 1952, President Truman issued an executive order authorizing seizure and operation of steel mills in order to avoid a nationwide strike. In *Youngstown Co. v. Sawyer*, the U.S. Supreme Court struck the order, holding that an executive order is valid only if it expressly or impliedly authorized by existing statutes. The president cannot make new law.

With the current challenge, the court will address a range of questions, including whether the challenging states have standing to challenge DAPA under the Administrative Procedure Act and whether the policy violates existing federal laws.

But the DAPA case provides an even more interesting issue for legal scholars and fans of political theater. Toward the end of their 40-page response in opposition to certiorari, the challenging states argued that DAPA violates the Take Care Clause of the federal constitution. This clause requires that the president "shall take care that the laws be faithfully executed." In granting certiorari, the court added this issue to the questions presented in the case.

In support of this argument, the challenging states relied upon Justice Robert Jackson's concurring opinion in *Youngstown*. There, Jackson observed that "(w)hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb..." Jackson was consistent in urging cautious scrutiny for presidential claims of power. In *Korematsu v. United States*

, Jackson dissented from the court's opinion upholding President Roosevelt's order authorizing deportation and internment of Japanese Americans.

By granting certiorari in the DAPA case, the Supreme Court might take an opportunity to address what Prof. Kevin M. Stack described, in the Iowa Law Review, as incoherence in the judicial review of executive orders.

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