114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–

AUTHORIZING THE SPEAKER TO APPEAR AS AMICUS CURIAE ON BEHALF OF THE HOUSE OF REPRESENTATIVES IN THE MATTER OF UNITED STATES, ET AL. V. TEXAS, ET AL., NO. 15-674

MARCH 16, 2016.— Referred to the House Calendar and ordered to be printed

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Mr. SESSIONS, from the Committee on Rules, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H. Res. 639]

The Committee on Rules, to whom was referred the resolution (H. Res. 639) authorizing the Speaker to appear as amicus curiae on behalf of the House of Representatives in the matter of *United States, et al. v. Texas, et al.*, No. 15-674, having considered the same, reports favorably thereon and recommends that the resolution be adopted.

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PURPOSE AND SUMMARY

This resolution authorizes the Speaker to appear as amicus curiae on behalf of the House of Representatives in the matter of

United States, et al. v. Texas, et al., No. 15-674, and to file a brief in support of the position that the petitioners have acted in a manner that is not consistent with their duties under the Constitution and laws of the United States. The resolution also requires the Speaker to notify the House upon his decision to file one or more briefs as amicus curiae pursuant to this resolution. Finally, the resolution provides that the Office of the General Counsel, at the direction of the Speaker, will represent the House in connection with the filing of any brief as amicus curiae pursuant to this resolution, including supervision of any outside counsel providing services to the Speaker on a pro bono basis for such purposes.

BACKGROUND AND NEED FOR LEGISLATION

The President has failed on numerous occasions to fulfill his duty under Article II, section 3 of the Constitution of the United States to "take Care that the Laws be faithfully executed." He has ignored certain statutes completely, selectively enforced others, and bypassed the legislative process to essentially create law by executive fiat. These unilateral actions have shifted the balance of power in favor of the presidency, thereby diminishing Congress' constitutional powers. Such a shift in power should alarm Members of both political parties because it threatens the very institution of Congress.

Contrary to its duty to faithfully execute the laws, the Administration has acted unilaterally to rewrite the Nation's immigration laws. These actions undermine the framework of the Constitution, which separates power between the branches to best protect liberty. The Constitution provides that, "All legislative Powers * * * shall be vested in a Congress of the United States," including authority "to establish a uniform rule of naturalization." The following are examples of executive overreach regarding the enforcement of the Nation's immigration laws that are the focus of litigation (*United States, et al. v. Texas, et al.*, No. 15-674) currently before the United States Supreme Court.

Deferred Action for Childhood Arrivals (DACA)

Napolitano Memo.—On June 15, 2012, Secretary of Homeland Security Janet Napolitano issued a memo entitled *"Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* providing that the Department of Homeland Security (DHS) would grant deferred action to unlawful aliens who "came to the United States under the age of sixteen; have continuously resided in the United States for a least five years preceding June 15, 2012, and were present in the United States on that date; are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States; have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and are not above the age of thirty." The DACA process is not directly at issue in the case *U.S. v. Texas*.

However, the manner in which DACA was implemented was material to the lower courts.

U.S. Citizenship and Immigration Services (USCIS) first granted DACA benefits in September 2012. Since the DACA term is two years, the first grants began expiring in September 2014. In May 2014, USCIS announced renewal procedures for initial DACA recipients.

Deferred Action for Unlawful Alien Parents of U.S. Citizen and Legal Permanent Resident Children (DAPA) and DACA Expansion

Johnson Memo.—On November 20, 2014, Secretary of Homeland Security Jeh Johnson issued a memo entitled *"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."* In this memo, Secretary Johnson ordered USCIS to: 1) expand the DACA process by removing the age restriction that excluded those who were older than 31, extended DACA renewal and work authorization periods from two to three years, and adjusted the eligibility cut-off date by which a DACA applicant must have been in the United States from June 15, 2007 to January 1, 2010; and, 2) establish Deferred Action for Unlawful Alien Parents (DAPA),"a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who have * * * a son or daughter who is a U.S. citizen or lawful permanent resident; have continuously resided in the U.S. since before January 1, 2010; are physically present in the United States on November 20, 2014 * * * and at the time of making a request for consideration of deferred action with USCIS; have no lawful status on the date of this memorandum; are not an enforcement priority (as defined) * * * ; and present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." This memo is directly at issue in *U.S. v. Texas*.

The Migration Policy Institute estimated that 3.71 million unlawful aliens will be potentially eligible to apply for DAPA. The Obama Administration estimated the number to be 4.1 million.

Texas v. United States and the Challenge to DAPA

Over 25 states or state officials have filed suit challenging the Administration's expansion of DACA and the creation of a DACA-like program for aliens who are parents of U.S. citizens or lawful permanent residents (DAPA). The states allege that these administrative actions run afoul of the Take Care Clause of the Constitution. Article II, section 3 declares that the President "shall take Care that the Laws be faithfully executed," thus requiring the President to enforce all constitutionally valid Acts of Congress, regardless of the Administration's view of their wisdom or policy. The states also allege that these legalizations run afoul of the separation of powers set forth in the Constitution. Article I, section 8 gives Congress, not the President, the authority "to establish a uniform rule of naturalization." While the Supreme Court has indicated on several occasions that the President has some measure of

"inherent" power over immigration, see, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), the Court has settled on the view that the formation of immigration policy "is entrusted exclusively to Congress," *Galvan v. Press*, 347 U.S. 522, 531 (1954), and that "[t]he plenary authority of Congress over aliens * * * is not open to question," *INS v. Chadha*, 462 U.S. 919, 940–41 (1983). Congress passed the Immigration and Nationality Act (INA), which specifies the limited cases in which the Executive Branch can suspend the removal of unlawful aliens. Finally, the states allege that the legalizations violate substantive and procedural requirements of the Administrative Procedure Act (APA).

Administration Claims that DAPA is Merely An Exercise of Prosecutorial Discretion

In *"Protecting the Homeland: Tool Kit for Prosecutors,"* ICE describes 'deferred action' as "not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on [removal] cases with a lower priority * * *". This includes, as they note in *"Continued Presence: Temporary Immigration Status for Victims of Human Trafficking,"* such action as "not placing an individual in removal proceedings."

DHS claims that grants of deferred action are merely an exercise of prosecutorial discretion. See *Texas v. U.S.*, No. 15-40238, slip op. at 34-35 (5th Cir. Nov. 9, 2015). Prosecutorial discretion is the inherent authority of an agency charged with enforcing a law to decide whether to devote resources to enforce the law in particular instances. It applies to both criminal and civil enforcement. The Supreme Court found in *Heckler v. Chaney*, 470 U.S. 821 (1985), that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Id. at 831. However, the Court in Heckler stated that the Executive Branch cannot "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." Id. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)(en banc).

To determine whether DAPA could fairly be characterized as an exercise of prosecutorial discretion, the District Court examined the operation of the DACA process. Despite its claim that DACA was applied on a case-by-case basis, the Administration could not provide a federal district court in Texas with any examples of DACA applicants who met the program's criteria but were denied DACA status. See *Texas v. U.S.*, Civ. No. B-14-254, slip op. at 109 n.101 (S.D. Tex. Feb. 16, 2015)(memorandum order and opinion). The Fifth Circuit ratified the district court's finding, stating that DHS "purported to identify several instances of discretionary denials. . . . The states properly maintain that those denials were not discretionary but instead were required because of failures to meet DACA's objective criteria." *Texas v. U.S.*, No. 15-40238, slip op. at 49, 49 n.140 (5th Cir. Nov. 9, 2015)(affirming grant of preliminary

injunction). In other words, had this program truly been applied on a case-by-case basis and had it not been binding on those who review applications, one would suspect that there would be at least a few instances in which a DACA applicant would have been denied status. Proof of such cases simply did not exist.

In addition, the Fifth Circuit concluded that:

" * * * there was evidence that the DACA application process itself did not allow for discretion * * * The district court's conclusion that DACA and DAPA would be applied similarly * * * was not clearly erroneous and indeed was not error under any standard of review * * * [W]e conclude that the states have established substantial likelihood that DAPA would not genuinely leave the agency and its employees free to exercise discretion." Id. at 48, 48 n.139, 50.

USCIS considers unlawful aliens who have received DAPA relief to be "lawfully present," see *Texas v. U.S.*, No. 15-40238, slip op. at 38, and usually grants them work authorization, see 8 C.F.R. § 274a.12(c)(14)—making DAPA in essence a grant of administrative, extra-statutory legalization. The Fifth Circuit concluded that "the INA [Immigration and Nationality Act] flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits * * *" *Texas v. U.S.*, No. 15-40238, slip op. at 63. And, while DHS claims that 8 U.S.C. § 1324a(h)(3)—which provides that an alien is eligible to work if they are "either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the [Secretary of Homeland Security]"—grants it the statutory authority to grant work authorization to unlawful aliens at its choosing, the Fifth Circuit rejected this interpretation, stating that "[t]he interpretation of th[e] provision[] that the Secretary advances would allow him to grant * * * work authorization to any illegal alien in the United States—an untenable position in light of the INA's intricate system of immigration classifications and employment eligibility." Id. at 62.

Procedural Disposition

On February 16, 2015, the district court (i) held that the states have standing to sue, (ii) held that DAPA and DACA expansions are judicially reviewable, and (iii) entered a preliminary injunction prohibiting further implementation of these programs on the ground that the states are likely to prevail in their argument that the programs run afoul of the procedural requirements of the APA. See *Texas v. U.S.* Civ. No. B-14-254, slip op. at 67, 112, 123 (granting preliminary injunction). Subsequently, on November 9, 2015, the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's order granting a preliminary injunction. See *Texas v. U.S.*, No. 15-40238, slip op. at 70. The Fifth Circuit concluded that (i) the states had standing to sue, id. at 28, (ii) DAPA was a reviewable agency action, id. at 40, (iii) DAPA's grant of lawful presence and eligibility for benefits was a substantive rule under the APA that must go through notice and comment, id. at 42, (iv) "the states have established a substantial likelihood of success on the merits

of their procedural claim," id. at 54, that DAPA was "manifestly contrary to the statute" and "therefore was properly enjoined," id. at 66, and (v) the states "have satisfied the other requirements for a preliminary injunction," id. The Administration then sought review from the Supreme Court, which granted its petition for certiorari on January 19, 2016. In so doing, the Court indicated that it would also consider the plaintiffs' claims under the Take Care Clause.

Conclusion

The questions presented in this case are extraordinarily significant to the House of Representatives. In particular, this case raises issues relating to the limits on Executive discretion not to enforce laws enacted by Congress, as well as the point at which the exercise of such discretion turns into lawmaking, thereby infringing on Congress's Article I legislative powers. It is precisely because of these constitutional questions pending before the Supreme Court that the House will take the rare step to consider this resolution authorizing the Speaker to appear as amicus curiae on behalf of the House of Representatives in this important litigation.

HEARINGS

The Rules Committee held a hearing on this resolution on March 16, 2016.

COMMITTEE CONSIDERATION

The Committee on Rules met on March 16, 2016 in open session and ordered H. Res. 639, without amendment, favorably reported to the House by a record vote of 7 yeas and 3 nays, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Woodall to report the resolution, without amendment, to the House with a favorable recommendation was agreed to by a record vote of 7 yeas and 3 nays, a quorum being present. The names of Members voting for and against follow:

RULES COMMITTEE RECORD VOTE NO. 156

H. RES. 639

Date: March 16, 2016.

Motion by Mr. Woodall to report the resolution to the House with a favorable recommendation.

Agreed to: 7 yeas and 3 nays.

Representative	Yea	Nay	Present	Not Voting	Representative	Yea	Nay	Present	Not Voting
Ms. Foxx, Vice Chairman				X	Ms. Slaughter, Ranking Member		X		

Representative	Yea	Nay	Present	Not Voting	Representative	Yea	Nay	Present	Not Voting
Mr. Cole				X	Mr. McGovern		X		
Mr. Woodall	X				Mr. Hastings				X
Mr. Burgess	X				Mr. Polis		X		
Mr. Stivers	X								
Mr. Collins	X								
Mr. Byrne	X								
Mr. Newhouse	X								
Mr. Sessions, Chairman	X								
					Vote Total:	**7**	**3**	**0**	**3**

The committee also considered the following amendments on which record votes were requested. The names of Members voting for and against follow:

RULES COMMITTEE RECORD VOTE NO. 155

H. RES. 639

Date: March 16, 2016.

Motion by Ms. Slaughter to adopt Slaughter amendment #1, which would express the position of the House in support of the Obama Administration in U.S. v. Texas.

Not Agreed to: 3 yeas and 7 nays.

Representative	Yea	Nay	Present	Not Voting	Representative	Yea	Nay	Present	Not Voting
Ms. Foxx, Vice Chairman				X	Ms. Slaughter, Ranking Member	X			
Mr. Cole				X	Mr. McGovern	X			
Mr. Woodall		X			Mr. Hastings				X
Mr. Burgess		X			Mr. Polis	X			
Mr. Stivers		X							
Mr. Collins		X							
Mr. Byrne		X							
Mr. Newhouse		X							
Mr. Sessions, Chairman		X							
					Vote Total:	**3**	**7**	**0**	**3**

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee made findings and recommendations that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The resolution will ensure the Speaker is authorized to appear as amicus curiae on behalf of the House of Representatives in the matter of *United States, et al. v. Texas, et al.*, No. 15-674, and to file a brief in support of the position that the petitioners have acted in a manner that is not consistent with their duties under the Constitution and laws of the United States.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

First Section. This section provides independent authority for the Speaker, on behalf of the House of Representatives, to appear as amicus curiae in the matter of *United States, et al. v. Texas, et al.*, No. 15-674, and to file a brief in support of the position that the petitioners have acted in a manner that is not consistent with their duties under the Constitution and laws of the United States.

Sec. 2. This section requires the Speaker to notify the House upon his decision to file one or more briefs as amicus curiae pursuant to this resolution.

Sec. 3. This section provides that the Office of the General Counsel, at the direction of the Speaker, will represent the House in connection with the filing of any brief as amicus curiae pursuant to this resolution, including supervision of any outside counsel providing services to the Speaker on a pro bono basis for such purposes.

CHANGES IN EXISTING HOUSE RULES MADE BY THE RESOLUTION, AS REPORTED

In compliance with clause 3(g) of rule XIII of the Rules of the House of Representatives, the Committee finds that this resolution does not propose to repeal or amend a standing rule of the House.

MINORITY VIEWS

Minority Views

H. Res. 639, authorizing the Speaker to file an amicus brief on behalf of the House of Representatives in *U.S. v. Texas*, is at best an unfortunate misuse of the House's time and resources.

Congress has the constitutional power if not the obligation to enact legislation making sense of our broken immigration system. The system, as it stands, cruelly fails to distinguish between hardened criminals and hard-working taxpayers who entered the country simply to build a better life for their families. It simultaneously fails to meet the needs of American businesses and our economy. Instead of putting the interests of the country first and bringing up the bipartisan, comprehensive immigration reform bill passed by the Senate 68-32 last term when they had the opportunity, House Republicans blocked it.

When the President sought to temporarily address some of the most significant problems in our immigration enforcement regime by exercising prosecutorial discretion and authority granted to him explicitly by Congress, Republicans voiced their objection.

But instead of opposing the Administration's policies using the powers committed to the Legislative Branch by the Constitution -- including passing laws and overriding vetoes, engaging in oversight and carrying out investigations, or leveraging the power of the purse -- Republicans have reached for a tool not in their constitutional toolbox: running to the courthouse. Rather than allow Congress to do its job, Republicans insist on telling the other branches of government how to do theirs.

House Republicans will file an amicus brief pursuant to this resolution and it will masquerade as expressing the position of the institution of the House of Representatives in an inter-branch, separation of powers conflict. But the fact is, this is nothing more than a partisan fight about elections and immigration policy. Democrats, who represent half of the country, were not consulted. We were

denied an opportunity to present an alternative. The Speaker's amicus brief does not speak for the Democratic Members of the House.

President Obama's executive actions on immigration -- Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) -- are common-sense, lawful exercises of executive discretion, consistent with the actions of presidents from both parties over the last half dozen decades.

For example, from 1987 to 1990, Presidents Reagan and Bush implemented a "Family Fairness" policy that deferred deportation of an estimated 1 million spouses and children of people who qualified for legal status. As President Obama is doing today, President Reagan used his discretion to grant work authorization to beneficiaries of deferred action, a longstanding practice that was later codified by Congress in the 1986 Immigration Reform and Control Act. Presidents from at least Eisenhower to Clinton have done similarly, and there are numerous laws on the books going at least as far back as 1952 explicitly instructing the Executive Branch either to exercise prosecutorial discretion or prioritize enforcement in immigration matters.

Even the Supreme Court, including Chief Justice Roberts and Justice Anthony Kennedy, has acknowledged the legitimacy of Executive Branch discretion in immigration. In *U.S. v. Arizona*, the Court recognized that this broad discretion is a "principal feature of the removal system" and that it extends to the question of "whether it makes sense to pursue removal at all."

Indeed, such prioritization is necessary in light of the fact that Congress appropriates only enough money for the Department of Homeland Security to remove approximately four percent of the undocumented immigrants already in the country.

But there is something more troubling here than the misuse of the House's time and resources, the weakness of the Republicans' legal argument, or the

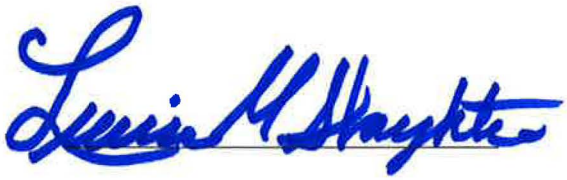
harm to the country and the economy that would result from the implementation of their preferred policies on immigration. Bringing this resolution to the floor of the House at this particular moment says something worrisome about the state of the Republican Party and its leadership.

It is quickly becoming clear that this is a dangerous moment in our country and in our political system. The Republican presidential primary field is resorting to demagoguery and nativism, fanning the flames of dangerous anti-immigrant anger, and anger in general. What the President rightly called "vulgar and divisive rhetoric" in the Republican contest is a logical and foreseeable consequence of the anger and fear carefully and deliberately cultivated by decades of Republican campaign strategy, as Republicans went beyond principled advocacy for smaller government to the outright encouragement of people to think of government as the problem and an enemy to be hated. In an effort to delegitimize President Obama, they indulged conspiracy theories about our first African American president being a foreign-born "secret Muslim" who aspires to be a dictator and take away our freedoms. And capping what the New York Times Editorial Board characterized on March 15 as "decades of pandering to intolerance," Republicans have used hateful slurs to describe Latino immigrants, saying they have "calves the size of cantaloupes," calling them "wetbacks," "dogs," "livestock," and saying they come from a "violent civilization." All of those things Republicans did and said to win elections and score political points have helped prime the electorate for this year's candidates.

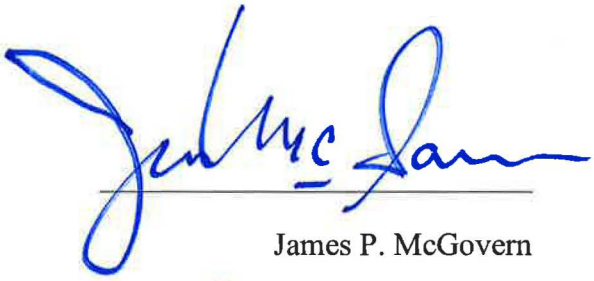
Now that Republican leaders see what they have created, do they take this opportunity to back off of the rhetoric? No, they forge ahead with more anti-immigrant, anti-Latino legislation, with more accusations that the President is a lawless tyrant who violates the Constitution and makes his own law.

If ever there were a moment for responsible leaders to take a step back and use their positions of influence and power to encourage level-headedness, this would be the time.

Our country of immigrants desperately needs its legislators to reform its badly broken immigration system. Doing so would create jobs, align the labor force with the needs of employers, reduce our deficit, strengthen our economy, keep families together, and make our communities safer by bringing millions of people out of the shadows. That Republican leaders continue instead to send to the floor of the House legislation designed to appeal to people's fear and hatred, even as our political system comes closer and closer to the edge of a crisis brought about by the deliberate sowing of that same fear and hatred, says something very worrisome indeed.



Louise M. Slaughter



James P. McGovern

Alcee L. Hastings

Jared Polis