



Written by [Warren Mass](#) on April 7, 2016

Senators File Brief in Support of States' Lawsuit to Stop Obama Amnesty for Illegals

Forty-three U.S. senators led by Senate Majority Leader Mitch McConnell filed an Amici Curiae (friend-of-the-court) brief to the Supreme Court on April 4, in support of Texas and 25 other states that filed a lawsuit against the federal government in the case *United States v. Texas*.

In their brief, the senators made a case based on constitutional grounds, stating:



As members of the Senate, amici have an unquestionable interest in protecting the legislative powers that Article I of the Constitution confers upon the Congress of the United States. See U.S. Const. art. I, § 1. (“All legislative Powers herein granted shall be vested in a Congress of the United States.”). The Constitution provides Congress with the powers to “establish a uniform rule of Naturalization,” to regulate interstate and foreign commerce, and to prescribe all such laws as are Necessary and Proper for carrying those powers into execution.... In exercise of those powers, Congress has enacted a comprehensive scheme for the regulation of legal and illegal aliens in the United States, including providing standards and procedures that determine when they may work in this country and when they may enjoy benefits provided from the public fisc [treasury]. Because the Executive’s orders contravene the letter and the spirit of the immigration laws, and threaten the separation of powers enshrined in the Constitution, amici submit this brief in support of Respondents [the states].

In *United States v. Texas*, the states filed their objection to President Obama’s November 20, 2014



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announcement that he would unilaterally suspend immigration law as applied to four million illegal immigrants. In the first ruling in the case, on February 16, 2015, U.S. District Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas in Brownsville issued an order of temporary injunction that blocks the federal government from implementing the Obama administration's use of executive actions to grant amnesty to the illegal aliens.

Hanen's injunction temporarily (pending a final resolution of the case or its appeal to a higher court) enjoined the federal government, and specifically Homeland Security (DHS) Secretary Jeh Johnson, from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program described in Johnson's November 20, 2014 memorandum.

Following a series of subsequent appeals, a three-judge panel from the U.S. Court of Appeals for the Fifth Circuit in New Orleans upheld Hanen's injunction on November 9, 2015. Soon afterwards, DOJ spokesman Patrick Rodenbush stated that the administration would file a petition asking the Supreme Court to review the case. On December 29, 2015, the Texas Attorney General's Office asked the Supreme Court to uphold the appeals court ruling, but on January 19, 2016, the High Court nevertheless agreed to review the case, which is currently pending.

The same day that the High Court agreed to hear the case, the *Wall Street Journal's* "Law Blog" noted that in granting the administration's petition, the court prescribed the following:

In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, §3."

When the administration and the plaintiff states submit their arguments concerning whether the Obama executive memoranda on the DAPA program violates, or is in conformity with, the "Take Care clause," it will focus the court's decision on more specific constitutional grounds than have previously been considered. However, the *Journal* writer observed:

There is no guarantee that the high court will break new ground. Even after briefing and arguments, the justices may decline to delve into the constitutional issues.

In their friend-of-the-court brief, the senators complied with the High Court's directive to argue whether the administration's actions have violated the Take Care Clause of the Constitution, writing:

The Take Care Clause of the U.S. Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This provision of the Constitution obliges the President "faithfully" to carry out the laws that Congress has enacted and constitutes an important limitation on the independent discretion of the Executive. It recognizes that the representative system of government can result in the election of legislative and executive officials that have conflicting policy visions, and elevates the considered policy judgments of Congress over those of the Executive by forbidding the Executive from authorizing action that violates federal statutes. By effectively suspending the enforcement of our immigration laws against millions of aliens in the United States, and moreover by granting those foreign nationals benefits to which they are not lawfully entitled, DAPA violates the letter and spirit of the federal immigration law that the Executive is constitutionally obligated to enforce.

A Western Journalism Center report noted that the senators' filing came after the House of Representatives voted 234 to 186 to authorize House Speaker Paul Ryan (R-Wis.) to file a similar brief for the House. Ryan's office said on April 4 that the House brief has already been filed.



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While these congressional briefs in support of Texas and the other 25 other states that are respondents in the case of *United States v. Texas* undoubtedly strengthens the case of the states, they are by no means the strongest weapons in the congressional arsenal.

Republicans in Congress came close to defunding the Department of Homeland Security (DHS) in 2015, as a way of stopping implementation of the Obama administration's plan to grant amnesty to illegal immigrants by means of executive memoranda. Recall that the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program was initially described in DHS Secretary Johnson's November 20, 2014 memorandum.

However, Republicans never closed the deal, and eventually gave the Obama administration what it wanted, banking on the uncertainty of stopping the amnesty-granting executive actions in court.

Johnson appeared with George Stephanopoulos on ABC's *This Week* program on February 22, 2015, and Stephanopoulos asked him to comment on what might happen if funds for his department are not re-appropriated by Congress.

The next guest on the program was Senator Lindsey Graham (shown, R-S.C.) who said if Republicans de-fund the Department of Homeland Security it would be the "worst thing to do" and would only "add gasoline to the fire."

Citing Johnson's statement on the program just moments earlier that he was frustrated by the House and the Senate on the issue of DHS funding, Stephanopoulos asked Graham if he thought the standoff was going to get resolved. Graham replied:

Yes, it will. I agree with the Texas judge [Hanan] who said that the executive orders were illegal. I hope Republicans will come together and back the court case, file a friend of the court brief with the court and fund DHS. I am willing and ready to pass a DHS funding bill and let this play out in court.

The worst possible outcome for this nation is to defund the Department of Homeland Security given the multiple threats we face to our homeland. And I will not be part of that.

Graham then replied to the question by Stephanopoulos about the prospects of legislation funding DHS passing the House:

Time will tell. I hope my House colleagues will understand that our best bet is to challenge this in court, that if we don't fund the Department of Homeland Security, we'll get blamed as a party. And to anyone who is watching the world as it is, I've never seen more terrorist organizations with more safe havens, with more money, with more capability to strike the homeland than I do today. And that's a direct result of a failed foreign policy by President Obama. And the worst thing to do is add gasoline to the fire by having the Republican Party defund the Department of Homeland Security.

True to what he said on the *This Week* program, Graham was one of the senators who signed the brief sent to the Supreme Court. However, as we noted, while this action is beneficial, it is not the most effective way to stop the DAPA plan. The Republican senators choked when it mattered most, and settled for a bunt instead of a home run.

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