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The US Problem with Immigration: Railroaded by the Supreme Court

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Immigration, blood source of the United States, its motor of development, has been rocked by judicial pronouncements of late. The Obama administration had put much stock in reforming the general approach to immigration in 2014, ostensibly employing a wide reading of executive power against the possible deportation. It was always going to be haphazard, merely another periodic panacea in a continuing problem.

On November 20, 2014, the President announced that there would be a unilateral suspension of immigration laws applicable to 4 million of the roughly 11 million undocumented immigrants in the United States.

The reasons were simple enough, and reflect a problem typical of the US imperium. Presidents over the last half century have found themselves providing patch remedies for those at risk of mass deportation. In 1987, the Reagan administration exempted two hundred thousand Nicaraguans from deportation, and legalising their entitlement to work.[1](There were, of course other political motivations as well.)

Closest to the Obama administration's mark in terms of precedent remains the 1990 Family Fairness program of President George H.W. Bush, designed to expand the previous administration's Immigration Reform and Control Act. The latter's defect lay in excluding the spouses and children of those placed on the path to legalization. The policy resulted in relief for 1.5 million family members pending formalisation by Congress.

At stages, xenophobic spikes and concerns of porous borders have marked the discussion about immigration reform in Congress. No better illustration of this exists than Donald Trump's threat of building an anti-Mexican wall. Such discussion has resulted in painful constipation, a situation that sees politicians happy to exploit the spectacle of cheap labour without accompanying rights and liberties.

Two dozen or more US states took issue with Obama's moves back in December 2014, particularly with his remarks that, "What you're not paying attention to is, *I just took an action to change the law*.[2]The Secretary of the Department of Homeland Security, the real instrument in this endeavour, subsequently issued a directive purporting to legalise the set number of undocumented immigrants, effectively granting them benefits and rights.

The primary aim was to permit undocumented immigrant parents of US citizen children protection from involuntary removal. This became known as a deferred action program known as "Deferred Action for Parents of Americans and Lawful Permanent Residents" (DAPA).

As the legal suit submitted by the states went, “This lawsuit is not about immigration. It is about the rule of law, presidential power, and the structural limits of the US Constitution.” This, as we shall see, was not necessarily the case at all. A Texas federal judge subsequently blocked the programs nationwide until necessary legal channels had been exhausted.On June 23, the Supreme Court in *United States v Texas*split 4-4 in attempting to resolve the issue, a result that affirmed the lower court’s ruling blocking the deferred action program.[3] The result, scantily expressed in one page, chilled the process regarding the assessment of millions of undocumented immigrants who are permanently under the threat of deportation.

The administration has attempted to work around the obstacle which effectively leaves a brake on executive action from a lower court. US Attorney-General Loretta Lynch has few options, but is nonetheless keeping up an optimistic front. “We will be reviewing the case and seeing what, if anything else, we need to do in court.”[4]

What then, to do? Certainly, the now Supreme Court justice Elena Kagan had argued previously in the *Harvard Law Review* that presidents should make the bureaucratic policy realm their own.[5] Since the days of the Clinton administration, the regulatory activity of the executive branch agencies became “an extension of his own policy and political agenda.”

Kagan, rather generously, suggested that Clinton showed that an assertion of personal ownership over such regulatory activity demonstrated “in the process, against conventional wisdom, that enhanced presidential control over administration can serve pro-regulatory objectives.”

The obvious point, and confusion in this entire case, has not been Chapter II powers of the president under the Constitution, but the statutory powers of the DHS Secretary, Jeh Johnson. “Put simply,” argues Peter M. Shane, “the question is whether Johnson is reading the statutes properly.”[6]

Shane’s points are solid. In terms of procedure, most of the technical aspects were lover court issues, whether, for instance, Texas had standing to bring the lawsuits in question, and whether Johnson should have abided by a notice-and-comment process before promulgating DAPA.

Assertions of executive reach do works both ways, though Obama has done himself few favours in declaring *US v Texas* as something more than dry, earth bound administrative law. The constitution is far less relevant than the parties assert.

The threat of an executive falling into imperial tendencies has always been a danger, and Obama’s critics have pounced on that point. When it happens, it should be curbed. But the relevant issue is whether Johnson had legal justification to implement the program, rather than Obama per se. That issue has been all but lost in the legal and political melee, much to the detriment of the undocumented immigrants in question.

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Notes

[1] http://www.nytimes.com/1987/07/09/world/immigration-rules-are-eased-for-nicaraguan-exiles-in-us.html

[2] https://www.texasattorneygeneral.gov/files/epress/files/ImmigrationStatesFirstAmendedLawsuit12092014.pdf

[3] http://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf

[4] http://www.reuters.com/article/us-usa-court-immigration-idUSKCN0ZE2X5

[5] http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol114_kagan.pdf

[6] http://www.theatlantic.com/politics/archive/2016/06/us-v-texas-wasnt-really-about-presidential-power/489047/

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