

# COMMENTS

## THE ROLE OF THE EXECUTIVE IN RULEMAKING: AN EXPLORATION OF EXECUTIVE ACTION IN UNITED STATES IMMIGRATION LAW

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## I. INTRODUCTION

Since the United States' founding, its immigration laws have shifted based on the politics and migration trends of the time.<sup>1</sup> While Congress usually passes immigration legislation to fit these trends, the last time Congress passed a major overhaul of immigration legislation was in 1986 with the Immigration Reform and Control Act (IRCA).<sup>2</sup> To address more recent changes in migration patterns, fears of terrorism, and numerous refugee crises, the use of executive action has become increasingly common, which can create problems and instability in the immigration system.<sup>3</sup>

A President's authority to implement executive action derives from Article II's "Take Care Clause," which grants the President executive power to ensure that U.S. laws are "faithfully executed."<sup>4</sup> There are multiple forms of executive action that the President may take. Presidents may issue (1) executive orders, which are binding policy directives; (2) presidential memoranda, which are also used to issue directives but go through a less-stringent process than executive orders; (3) presidential proclamations; (4) national security directives; (5) executive agreements; and (6) presidential signing statements.<sup>5</sup> Of these actions, the most binding—and most frequently reported upon—are executive orders.<sup>6</sup>

Presidents as far back as George Washington have used executive action, but the current system of classifying and codifying executive orders did not

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1. D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RES. CTR. (Sept. 30, 2015), <http://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history>.

2. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359; see also *American Immigration Laws Timeline*, NAT'L ARCHIVES, <https://www.archives.gov/files/philadelphia/public/red-star-line/immigration-laws-timeline.pdf> (last visited May 16, 2018) (detailing a timeline of major American immigration laws); David Nakamura, *For More Than 25 Years, It's Never Been the Right Time for Immigration Reform*, WASH. POST (Feb. 15, 2014), [https://www.washingtonpost.com/politics/for-more-than-25-years-its-never-been-the-right-time-for-immigration-reform/2014/02/15/90a4ff08-93f9-11e3-84e1-27626c5ef5fb\\_story.html?utm\\_term=.2721aa017d2b](https://www.washingtonpost.com/politics/for-more-than-25-years-its-never-been-the-right-time-for-immigration-reform/2014/02/15/90a4ff08-93f9-11e3-84e1-27626c5ef5fb_story.html?utm_term=.2721aa017d2b). In 2018, the federal government shut down twice in three weeks after Congress failed to agree on immigration legislation. Mike DeBonis & Erica Werner, *Brief Government Shutdown Ends as Trump Signs Spending Bill*, WASH. POST (Feb. 9, 2018), [https://www.washingtonpost.com/powerpost/congress-passes-sweeping-budget-bill-ending-brief-shutdown/2018/02/09/6021367e-0d69-11e8-8890-372e2047c935\\_story.html?utm\\_term=.0528fafa9609](https://www.washingtonpost.com/powerpost/congress-passes-sweeping-budget-bill-ending-brief-shutdown/2018/02/09/6021367e-0d69-11e8-8890-372e2047c935_story.html?utm_term=.0528fafa9609).

3. See *infra* Part III for a detailed discussion of recent presidential executive actions and their effects.

4. U.S. CONST. art. II, § 3, cl. 5; see also Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291*, 80 MICH. L. REV. 193, 196 (1981) (inferring that Article II of the Constitution enables Presidential executive action).

5. Andrew M. Wright, *Presidential Executive Orders*, ARK. LAW., Summer 2017, at 30–32.

6. *Id.* at 30–31.

exist until 1907.<sup>7</sup> It was not until 1935 that a structured guideline for drafting executive orders emerged, ironically in the form of an executive order.<sup>8</sup> The guideline required that the President receive financial approval from the Office of Management and Budget (OMB) and legal review from the Attorney General before signing an executive order into action.<sup>9</sup> However, the President is not legally obligated to follow the process, and there are no sanctions should he choose to ignore these requirements.<sup>10</sup> Additionally, even when a president follows these requirements, issuing executive orders is still quicker than passing legislation through Congress.<sup>11</sup>

Every president except President William Henry Harrison, who died after thirty-one days in office, has exercised his right to use executive orders.<sup>12</sup> The use of executive orders depends both on the President and the Congress of the time period; throughout the nineteenth and twentieth centuries, presidents issued their most memorable executive orders in times of national crisis.<sup>13</sup> President Franklin D. Roosevelt, for example, expanded the use of executive orders by using them frequently to implement his policies quickly.<sup>14</sup> In addition, President Harry Truman attempted to nationalize steel industry by way of executive order, although the Supreme Court struck his executive order down as unconstitutional in the infamous *Youngstown Sheet & Tube Co. v. Sawyer*<sup>15</sup> case. Despite this case, many presidents continued to use executive orders and other forms of executive action to create and reorganize agencies, a practice that carried into the Obama presidency.<sup>16</sup>

Despite their frequent use throughout history, the issues and criticisms

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7. John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 338–39 (2010).

8. See Exec. Order No. 7298, 1 Fed. Reg. 2284 (Feb. 18, 1936).

9. Duncan, *supra* note 7, at 341.

10. *Id.*

11. *Id.* at 342.

12. See JOHN CONTRUBIS, CONG. RESEARCH SERV., 95–722 A, EXECUTIVE ORDERS AND PROCLAMATIONS 25–26 (1999); *William Henry Harrison*, WHITE HOUSE (2006), <https://www.whitehouse.gov/about-the-white-house/presidents/william-henry-harrison/>; see also *infra* Part III for examples of executive action from the three most recent administrations.

13. Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 282–83 (2001) (noting that Abraham Lincoln, Franklin D. Roosevelt, and Harry Truman all issued especially memorable executive orders during periods of war and economic turmoil in American history).

14. *Id.* at 283.

15. 343 U.S. 579 (1952). *Youngstown* is particularly important because it clearly asserts that there are limits to presidential power. *Id.* at 587. While the President does have the authority to ensure that laws are faithfully executed, he cannot create laws; that power is vested in Congress. *Id.* at 587–88.

16. Duncan, *supra* note 7, at 347–48.

that have plagued presidential executive actions and orders remain the same. One ongoing concern is whether the scope of executive power is proper in relation to Congress's authority.<sup>17</sup> This criticism increases when presidents use executive orders to implement policies during politically-divided times.<sup>18</sup>

The decisions of recent presidents have renewed discussion about the use of executive action: President Obama's most well-known use of executive power in immigration law came when he implemented Deferred Action for Childhood Arrivals (DACA) through the Department of Homeland Security (DHS),<sup>19</sup> and President Trump has consistently used executive authority to implement immigration policies like a travel ban.<sup>20</sup> Both administrations' use of presidential executive actions serve as key examples for critics concerned about the increasing scope of executive power.

A second common critique of executive action is that presidents will use it to institute policies if Congress fails to pass a law that they want.<sup>21</sup> The third main criticism relates to the proper role of the President in agency ac-

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17. See Gaziano, *supra* note 13, at 271.

18. *Id.* at 282–83.

19. See Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec. to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enft (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano Memo].

20. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). The Trump Administration has announced its policies through both executive orders and Department of Homeland Security (DHS) memoranda. See, e.g., Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., Thomas D. Homan, Acting Dir., U.S. Immigration & Customs Enft., Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Joseph B. Maher, Acting Gen. Counsel, Ambassador James D. Nealon, Assistant Sec'y, Int'l Engagement, and Julie M. Kirchner, Citizenship & Immigration Servs. Ombudsman (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (rescinding the Deferred Action for Childhood Arrivals (DACA) program) [hereinafter Duke Memo].

21. Christopher J. Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 POL. RES. Q. 767, 767 (1999) (noting that executive actions may allow the President to "circumvent" Congress). This was the primary criticism leveled at President Obama when he issued DACA. See Michael W. McConnell, *Trump, Obama, DACA, and the Strict Limits on Presidential Power*, NEWSWEEK (Sept. 13, 2017, 11:32 AM), <http://www.newsweek.com/trump-obama-daca-and-strict-limits-presidential-power-664359>. But see generally Joan Z. Bernstein, *The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President's Hands*, 56 TUL. L. REV. 818, 827 (1982) (asserting that presidential participation is necessary to complete national goals and policies); CONTRUBIS, *supra* note 12, at 16 (arguing that presidential executive action is kept in check because Congress can retroactively repeal statutory authority).

tion and whether executive actions may hinder the effectiveness of agency action by contradicting the authority and expertise of agencies.<sup>22</sup> While the President is authorized to direct agency action, he has no authority to completely control administrative agencies.<sup>23</sup>

Despite these criticisms, most scholars generally agree that executive orders are within the purview of the President's power.<sup>24</sup> Courts have only held two executive orders as unconstitutional.<sup>25</sup> In *Youngstown*, the Supreme Court held that President Truman's executive order, which directed the Secretary of Commerce to take possession of most of the country's steel mills, was unconstitutional and that neither the Constitution nor an act of Congress permitted the President to seize the nation's steel mills.<sup>26</sup> More recently, the D.C. Circuit found that the National Labor Relations Act preempted President Clinton's executive order barring the federal government from contracting with employers that hire permanent replacements during a lawful strike.<sup>27</sup> The scarcity of court cases declaring presidential executive action unconstitutional demonstrates that courts are and have remained deferential to the president in the realm of rulemaking.

This Comment explores the legal issues surrounding the promulgation of rules and regulations through executive action and directives to DHS. Part I of this Comment introduced executive orders and how they are commonly used in immigration law. Part II examines the role of presidential executive actions in relationship to administrative law and explains whether they should be considered legislative or interpretive rules. Part III looks at specific examples of executive action issued by the last three presidents, applying the administrative analysis discussed in Part II. Part IV recommends that DHS promulgate rules using notice-and-comment rulemaking to en-

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22. See Bernstein, *supra* note 21, at 820; Rosenberg, *supra* note 4, at 246.

23. Rosenberg, *supra* note 4, at 246.

24. Duncan, *supra* note 7, at 337.

25. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding President Truman's executive order unconstitutional); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (holding that President Clinton's executive order was unconstitutional); see also Gaziano, *supra* note 13, at 283–86 (detailing why the courts in *Youngstown* and *Reich* found the executive orders unconstitutional).

26. *Youngstown*, 343 U.S. at 587–88. The Court found that while there were two statutes that allowed the President to seize personal or real property, neither of these statutes granted the President the authority to seize the steel mills. *Id.* at 585–86. Additionally, Article II of the Constitution states that the President should faithfully execute the laws, *not* create the laws, which is what President Truman did through this executive order. *Id.* at 587. Justice Jackson's concurring opinion, which assessed how executive authority differed in three different situations regarding Congress and the president, is one of the most cited scholarly takeaways from this case. *Id.* at 635–38 (Jackson, J., concurring); see also CONTRUBIS, *supra* note 12, at 7 (noting that Justice Jackson's concurrence is the "most enduring and influential" of the *Youngstown* opinions).

27. *Reich*, 74 F.3d at 1339.

sure that presidents do not overreach their executive authority. Finally, Part V briefly concludes with an overview of the concepts and analyses detailed in this Comment.

## II. THE ROLE OF EXECUTIVE ACTION IN ADMINISTRATIVE LAW

### A. *The Executive Office of the President*

The Roosevelt-era New Deal programs<sup>28</sup> helped expand the scope of U.S. administrative law in the latter half of the twentieth century.<sup>29</sup> The Administrative Procedure Act (APA), passed in 1946,<sup>30</sup> cemented the expansion of the agency state and set forth the procedures by which federal administrative agencies propose and establish rules and regulations.<sup>31</sup>

One of the many agencies governed by the APA is the Executive Office of the President (EOP), which President Roosevelt established in 1939 to aid the President in accomplishing the goals of his administration.<sup>32</sup> The President releases executive orders and other forms of executive action through the EOP.<sup>33</sup> However, the unique characteristics of this agency and its mission to attain the goals of the sitting President—who changes every four to eight years—make it less suited to promulgate rules that have a long-term impact on the public.

While the EOP is technically an executive agency, certain offices within it are sometimes classified differently under the Freedom of Information

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28. The New Deal was a series of programs that existed from roughly 1933–1939 during the Franklin D. Roosevelt presidency. Editors of Encyclopaedia Britannica, *The New Deal*, BRITANNICA ENCYCLOPAEDIA, <https://www.britannica.com/event/New-Deal> (last updated Apr. 12, 2018). These New Deal programs subsequently led to the creation of new agencies (some through Roosevelt's executive orders), which contributed to the expansion of U.S. administrative law. Gaziano, *supra* note 13, at 296.

29. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 957 (2016) (stating that the New Deal expanded federal authority into those areas that used to be state-governed). Agencies from the New Deal time period were created by Congress and had broad enactment statutes that gave them wide discretion to complete their duties. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440 (2003).

30. Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 561–70a, 701–06 (2012)).

31. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1175 (2014) (noting that many scholars view the Administrative Procedure Act (APA) as a compromise between individuals that supported New Deal programs that expanded executive power and those who wanted agencies to quickly and effectively conduct their work).

32. *The Administration*, WHITE HOUSE, <https://www.whitehouse.gov/the-trump-administration/> (last visited May 21, 2018).

33. *Executive Office of the President*, FED. REG., <https://www.federalregister.gov/agencies/executive-office-of-the-president> (last visited July 2, 2018).

Act (FOIA).<sup>34</sup> FOIA gives the public access to records of any federal agency.<sup>35</sup> However, under FOIA, some EOP offices are not categorized as agencies and are therefore not required to provide their records to the public.<sup>36</sup> In this sense, the EOP lacks some of the transparency of other executive agencies, making it difficult for those in the public who want to actively participate in the democratic process. Further, the EOP differs from other agencies because of the documents that it releases. Unlike other agencies, the EOP generally releases more presidential documents than rules and regulations through its rulemaking process.<sup>37</sup> Additionally, out of respect for separation of powers and presidential authority, executive orders do not have to go through the notice-and-comment process.<sup>38</sup> Because executive orders do not have to go through notice-and-comment rulemaking, it creates another situation where the public is not afforded a possibility of active participation. Lastly, the EOP aids the President in promoting his policies, which vary greatly depending on the administration; therefore, this agency may not be best suited to promulgate rules that will impact individuals and other agencies long after the administration's end, such as those in the field of immigration. These issues and concerns will be discussed in more detail in Part IV.

#### B. Presidential Executive Actions and Administrative Law

Administrative agencies typically promulgate two types of rules: legislative<sup>39</sup> and interpretive.<sup>40</sup> Legislative rules have the force of law.<sup>41</sup> In con-

34. Marjorie A. Shields, Annotation, *What Constitutes "Agency" for Purposes of Freedom of Information Act* (5 U.S.C.A. § 552), 165 A.L.R. Fed. 591, \*4 (2018) (noting that the Freedom of Information Act (FOIA) does not classify certain agencies—like the Executive Office of the President (EOP) or the Office of the Administration of the EOP—as agencies under the act, thereby precluding information requests from those agencies).

35. Freedom of Information Act, 5 U.S.C. § 552 (2012).

36. See, e.g., *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (excluding the Office of the President as an agency under FOIA); *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 565 (D.C. Cir. 1996) (holding that the National Security Council is not an agency under FOIA).

37. *Search of Executive Office of the President Documents*, FED. REG., [https://www.federal-register.gov/documents/search?conditions%5Bagencies%5D=executive-office-of-the-president&page=2&per\\_page=10](https://www.federal-register.gov/documents/search?conditions%5Bagencies%5D=executive-office-of-the-president&page=2&per_page=10) (last visited on May 21, 2018) (demonstrating that the EOP publishes thousands of presidential documents and few rules).

38. Duncan, *supra* note 7, at 342.

39. This rule is also known as a “substantive rule.” David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 286 (2010).

40. This type of rule is written as “interpretative” in the APA, but following the rendering used commonly by other commentators and several court cases, this Comment will use the term “interpretive.” See Franklin, *supra* note 39, 286 n. 42 (2010); William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 n.2 (2001).

41. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

trast, interpretive rules do not have the force of law; rather, they are the agency's interpretation of an existing statute or regulation.<sup>42</sup> Agencies issue legislative rules pursuant to the authority granted to them in their enacting statute; it is an exercise of their delegated power.<sup>43</sup> Under the APA, interpretive rules are not subject to the notice-and-comment process,<sup>44</sup> while legislative rules are because they substantively change the law and are binding.<sup>45</sup>

While legislative and interpretive rules can be difficult to differentiate, courts look to see whether the action creates rights for a group of people or if it allows the agency discretion in decisionmaking.<sup>46</sup> If the rule imposes or takes away significant rights, it is generally a legislative rule; if the agency is exercising its discretion to interpret a statute, then the rule is likely interpretive.<sup>47</sup> Further, if a rule “effects a substantive regulatory change to the statutory or regulatory regime”—that is, if it significantly changes the agency's procedures or the way that it conducts its business—it is legislative rather than interpretive.<sup>48</sup> As such, when determining whether a rule is substantive or legislative, there are three main factors to consider: (1) whether the rule is legally binding;<sup>49</sup> (2) whether the rule will have a significant effect on the regulatory actions of the agency;<sup>50</sup> and (3) whether the rule imposes any rights or obligations on the public.<sup>51</sup>

Unlike agency rules and regulations that go through a rulemaking pro-

42. *Id.* at 1204 (asserting that while it is easier for agencies to issue interpretive rules than legislative rules, the lack of notice-and-comment obligation means that interpretive rules do not have the force and effect of law).

43. *Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992).

44. *See* 5 U.S.C. § 553(b)(3)(A) (2012) (exempting interpretive rules from notice-and-comment).

45. *See, e.g., Mortg. Bankers Ass'n*, 135 S. Ct. at 1204 (asserting that while it is easier for agencies to issue interpretive rules than legislative rules, the lack of notice-and-comment obligation means that interpretive rules do not have the force and effect of law).

46. *See, e.g., Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002).

47. *Id.*

48. *See Elec. Privacy Info. Ctr. v. U.S. Dep't. of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011) (citing *U.S. Telecomms. Ass'n v. FCC*, 400 F.3d 29, 34–40 (2005)) (holding that when an agency with broad statutory authority issues a rule without notice-and-comment, it subsequently changes the regulatory regime so that the public is noticeably affected); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307–08 (D.C. Cir. 1991) (reiterating that if an agency rule intends to create new rights or duties, it is legislative).

49. *See Mortg. Bankers Ass'n*, 135 S. Ct. at 1204; *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993). *See generally* Ronald M. Levin, *Rule-making and the Guidance Exemption 3* (Wash. U. L., Legal Studies Res. Paper Series, Working Paper No. 17-04-05, 2018) (noting that courts examine if rules have the force of law when determining whether they are legislative or interpretive); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 897, 925–26 (2004) (same).

50. *See Elec. Privacy Info. Ctr.*, 653 F.3d at 6–7; *Fertilizer Inst.*, 935 F.2d at 1307–08.

51. *See Gen. Elec. Co.*, 290 F.3d at 382.



cess before promulgation, executive orders and other presidential documents are unique because they go through a different administrative process.<sup>52</sup> As such, their role in administrative rulemaking is more complicated, particularly because no statutes or rules require a notice-and-comment process for executive orders<sup>53</sup>—the most powerful form of presidential action. This makes them similar to interpretive rules.<sup>54</sup> Yet while the main purpose of executive orders is to direct and govern agency action,<sup>55</sup> executive orders are unique in that they still have the force of law.<sup>56</sup>

Therefore, while the President is supposed to be simply directing how he expects the specified agency to use its resources, the effect of the order is still sometimes like binding law.<sup>57</sup> In addition to Article II presidential power, certain Supreme Court cases have also affirmed that executive orders may have the effect and force of law.<sup>58</sup>

Although presidential action is typically considered one way in which the President may influence and control an agency's rulemaking process, there is a fine line between overseeing and completely controlling.<sup>59</sup> In fact, a common critique of broad executive power is that it violates the separation of powers doctrine and gives the President more power than he or she should have.<sup>60</sup> Executive orders are also criticized for having a direct impact on individuals, often through due process claims.<sup>61</sup> While executive

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52. See Duncan, *supra* note 7, at 341.

53. *Id.*

54. Executive action is an exercise of the President's Article II authority under the "Take Care Clause." See U.S. CONST. art. II, § 3, cl. 5. *Cf.* Administrative Procedure Act, 5 U.S.C. § 553 (2012) (excluding executive orders in its instruction of notice-and-comment rulemaking).

55. CONTRUBIS, *supra* note 12, at 20.

56. *Id.*

57. Aaron Blake, *What is an Executive Order? And How do President Trump's Stack Up?*, WASH POST (Jan. 27, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?utm\\_term=.2ceff0225-d9a](https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?utm_term=.2ceff0225-d9a).

58. See Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Haig v. Agee, 453 U.S. 280 (1981); United States v. Midwest Oil Co., 236 U.S. 459 (1915). See generally Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015) (conducting an extensive study of 297 judicial opinions regarding executive orders and finding that executive orders may have the force of law, particularly if Congress does nothing to contradict them).

59. See CONTRUBIS, *supra* note 12, at 13 (noting that presidents use executive action to supervise agency rulemaking); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645 (2010) (examining the distinction between oversight and control).

60. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 475–76 (2009) (discussing the role of separation of powers in immigration law and how the President may act as a "sole organ" in the federal government).

61. See, for example, *infra* note 162 and accompanying text for recent examples of due process claims.

orders are not always intended to impact individuals directly, they often still can and do.<sup>62</sup> This effect becomes particularly relevant in the context of immigration, where recent executive actions consistently affect individuals.<sup>63</sup>

Despite these issues, the President typically has more influence over immigration law than other types of law because Article II of the Constitution specifically grants the President power over foreign affairs, which includes issues of immigration.<sup>64</sup> Due to this authority, courts and agencies typically defer to the President in matters of immigration law.<sup>65</sup> Deference to the President is rooted partly in the executive's authority in certain areas of governance, but also based on the idea that executive orders are one way that executives carry out their duties.<sup>66</sup>

Nevertheless, administrative agencies like DHS may be better equipped to promulgate regulations in the realm of immigration law because of their expertise and nonelected staff. Through their enacting statutes, Congress determined that agencies are specialists in their realm of law and policy.<sup>67</sup> Further, agency staff are hired based on merit, rather than by election, so there is a level of insulation from the political process that ensures that the same people are working on the same issues over time.<sup>68</sup>

Additionally, the entire rulemaking process that agencies must conduct before promulgating legislative rules provides another level of accountability that presidents do not have to meet. As it stands now, the President can issue executive orders that do not require notice-and-comment rulemaking

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62. Key examples of presidential executive actions that have directly impacted substantive rights are President Lincoln's Emancipation Proclamation and President Franklin Roosevelt's permission to send Japanese-Americans to internment camps. *See* Proclamation No. 95 (Jan. 1, 1863) (eradicating slavery); Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (permitting the internment of Japanese-Americans). Roosevelt's executive order is one example where the courts gave the President wide deference. *See* *Korematsu v. United States*, 323 U.S. 214, 224 (1944) (declining to deem Executive Order 9066 unconstitutional on the grounds that the President should be granted deference in times of national security and war).

63. *See infra* Part III for an in-depth analysis of recent immigration executive orders and the effect they have had on individuals.

64. U.S. CONST. art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

65. Cox & Rodríguez, *supra* note 60, at 480–81.

66. Duncan, *supra* note 7, at 335.

67. Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2086 (2005).

68. Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1024.

but are still binding. In this way, executive orders act like agencies' legislative rules.

This situation is problematic because this form of rulemaking, which requires a congressional act or judicial opinion to offset, creates a situation where the President could undermine the purpose of agencies with no immediate consequences.<sup>69</sup> The notion that the President unilaterally creates law is especially problematic in the field of immigration, which is often subject to the politics of the time and may be susceptible to unnecessary (or harmful) change.<sup>70</sup> If presidential actions substantively affect the rights of individuals and change the regulatory scheme within which the agency operates, the policy or law is better-suited to be promulgated as an agency rule because the process of notice-and-comment rulemaking provides for more public input and ensures that the executive agencies remain accountable and not completely malleable to politics.

Presidential action, and particularly executive orders, often directs agencies to act in a certain way, which may affect the public more directly than was originally intended. Therefore, in certain cases, examining whether the executive action serves more like an interpretive or legislative rule may determine that an agency would be better equipped to handle the topic through promulgating a notice-and-comment rule. While this test may be relevant for all types of presidential actions, it is particularly noteworthy in the field of immigration.

### III. AN ANALYSIS OF PRESIDENTIAL EXECUTIVE ACTION: INTERPRETIVE OR LEGISLATIVE RULES?

After decades of jurisprudence, courts still have a difficult time determining the best way to distinguish between interpretive and legislative rules.<sup>71</sup> A key distinction between the two rules is that a legislative rule is meant to legally bind the agency that passes it and the people that the agency governs, while interpretive rules are just meant to "interpret law"; they should not add any new obligations outside of what is already statutorily permitted.<sup>72</sup> Despite this distinction, courts have not determined the line between creation and mere interpretation.<sup>73</sup> This lack of clarity has led to the creation of a number of tests meant to identify the differences between interpretive and legislative rules, though courts have not definitively chosen one of

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69. See Duncan, *supra* note 7, at 376, 396; Julia L. Ernst, *The Legacy of Theodore Roosevelt's Approach to Governmental Powers*, 92 N.D. L. REV. 309, 342 (2017).

70. See *infra* Part III (providing a more detailed analysis of this concept).

71. Manning, *supra* note 49, at 894 (explaining that D.C. courts know that their legislative-interpretive rule tests are unclear); Franklin, *supra* note 39, at 278 (arguing that distinguishing between the two types of rules is a common problem in administrative law).

72. Funk, *supra* note 40, at 1322–24.

73. Levin, *supra* note 49, at 51 (stating that the distinction between the rules is often based on "unilluminating verbal formulas").

these tests as better than the rest.<sup>74</sup> For the purposes of this Comment, analysis of the executive orders will examine: (1) whether the rule is legally binding;<sup>75</sup> (2) whether the rule will have a significant effect on the regulatory actions of the agency;<sup>76</sup> or (3) whether the rule imposes any rights or obligations on the public.<sup>77</sup>

During the past three presidential administrations, each president has issued many executive actions pertaining to immigration.<sup>78</sup> While perhaps intended to be policy statements or guidance documents that operated similarly to interpretive rules, many have had a more substantial legal effect, thereby acting more like legislative rules.<sup>79</sup> This Comment will utilize the aforementioned three-prong test to examine whether pieces of executive action are more interpretive or legislative. The following analysis looks at executive actions from Presidents George W. Bush, Barack Obama, and Donald J. Trump to consider how some act as interpretive and others act as legislative.

### A. Presidential Executive Actions as Interpretive Rules

#### 1. Homeland Security Executive Order

Under President Bush, immigration agencies in the United States underwent a massive overhaul, in part due to the attacks that occurred on September 11, 2001 (9/11);<sup>80</sup> this change began with Executive Order 13,228 (Homeland Security Order).<sup>81</sup> This executive order established the Office of Homeland Security with a mission to help develop a national

74. One such test is the substantial impact test, where courts determine that rules are legislative if they had a “substantial impact on the regulated community.” Funk, *supra* note 40, at 1325. More recent jurisprudence has favored the legally binding test, which determines that legislative rules are legally binding, while interpretive rules are not. *Id.* at 1326. The issue with the legally binding test is that courts have a difficult time deciding how to determine if a rule is legally binding. *Id.* The legislative rule test utilized throughout this Comment is a compromise between the substantial impact test and the legally binding test. The prongs are intended to determine if an executive action functions with the force of law by examining its impact on the public and the agency. See, e.g., Levin, *supra* note 49, at 45 (“A legislative rule . . . is binding on members of the public and the agency itself if validly adopted.”).

75. Perez v. Mortg. Bankers Ass’n., 135 S. Ct. 1199, 1204 (2015); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111 (D.C. Cir. 1993).

76. Elec. Privacy Info. Ctr. v. U.S. Dep’t. of Homeland Sec., 653 F.3d 1, 6–7 (D.C. Cir. 2011); Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307–08 (D.C. Cir. 1993).

77. Gen. Elec. Co. v. EPA, 290 F.3d 377, 382 (D.C. Cir. 2002).

78. See *infra* Section III.A.

79. *Id.*

80. *Creation of Department of Homeland Security*, DEP’T OF HOMELAND SECURITY (Sept. 24, 2015), <https://www.dhs.gov/creation-department-homeland-security>.

81. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

strategy to coordinate against terrorist attacks in the United States.<sup>82</sup> The creation of the Office of Homeland Security reflected sentiment from the time: increasing fear about foreign terrorism following 9/11.<sup>83</sup> Inserting the immigration and naturalization process into the same agency that handles national security reflects how the nation then viewed terrorism and its prevention, and echoes the way prior presidents used wartime as a way to maintain a strong executive presence when the nation was under severe stress and turmoil.<sup>84</sup>

The Homeland Security Order satisfied two prongs of the legislative rule test. As an executive order, the Homeland Security Order had the force of law—the first prong of the test.<sup>85</sup> The Homeland Security Order also met the second prong of the test because it had a significant regulatory effect on the immigrant regulatory regime; that is, it changed the structure of the agency, how it operated, and how it affected the people it impacts.<sup>86</sup> As a direct result of this executive order, the Homeland Security Act was passed in 2003 and the older immigration agency, the U.S. Immigration and Naturalization Service (INS), was replaced.<sup>87</sup>

The Homeland Security Act established DHS, which undertook the duties and functions of the INS, including its power to execute immigration and naturalization law and policy, and eventually absorbed the agency itself.<sup>88</sup> Currently, three components of DHS—Customs and Border Patrol (CBP), U.S. Citizenship and Immigration Services (USCIS), and Immigration and Customs Enforcement (ICE)—work together to implement and execute U.S. immigration law.<sup>89</sup> As such, the dissolution of the INS created an entirely new agency with a different structure. This change directly pertains to the second prong of the legislative rule test: it completely affected

82. *Id.*

83. *Creation of Department of Homeland Security*, *supra* note 80.

84. *Id.*; see Gaziano, *supra* note 13, at 282.

85. See CONTRUBIS, *supra* note 12, at 1 (noting that executive orders are binding law).

86. Exec. Order No. 13,228, 66 Fed. Reg. 51,812.

87. See Homeland Security Act of 2002, Pub. L. No. 107–296, § 471(a), 116 Stat. 2135, 2205 (abolishing the U.S. Immigration and Naturalization Service (INS)).

88. *Id.* at § 451 (establishing the U.S. Citizenship and Immigration Services (USCIS)).

89. U.S. Customs and Border Protection (CBP) keeps the border safe while ensuring that trade and travel are secure; USCIS grants immigration and citizenship benefits; and U.S. Immigration and Customs Enforcement (ICE) enforces criminal and civil enforcement of federal immigration, trade, customs, and border control laws. *Operational and Support Components*, DEP'T OF HOMELAND SECURITY (June 14, 2017), <https://www.dhs.gov/operational-and-support-components>. Because Congress passed the Immigration and Nationality Act (INA), § 103, 8 U.S.C. § 1103 (2012), before the establishment of DHS, USCIS, CBP, and ICE, the Homeland Security Act of 2002 describes the transfer of duties between INS and DHS and its various internal components and demonstrates how the Homeland Security Order and subsequent congressional act shifted the regulatory regime. Homeland Security Act § 471.

the way immigration requests were processed and immigration tasks were conducted by creating a new agency that delegated offices and duties differently than before.<sup>90</sup>

The Homeland Security Order began to change the regulatory regime, which Congress authorized by passing the Homeland Security Act of 2002.<sup>91</sup> In this instance, Congress did more than passively allow the Homeland Security Order's policies to promulgate; it chose to explicitly authorize those policies by incorporating them into a congressional statute that established an entirely new federal department.<sup>92</sup> If President Bush had established the Office of Homeland Security through his sole executive authority under Article II and had Congress not subsequently passed the Homeland Security Act, there would be a strong argument that courts should treat the Homeland Security Order as a legislative rule. Without statutory authorization from Congress, the Homeland Security Order satisfies all three prongs on the legislative rule test and, in that case, it should have gone through the informal rulemaking process. However, because Congress, not the President, was ultimately determinative in changing the agency structure, it was not necessary for the Homeland Security Order to be worked through the notice-and-comment rulemaking process.

## 2. *Sanctuary City Executive Order*

In early 2017, President Trump issued Executive Order 13,768 (Sanctuary City Order).<sup>93</sup> This order required DHS to prioritize all undocumented immigrants for removal and increase the number of immigration officials, both by hiring more ICE officers and by empowering CBP to work with local law enforcement more frequently.<sup>94</sup> While it has the force of law, as executive orders do, it does not satisfy the second or third prong of the legislative rule test.<sup>95</sup> First, it does not significantly change the regulatory regime.<sup>96</sup> The Immigration and Nationality Act (INA) grants the President

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90. Homeland Security Act § 471; *see also* Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (establishing the Office of Homeland Security, which became the basis for the Homeland Security Act of 2002).

91. Homeland Security Act § 471 (incorporating the policies of the Homeland Security Order into a new federal agency, the Department of Homeland Security); Newland, *supra* note 58, at 2058 (noting that congressional intent is important when examining the authority of executive orders).

92. Newland, *supra* note 58, at 2058; *see also* Homeland Security Act § 471.

93. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

94. *Id.* at 8800 (“[T]he Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law . . . take all appropriate action to hire 10,000 additional immigration officers.”).

95. *See* CONTRUBIS, *supra* note 12, at 1.

96. Exec. Order No. 13,768, 82 Fed. Reg. at 8799–800; *see also* Daniel Hemel, *Trump Can't Revoke DACA Without Going Through Notice and Comment*, TAKE CARE (Sept. 5, 2017),

the authority to direct immigration enforcement through the DHS Secretary;<sup>97</sup> therefore, it is within President Trump's statutory authority to direct the DHS Secretary's enforcement priorities as he did in the Sanctuary City Order.<sup>98</sup> In addition, the Sanctuary City Order grants DHS the opportunity to hire more officers and work with local law enforcement in more depth, but it does not change the fundamental ways that DHS conducts its job.<sup>99</sup> As such, it is not significantly changing the agency's regulatory actions.<sup>100</sup>

Second, while the Sanctuary City Order directs agency procedures and expands enforcement priorities, it does not grant (or take away) substantive rights to a small group of people.<sup>101</sup> Because neither the second nor third prong of the legislative rule test is satisfied, the Sanctuary City Order is more like an interpretive rule and should be exempt from the notice-and-comment rulemaking process, particularly because the INA grants the President the authority to direct and prioritize agency procedures.<sup>102</sup> Section 10(b) of the Sanctuary City Order states that, after review of agency procedures, the Secretary can require publication for notice-and-comment rulemaking.<sup>103</sup> This suggests that while the Sanctuary City Order is currently more procedural, its eventual directives could lead to substantial alterations or amendments to rules at some point in the future, which would require the proper notice-and-comment process. This Section recognizes that certain elements of the Sanctuary City Order could eventually substantively affect both individual rights and the regulatory regime; at that point, it should be regarded as a legislative rule.<sup>104</sup>

### 3. *Napolitano Memo*

While President Obama's use of executive action—particularly through

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<https://takecareblog.com/blog/trump-can-t-revoke-daca-without-going-through-notice-and-comment> (arguing that substantive rules affect the statutory or regulatory regime).

97. See INA, § 103, 8 U.S.C. § 1103 (2012).

98. See Exec. Order No. 13,768, 82 Fed. Reg. at 8800.

99. See *id.*

100. See *id.*

101. Compare *id.* (stating that all undocumented immigrants are subject to enforcement), with *Napolitano Memo*, *supra* note 19, at 1 (impacting a much smaller group of undocumented immigrants).

102. See § 103, 8 U.S.C. § 1103; see also Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1296 (2015) (noting that the U.S. Attorney General is one of the President's delegates for enforcing immigration law).

103. Exec. Order No. 13,768, 82 Fed. Reg. at 8801.

104. *Id.* (noting the potential for substantial changes to the agency's regulatory actions); see also *Elec. Privacy Info. Ctr. v. U.S. Dep't. of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011) (establishing that rules without notice-and-comment could affect the agency's regulatory regime); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1307–08 (D.C. Cir. 1993) (reiterating that if a rule creates new rights or duties for the agency, then it is legislative).

executive orders—garnered criticism during his Administration,<sup>105</sup> his most well-known immigration directive was not implemented through executive order. Rather, DACA was implemented through a memorandum (Napolitano Memo) under DHS Secretary Janet Napolitano.<sup>106</sup> It is unclear why President Obama chose to direct the implementation of DACA through a memorandum, but on the same day that DACA was announced, President Obama released a statement taking full ownership of the program.<sup>107</sup> By linking himself directly to the program and the DHS action, President Obama was effectively taking as much responsibility as he would have had it been issued as an executive order.

Determining whether the Napolitano Memo is a legislative or interpretive rule is complicated because the memorandum states that the DACA policy was an exercise of prosecutorial discretion, which is an inherent authority recognized in executive enforcement of laws and is therefore not subject to review.<sup>108</sup> The President's right to direct prosecutorial discretion, particularly through his executive agencies and officers, is well established,<sup>109</sup> so unless there were constitutional issues with the Napolitano

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105. See, e.g., Darla Cameron, *What President Obama's Executive Actions Mean for President Trump*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/graphics/politics/executive-action/> (referencing critics who called Obama's executive action tactics "aggressive"); Clyde Wayne Crews, Jr., *Obama's Legacy: An Abundance of Executive Actions*, FORBES (Jan. 10, 2016, 2:21 PM), <https://www.forbes.com/sites/waynecrews/2016/01/10/this-inventory-of-obamas-dozens-of-executive-actions-frames-his-final-state-of-the-union-address/#665cfd375f5f> (referring to President Obama's executive action as "unilateral pen and phone" actions).

106. Napolitano Memo, *supra* note 19. This memorandum outlines how DHS was going to enforce U.S. immigration laws against certain young people who were brought into this country as children by relatives. *Id.* The memorandum also outlines certain criteria that the young people must meet to qualify for deferred action. *Id.* For instance, the individual (1) must have arrived in the United States before the age of 16; (2) should have continuously resided in the United States for at least five years preceding the date of the memorandum and be currently present in the United States; (3) must be currently in school, have graduated high school, received a GED, or been an honorably discharged veteran of the U.S. Armed Forces; and (4) must not have certain criminal or misdemeanor convictions; and (5) is not above the age of thirty. *Id.*

107. Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> (stating that DHS announced his Administration's steps to fix immigration policy).

108. Napolitano Memo, *supra* note 19, at 1; see Wadhia, *supra* note 102, at 1285–86 (describing how prosecutorial discretion is used in immigration law).

109. See INA, § 242(g), 8 U.S.C. § 1252(g)(2012) (establishing the concept of prosecutorial discretion in U.S. immigration law); *Arizona v. United States*, 567 U.S. 387, 396 (2012) (reiterating that prosecutorial discretion is an important part of federal immigration law); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that U.S. attorneys have broad discretion to enforce criminal law to aid the President in fulfilling his duty to "take



Memo, a court could not review this issue under the INA.<sup>110</sup>

Nevertheless, it is still possible to use the Napolitano Memo as a sample executive action to examine through the APA rulemaking process. If the Napolitano Memo is a legislative rule—one that (1) is legally binding, (2) affects the regulatory actions of an agency, or (3) confers substantive rights on the public—it should have been subject to the notice-and-comment process before promulgation.<sup>111</sup>

The Napolitano Memo was not a presidential executive action and therefore did not have immediate legal force, which is relevant to the first prong of legislative rule analysis that asks whether the rule is legally binding.<sup>112</sup> In fact, while DACA remained intact throughout President Obama's Administration, it was consistently attacked for its legality.<sup>113</sup> This type of executive action and its use reflects an instance where there are problems with a president unilaterally attempting to fix a problem. With DACA, there was growing concern on both political sides about a group of people who were brought into the country illegally by their parents when they were children (Dreamers).<sup>114</sup> Because they were brought into the country at such a young age, Dreamers were often unaware of their citizenship status until years later, which made them a sympathetic group of immigrants with widespread support from the American public, a status that influenced President Obama's decision.<sup>115</sup> While President Obama and DHS implemented the Napolitano Memo in response to Congress's failure to pass comprehensive immigration dealing with Dreamers, the amount of

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care" that laws are executed); *see also* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 199 (2013) ("[P]rosecutorial discretion is warranted at all stages of immigration proceedings, but emphasized that earlier discretion is preferable in order to conserve government resources."); Wadhia, *supra* note 102, at 1296 ("[T]he Attorney General and the United States Attorneys retain '[b]road discretion' to enforce the Nation's criminal laws . . . because they are designated by status as the President's delegates to help him discharge his constitutional duty.").

110. *See* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (prohibiting three areas within prosecutorial discretion from judicial review).

111. OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 1–3 (2018), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

112. *See* *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (legally binding); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (legally binding); *Metro. Sch. Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (legally binding).

113. *But see* Miriam Valverde, *What Have Courts Said About the Constitutionality of DACA?*, POLITIFACT (Sept. 11, 2017, 10:59 AM), <http://www.politifact.com/truth-o-meter/statements/2017/sep/11/eric-schneiderman/has-daca-been-ruled-unconstitutional/> (noting that no courts have found DACA unconstitutional).

114. Catherine E. Schoichet, Susannah Cullinane, & Tal Kopan, *US Immigration: DACA and Dreamers Explained*, CNN (Oct. 26, 2017, 2:13 PM), <https://www.cnn.com/2017/09/04/politics/daca-dreamers-immigration-program/index.html>.

115. *Id.*

controversy surrounding DACA demonstrates the chaos that can erupt when the Executive Branch unilaterally takes certain matters into its own hands.<sup>116</sup>

The text of the Napolitano Memo also suggests that it is an interpretive rule. Unlike the Homeland Security Order and Sanctuary City Order, which primarily dealt with the second prong of analysis (whether the action affects the agency's regulatory actions),<sup>117</sup> the most significant analysis of the Napolitano Memo is the third prong, granting substantive rights to a group. The last paragraph of the Napolitano Memo states that the memo "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law."<sup>118</sup> This statement is particularly important because it specifically notes that the memorandum is not meant to confer a substantive right, which prior courts have noted is a key aspect of a legislative agency rule.<sup>119</sup> The memorandum reiterates this point by further stating that Congress remains the only branch that can confer immigration status or a pathway to citizenship.<sup>120</sup> As such, the actual language of the Napolitano Memo rejects this important prong of the legislative rule test, suggesting that it was interpretive and therefore not required to go through the notice-and-comment rulemaking process.

Although the DHS memorandum states that it does not confer a substantive right, the memorandum, in practice, provides the opportunity for those who qualify to potentially apply for work authorization and Social Security and Medicare benefits.<sup>121</sup> Social Security, Medicare, and work benefits for immigrants are in the *Code of Federal Regulations* (C.F.R.), the codification of rules published by federal administrative agencies.<sup>122</sup> Rules cod-

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116. See Richard Gonzalez, *5 Questions About DACA Answered*, NPR (Sept. 5, 2017, 8:48 PM), <http://www.npr.org/2017/09/05/548754723/5-things-you-should-know-about-daca> (noting that DACA was created in part to combat the lack of legislative solutions).

117. See *supra* Sections III.A.1 and III.A.2.

118. Napolitano Memo, *supra* note 19, at 3.

119. See, e.g., *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (arguing that legislative rules affect individual rights).

120. See Napolitano Memo, *supra* note 19, at 3.

121. See Hemel, *supra* note 96. However, some commentators argue if an interpretive document's effect is legislative, then the document is actually legislative and binding, regardless of the intent of the agency. See, e.g., Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1318 (2001); Thomas J. Fraser, Note, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry*, 90 B.U. L. REV. 1303, 1309 (2010).

122. See, e.g., 8 C.F.R. §§ 274a.12(a)(11), (c)(14) (2016) (establishing that if the government has granted deferred action to an "alien," he or she may apply for employment authorization if economically possible); 42 C.F.R. §§ 417.422(h), 422.50(a)(7) (2016) (granting

ified in the C.F.R. are typically substantive, legally-binding rights.<sup>123</sup> These benefits are usually granted on a case-by-case basis<sup>124</sup>—a reflection of the discretionary authority granted to DHS by both the INA and the Napolitano Memo. While critics may argue that DACA is the first program of its kind, there is precedent for granting deferred action applicants the opportunity to apply for work authorization and Social Security and Medicare benefits since similar programs existed in the past.<sup>125</sup>

At the time of the Napolitano Memo, there were already references to deferred action in the C.F.R. because other presidents had utilized deferred action programs during their presidencies, albeit in different ways. The main example of deferred action before DACA was the Reagan-Bush Family Fairness Plan (Family Fairness program).<sup>126</sup> In this program, Presidents Ronald Reagan and George H. W. Bush utilized executive action to implement deferred action programs that expanded the IRCA.<sup>127</sup> Among other provisions, this deferred action program provided the opportunity for those who received deferred action to apply for work authorization, which explains the presence of deferred action provisions in the C.F.R. and the precedent for allowing deferred action recipients the ability to work and have medical care.<sup>128</sup> The Family Fairness program went against “clear” congressional intent by granting deferred action to certain family members that Congress had purposely excluded from the IRCA.<sup>129</sup> So, unlike the Family Fairness program, DACA did not explicitly go against a congressional statute.<sup>130</sup> Rather, DACA was implemented partly due to Congress’s failure to pass a law providing for the Dreamers.<sup>131</sup>

Administrative agencies codify substantive rights into the C.F.R., partic-

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health benefits to certain immigrants lawfully present in the United States).

123. Hemel, *supra* note 96.

124. *Id.*

125. See *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 28, 2016), <https://www.uscis.gov/humanitarian/temporary-protected-status/deferred-enforced-departure> (summarizing the Deferred Enforced Departure (DED) program). Compare 8 C.F.R. §§ 274a.12 (c)(14), and 42 C.F.R. §§ 417.422(h), 422.50(a)(7) (granting health benefits and employment authorization to certain deferred action status holders), with 8 C.F.R. § 1.3(a)(4)(v) (establishing that those granted DED may apply for Social Security benefits).

126. See *Reagan-Bush Family Fairness: A Chronological History*, AM. IMMIGRATION COUNCIL 1, 1 (Dec. 9, 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/reagan\\_bush\\_family\\_fairness\\_final\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/reagan_bush_family_fairness_final_0.pdf).

127. See *id.* at 2; see Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

128. *Reagan-Bush Family Fairness*, *supra* note 126, at 5.

129. *Id.*

130. Compare *id.* at 1-2 (granting family members deferred action since IRCA did not include them) with Napolitano Memo, *supra* note 19 (granting deferred action to certain individuals who Congress has not addressed through a statute).

131. Gonzalez, *supra* note 116.

ularly if the rights are implemented through regulations or rules that have already gone through a rulemaking process.<sup>132</sup> As such, the codified deferred action provisions of the C.F.R. are important because they show that binding, substantive rights already exist for those who qualify for deferred action status.<sup>133</sup> These rights are legally binding, which satisfies the first prong of analysis, and adding another group to the deferred action category could affect the DHS's regulatory actions.

Because the Napolitano Memo granted deferred action to Dreamers,<sup>134</sup> they were also granted substantive rights.<sup>135</sup> As established, the ability to work and to have healthcare in the United States are substantive rights because they directly impact the lives of the beneficiaries. As such, more than 700,000 people<sup>136</sup> were recipients of these potential substantive rights.<sup>137</sup> Applications for these medical benefits and employment abilities (which are already authorized and codified in the C.F.R.) would change DHS's regulatory actions because it would have to incorporate an entirely new group of people into its framework.<sup>138</sup> If DHS provided these applications, it would change the way it conducted its affairs, which satisfies the second prong of the legislative rule test and provides an additional level of analysis for this prong.<sup>139</sup>

A key distinction, however, is that the Napolitano Memo did not explicitly grant these rights to Dreamers. Instead, it states that USCIS could accept applications and then determine whether the individuals qualify for

132. OFFICE OF THE FED. REGISTER, *supra* note 111, at 9; Hemel, *supra* note 96.

133. *See, e.g.*, 8 C.F.R. §§ 274a.12(a)(11), (c)(14) (2016) (granting health benefits); 42 C.F.R. §§ 417.422(h), 422.50(a)(7) (granting employment authorization); 8 C.F.R. § 1.3(a)(4)(v) (granting the ability to apply for Social Security benefits).

134. Schoichet, Cullinane, & Kopan, *supra* note 114.

135. *But see* Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing, 78 Fed. Reg. 4593, 4613 (proposed Jan. 22, 2013) (to be codified at 42 C.F.R. pts. 430, 431, 433, 435, 440, 447, and 457) (attempting to exclude DACA recipients from the "lawfully present definition" that grants eligibility for Medicaid and the Children's Health Insurance Program (CHIP)). However, review of the final rule demonstrates that this exception was not actually included. *See* Medicaid and Children's Health Insurance Programs: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes, and Premiums and Cost Sharing; Exchanges: Eligibility and Enrollment, 78 Fed. Reg. 42,160 (July 15, 2013) (to be codified at 42 CFR pts. 431, 435, 436, 438, 440, 447, and 457).

136. *See supra* notes 132–133 and accompanying text.

137. Schoichet, Cullinane, & Kopan, *supra* note 114.

138. *Id.* (describing the information and process that Dreamers underwent to qualify for DACA).

139. *See supra* Section II.B for a discussion of the legislative rule test.

work authorization or medical benefits.<sup>140</sup> As such, the Napolitano Memo did not grant substantive rights, but the *opportunity* for them. In other words, while the rights were authorized in the C.F.R., applicants still must apply for deferred action before receiving them.<sup>141</sup> This small but key distinction is what ultimately classifies the Napolitano Memo as an interpretive rule.

While the Napolitano Memo clearly states that it was not meant to grant a substantive right, once DHS started reviewing individual applicants and granting deferred action on a case-by-case basis, it provided deferred action individuals the ability to gradually obtain substantive rights.<sup>142</sup> If DHS chooses to review an individual and grant deferred action, the individual may apply for these rights, which are then granted in accordance with C.F.R. regulations<sup>143</sup> rather than the memorandum itself.<sup>144</sup> This distinction is important when exploring the memorandum that revoked DACA (the Duke Memo), which directly took away rights, rather than detailing the potential for their rescission.<sup>145</sup>

## B. Presidential Executive Actions as Legislative Rules

### 1. Travel Ban Executive Orders

The first travel ban Executive Order that President Trump released—Executive Order 13,769 (First Travel Ban Order)—was heavily criticized upon its signing.<sup>146</sup> The First Travel Ban Order suspended the issuance of visas to nationals of seven countries and stopped the United States Refugee

140. See Napolitano Memo, *supra* note 19.

141. See *id.*; *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 14, 2018), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (describing the process and forms for applying to the DACA program).

142. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 141.

143. See *id.* (detailing the DACA application process). Two main C.F.R. regulations grant rights to deferred action recipients. See 8 C.F.R. §§ 274a.12(a)(11), (c)(14) (2016) (employment rights); 42 C.F.R. §§ 417.422(h), 422.50(a)(7) (2016) (health benefits); see also Hemel, *supra* note 96 (arguing that the C.F.R., not the Napolitano Memo, is what granted substantive rights to DACA recipients).

144. 8 C.F.R. §§ 274a.12(a)(11), (c)(14) (employment rights); 42 C.F.R. 417.422(h), 422.50(a)(7); see also Napolitano Memo, *supra* note 19.

145. See *infra* Section III.B.2.

146. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (First Travel Ban Order); see Thaddeus Talbot, *You Have a Right to Know How Trump's Muslim Ban Was Implemented. So We Sued.*, AM. C.L. UNION BLOG (Apr. 13, 2017, 5:15 PM), <https://www.aclu.org/blog/immigrants-rights/you-have-right-know-how-trumps-muslim-ban-was-implemented-so-we-sued?redirect=blog/speak-freely/you-have-right-know-how-trumps-muslim-ban-was-implemented-so-we-sued> (detailing the confusion and lawsuits resulting from the First Travel Ban Order).

Admissions Program (USRAP) for ninety days.<sup>147</sup> On the ground after the release of the First Travel Ban Order, there was mass chaos at airports, as people who had pre-approved visas were denied entry.<sup>148</sup> The order created additional confusion because neither DHS nor its internal agencies knew about the order or that it was going into effect.<sup>149</sup> The disorder that resulted from the attempted implementation of the First Travel Ban Order meets the second prong of legislative rule analysis because it directly affected both how DHS and its internal agencies did their jobs and how the agencies interacted with the people they are supposed to aid. A prime example of this problem is that implementation of the First Travel Ban Order varied widely depending on the place, showing that the agencies were not given clear guidelines on how to do their job.<sup>150</sup> Their regulatory actions were directly affected as a result of the First Travel Ban Order.

In addition to affecting the way DHS processed requests, the First Travel Ban Order also substantively altered the rights of a group of people; when it was issued, lawful permanent residents were unable to re-enter the country.<sup>151</sup> Among the many substantive rights that lawful permanent residents hold is the ability to travel freely outside of the United States and to be protected by all U.S. laws.<sup>152</sup> The First Travel Ban Order should be treated as a legislative rule that should have gone through the notice-and-comment process.

In an effort to combat the criticisms arising from the first travel ban, President Trump released Executive Order 13,780 (Second Travel Ban Order) on March 9, 2017, which continued to limit travel from seven mostly-Muslim countries and suspended USRAP for 120 days.<sup>153</sup> On September 24, 2017, President Trump issued Proclamation 9,645 to continue the policies established in the Second Travel Ban Order, which expired after

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147. Exec. Order No. 13,769, 82 Fed. Reg. at 8978.

148. See Talbot, *supra* note 146 (describing how confusion erupted throughout United States airports after the issuance of the First Travel Ban Order).

149. Jonathan Allen & Brendan O'Brien, *How Trump's Abrupt Immigration Ban Sowed Confusion at Airports, Agencies*, REUTERS (Jan. 29, 2017, 1:25 AM), <http://www.reuters.com/article/us-usa-trump-immigration-confusion-idUSKBN15D07S> (observing that CBP officers did not know how to implement the Order).

150. *Id.*; see also Talbot, *supra* note 146 (noting the contradictory statements from different executive offices and agencies following the executive order).

151. See Exec. Order No. 13,769, 82 Fed. Reg. at 8977–78 (restricting travel for all nationals of certain countries); Marie Solis, *Trump Administration Stopped Mostly Legal Residents with Travel Ban*, NEWSWEEK (Apr. 2, 2018, 11:12 AM), <http://www.newsweek.com/under-trumps-travel-ban-majority-people-immigration-officials-stopped-were-868380>.

152. *International Travel as a Permanent Resident*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 11, 2018), <https://www.uscis.gov/green-card/after-green-card-granted/international-travel-permanent-resident>.

153. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,210–11, 13,215 (Mar. 9, 2017).

thirty days.<sup>154</sup> While it addressed many of the problems in the First Travel Ban Order, including allowing legal permanent residents to re-enter the country, the history and confusion behind its implementation still hints that a notice-and-comment process would have been beneficial in the first place.<sup>155</sup> Many lawsuits followed in the wake of these Travel Bans, most notably, *Trump v. Hawaii*.<sup>156</sup>

## 2. *Duke Memo*

More recently, the Trump Administration has been criticized for rescinding the DACA program.<sup>157</sup> Like the Napolitano Memo, this policy change was announced through DHS rather than an executive order.<sup>158</sup> However, a key difference between the Napolitano Memo and the Duke Memo is that President Obama publicly linked himself to DACA, whereas President Trump issued the Duke Memo through Attorney General Jeff Sessions and DHS Acting Secretary Elaine Duke.<sup>159</sup>

As discussed earlier, the Napolitano Memo that established DACA did not intend to confer substantive rights; rather, it granted the opportunity to obtain such rights.<sup>160</sup> However, in the five years since the implementation of the Napolitano Memo, Dreamers have applied and subsequently qualified for the health and medical benefits provided in the C.F.R.; therefore, DHS's *implementation* of the program created substantive rights for the 700,000 Dreamers who were part of the program.<sup>161</sup> As such, the third prong of the legislative rule analysis is satisfied: rights were taken away.

Key lawsuits announced after the pronouncement of the Duke Memo also suggest that a notice-and-comment period should have been required, particularly since thousands of individuals benefited from and relied on DACA.<sup>162</sup> All of these individuals subsequently lost their rights due to one

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154. Proclamation 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

155. See OFFICE OF THE FED. REGISTER, *supra* note 111, at 5 (explaining that a notice-and-comment period is helpful for obtaining comments and suggestions).

156. No. 17-965, slip op. 1, 38 (June 26, 2018) (holding that Proclamation 9,645 is constitutional for national security justifications).

157. See Duke Memo, *supra* note 20.

158. *Id.*

159. See Remarks by the President on Immigration, *supra* note 107; Letter from Jefferson B. Sessions III, U.S. Attorney Gen., to Elaine Duke, Acting Sec'y, Dep't of Homeland Sec. (June 5, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0904\\_DOJ\\_AG-letter-DACA.pdf](https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf).

160. Napolitano Memo, *supra* note 19, at 3.

161. See Schoichet, Cullinane, & Kopan, *supra* note 114; Hemel, *supra* note 96.

162. See, e.g., Complaint at 1-2, California v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05235-MEJ (N.D. Cal. Sept. 11, 2017) (alleging Due Process violations and APA violations); Complaint at 1, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017) (alleging that the DACA rescission violated the 5th Amendment and the APA); Complaint at 1-2, New York v. Trump, No. 1:17-cv-05228

memorandum and were not presented the opportunity to voice their opinions about the decision to those who made it. Like the Travel Ban Executive Order, DACA litigation is ongoing.<sup>163</sup> Federal courts for U.S. District Court for the Northern District of California and the U.S. District Court for the Eastern District of New York have issued preliminary injunctions requiring DHS to continue accepting DACA renewals, demonstrating that this issue is far from settled.<sup>164</sup>

#### IV. RECOMMENDATION

Presidents since the turn of the twenty-first century have increasingly used executive action in the field of immigration to pass policies and laws that Congress could not achieve.<sup>165</sup> While effective in theory, certain executive actions exceed presidential authority resulting in a more legislative effect, rather than the intended interpretive purpose.<sup>166</sup> In the future, the President and the EOP should not release executive actions that act as legislative rules. Instead, DHS should promulgate those policies through the notice-and-comment process, which allows the agency to input its specialized knowledge, as well as give the public a more viable and active way to engage with its government.<sup>167</sup>

As the chief executive, the President has a right to utilize executive action.<sup>168</sup> Requiring certain types of executive action to go through DHS and a notice-and-comment period does limit certain executive privileges.<sup>169</sup> However, this Comment does not recommend that *all* executive actions re-

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(E.D.N.Y. Sept. 6, 2017) (alleging that the rescission memorandum did not provide adequate description on what would happen to Dreamers' information, which they willingly and cooperatively gave to the government for a program that no longer exists); Letter from Michael J. Wishnie, Attorney, The Jerome Frank Legal Servs. Org. at Yale Law Sch., to the Honorable Nicholas G. Garaufis, U.S. Dist. Court for the E. Dist. of N.Y. (alleging that the DACA rescission violates the APA and the Due Process Clause).

163. *Status of Current DACA Litigation*, NAT'L IMMIGR. L. CTR. (May 16, 2018), <https://www.nilc.org/wp-content/uploads/2018/02/Status-of-Current-DACA-Litigation-2018.pdf>.

164. *Id.* at 1–3.

165. *See* Nakamura, *supra* note 2 (explaining that comprehensive legislative immigration reform has not occurred for twenty-five years); *see also supra* Part III.

166. *See supra* Section III.B.

167. *See, e.g.*, Manning, *supra* note 49, at 915 (noting that when agencies circumvent notice-and-comment, they often waste years issuing “circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations,” which leads to delays, confusion, and a lack of public participation).

168. CONTRUBIS, *supra* note 12, at 1; U.S. CONST. art. II, § 3, cl. 5 (establishing the President's executive authority to “take care” that the laws of the land are properly executed).

169. Duncan, *supra* note 7, at 335 (asserting that executive orders are a key administrative tool for the President).



garding immigration go through DHS; instead, it suggests that only those actions that affect the agency's regulatory actions or change individuals' substantive rights, or both, should be promulgated using notice-and-comment. Recent executive actions, like the Duke Memo and the First Travel Ban Order, are key examples of executive action that would have benefited from undergoing notice-and-comment through DHS.

While executive action is within the scope of the President's power, neither the President nor the EOP have the expertise that other agencies do.<sup>170</sup> Congress delegates authority to administrative agencies through congressional legislation and the agencies therefore have the "entire statutory scheme entrusted to it."<sup>171</sup> As such, substantive immigration policies should be left to the agency that specializes in the INA, which is DHS.<sup>172</sup> This Comment does not suggest that the President cannot be involved in the promulgation of immigration rules; it simply encourages the President to work more closely with DHS to ensure that his immigration executive action is proper.<sup>173</sup>

Immigration executive orders that go through the notice-and-comment process will also become part of the C.F.R. as legally-binding laws that are ripe for review.<sup>174</sup> As part of the C.F.R., the judicial process will go more smoothly, as courts will be able to analyze the rules more effectively than executive orders, which courts may not always review.<sup>175</sup> Further, because the realm of immigration law has grown increasingly politicized and polarized,<sup>176</sup> requiring immigration executive actions to go through notice-and-comment will encourage the Executive Branch to approach the policies carefully and will increase accountability to U.S. law, not the political tide, which will hopefully prevent a litany of litigation.

Utilizing twenty-first century executive action for political means is not a

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170. Aprill, *supra* note 67, at 2086.

171. *Id.*

172. See *Providing Immigration Benefits & Information*, DEP'T HOMELAND SEC. (Oct. 4, 2016), <https://www.dhs.gov/providing-immigration-benefits-information>; *Who Joined DHS*, DEP'T HOMELAND SEC. (Sept. 24, 2015), <https://www.dhs.gov/who-joined-dhs>.

173. Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 276 (1993) (suggesting that the President should be involved in administrative decisions, but in a limited capacity).

174. Administrative Procedure Act, 5 U.S.C. § 702 (2012) (describing the court's right to review agency actions)

175. See *id.*; Charles A. Breer & Scot W. Anderson, *Regulation Without Rulemaking: The Force and Authority of Informal Agency Action*, PROC. OF 47TH ANN. ROCKY MTN. MIN. L. INST. note 197 (2001) (stating that courts cannot review certain executive orders because they are seen as part of the internal administration of the Executive Branch).

176. See Bradley Jones, *Americans' View of Immigrants Marked by Widening Partisan, Generational Divides*, PEW RES. CTR. (Apr. 15, 2016), <http://www.pewresearch.org/fact-tank/2016/04/15/americans-views-of-immigrants-marked-by-widening-partisan-generational-divides/>.

new concept. In 1942, President Franklin D. Roosevelt issued an executive order that commanded the internment of Japanese-American citizens.<sup>177</sup> At the time, Congress also backed this executive order due to the political and social environments surrounding the Second World War.<sup>178</sup> This example demonstrates one of the potential dangers of an executive acting unilaterally in times of high political tension. While administrative agencies' missions are reflective of the current presidential administration, they are not directly a result of it; there is still some level of insulation from politics.<sup>179</sup> Allowing DHS to take on presidential executive orders that are too legislative in nature is one way that the Executive Branch may work to mitigate strong political influences, as administrative agencies are not as beholden to the political backdrop as presidents are.<sup>180</sup>

The notice-and-comment process also allows the public to actively participate, which is another key benefit of this mode of promulgating immigration policies.<sup>181</sup> In fact, the comment period of this process is seen as "one of the most fundamental, important, and far-reaching of democratic rights."<sup>182</sup> The notice-and-comment period often begins with advance notice of the rule, which is beneficial in providing the public with an idea of what policies or ideas are going to proceed.<sup>183</sup> This notice is important, especially in the recent immigration context, which has been rife with confusion and chaos.<sup>184</sup> The benefits of giving the public advance notice, especially of something as drastic as a travel ban, ensures that the public remains informed and aids the agency's preparedness to implement the policy.

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177. See Exec. Order No. 9,066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

178. *Japanese Relocation During World War II*, NAT'L ARCHIVES (Apr. 10, 2017), <https://www.archives.gov/education/lessons/japanese-relocation>. A more recent example of utilizing executive action based on the political landscape is the Court's opinion in *Trump v. Hawaii*, which the dissent likens to *Korematsu v. United States*, the 1944 Supreme Court decision that upheld Japanese internment. No. 17-965, slip op. 1, 26 (June 26, 2018) (Sotomayor, J., dissenting) ("In *Korematsu*, the Court gave 'a pass [to] an odious, gravely injurious racial classification' authorized by an executive order . . . As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion.").

179. Berry & Gersen, *supra* note 68.

180. Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1412 (2013).

181. Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-mail*, 79 GEO. WASH. L. REV. 1343, 1344 (2011).

182. *Id.*

183. OFFICE OF THE FED. REGISTER, *supra* note 111, at 3.

184. See, e.g., Allen & O'Brien, *supra* note 149 (quoting CBP agents as "in the dark" on how to implement the First Travel Ban Order); Talbot, *supra* note 146 (detailing how implementation of the First Travel Ban Order varied depending on the airports and federal agents).

While it is true that agencies do not have to incorporate every comment they receive into the final rule,<sup>185</sup> this possibility does not undercut the importance of the concepts of public engagement and participatory governance that form the root of United States government and politics.<sup>186</sup> The notice-and-comment process requires agencies to describe their reasoning behind the final promulgated rule, which introduces a level of accountability and openness.<sup>187</sup> While the online comment system is not perfect,<sup>188</sup> it still provides an opportunity for people to participate, whereas there is no opportunity for citizens to comment on presidential executive orders and other actions before their implementation. Further, due to FOIA considerations, the public does not have access to the reasoning behind certain presidential documents and decisions, whereas a brief description of the final rule should provide some of the agency's reasoning.<sup>189</sup> If agencies complete this task properly and include a significant description with their final rule, then they are aiding the process of public engagement by informing the public of useful information and educational materials about the policy.<sup>190</sup>

A good example of the importance of public participation relates to the Duke Memo, which was released among great confusion over what the Trump Administration's policy on DACA would be.<sup>191</sup> The Duke Memo stated that the program would not be fully rescinded for six more months, but gave no opportunity for either Dreamers or supporters of Dreamers to give their input before or after its implementation.<sup>192</sup> Without a proper no-

185. OFFICE OF THE FED. REGISTER, *supra* note 111, at 6.

186. See Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 624 (2013) ("The drafters of the American Constitution . . . sought to implement a government that relied on representation to integrate the will of the people into government decisionmaking.").

187. OFFICE OF THE FED. REGISTER, *supra* note 111, at 7.

188. Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 78, 94–98 (2012) (describing some pitfalls of Regulations.gov, the website where people can comment on proposed rules).

189. See generally Shields, *supra* note 34 (describing which EOP offices are exempt from FOIA).

190. Bull, *supra* note 186, at 627.

191. During his campaign and after his election, President Trump gave varying statements about the DACA program, which left Dreamers in a state of constant uncertainty until the rescission was announced. Compare Alan Gomez, *Trump Tells DREAMers to "Rest Easy"—But One in Mexico Can't*, USA TODAY (Apr. 21, 2017, 6:27 PM), <https://www.usatoday.com/story/news/world/2017/04/21/trump-tells-dreamers-to-rest-easy-responds-to-juan-manuel-montes-case/100757434/> (describing the positive things President Trump has said about Dreamers and immigration), with Eric Bradner, *7 Lines that Defined Trump's Immigration Speech*, CNN (Sept. 1, 2016, 10:34 AM), <http://www.cnn.com/2016/08/31/politics/donald-trump-immigration-top-lines/index.html> (noting the negative language President Trump has used to describe immigration and immigrants).

192. Duke Memo, *supra* note 20.

tice-and-comment rulemaking process, the public was both unaware of the details and far-reaching consequences of the Duke Memo before its release, and actual beneficiaries of the program were not able to detail their opinions in a government-operated space.<sup>193</sup> They have had no opportunity to let their voices be directly heard through the notice-and-comment process; while there are other methods for individuals to make their opinions known, notice-and-comment rulemaking would be the most effective because it is the most direct and a procedure with which the agency is already familiar.<sup>194</sup>

Despite the benefits of this rulemaking process, issuing immigration policies through notice-and-comment rather than executive action is a more time-consuming process for the President to undertake.<sup>195</sup> However, for roughly thirty years, neither Congress nor the President has been able to enact real change in the field of immigration law, which has caused a variety of problems.<sup>196</sup> This Comment suggests a change to procedures that are already in place. The law already requires that the President submit executive orders for publication in the *Federal Register*.<sup>197</sup> Extending this process one step further and opening certain executive orders for public comment is one way to ensure accountability of the executive to the populace. Further, by creating a notice-and-comment process for immigration executive orders, DHS's regulatory implementation of rules will go more smoothly. This process will require DHS to follow all the procedures of notice-and-comment, including setting out a general statement of basis and purpose for final rules.<sup>198</sup> This requirement provides more clarity about the basis of an agency's purpose for both the agency itself and the public. Therefore, unlike the chaos that erupted following the abrupt First Travel Ban Order,<sup>199</sup> the Department will be better prepared and more aware of the public perception of certain policies so that it may be able to not only implement its laws more effectively but know how to respond to public criticism and explain its actions properly if there are complaints.

## V. CONCLUSION

Although U.S. immigration law is in dire need of reform, neither Con-

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193. Hemel, *supra* note 96.

194. See OFFICE OF THE FED. REGISTER, *supra* note 111.

195. *Id.* (stating that the notice-and-comment period may take anywhere from 30 to 180 days).

196. See, e.g., Nakamura, *supra* note 2 (noting that Congress has not made significant immigration reform in over twenty-five years); DeBonis & Werner, *supra* note 2 (detailing the recent government shutdowns); *supra* Section III.B (describing the issues with constant executive action in the field of immigration law).

197. See Federal Register Act, 44 U.S.C. § 1502 (2012).

198. See 5 U.S.C. § 553(b)(1)–(3).

199. See Talbot, *supra* note 146; Allen & O'Brien, *supra* note 149.

gress nor the President has been able to make substantial changes for decades. As such, presidents from the past three administrations have increasingly turned to executive action to achieve their immigration goals. However, some of these presidential executive actions have caused problems by substantially affecting a large amount of people or changing the way agencies do their jobs. To combat this issue, DHS should handle those executive actions that act more like legislative rules and promulgate them through the notice-and-comment process.

Determining the line between legislative and interpretive rules is difficult, and this distinction is even harder to develop when using it to analyze executive action. When determining whether an action is interpretive or legislative, a President should consider whether his or her actions (1) are legally binding, (2) will have a significant effect on an agency's regulatory actions, or (3) will substantially alter individuals' rights. If the executive action meets two or more of these prongs, then he or she should consider having DHS promulgate the policy through notice-and-comment rulemaking. While these considerations are relevant to many areas of presidential authority, they are particularly relevant in the realm of immigration law due to the history of executive actions in immigration law and the substantive impact that immigration executive actions often have on individuals' rights and the regulatory actions of DHS.