

25 November 2014

We write as scholars and teachers of immigration law who have reviewed the executive actions announced by the President on November 20, 2014. It is our considered view that the expansion of the Deferred Action for Childhood Arrivals (DACA) and establishment of the Deferred Action for Parental Accountability (DAPA) programs are within the legal authority of the executive branch of the government of the United States. To explain, we cite federal statutes, regulations, and historical precedents. We do not express any views on the policy aspects of these two executive actions.

This letter updates a letter transmitted by 136 law professors to the White House on September 3, 2014, on the role of executive action in immigration law.¹ We focus on the legal basis for granting certain noncitizens in the United States “deferred action” status as a temporary reprieve from deportation. One of these programs, Deferred Action for Childhood Arrivals (DACA), was established by executive action in June 2012. On November 20, the President announced the expansion of eligibility criteria for DACA and the creation of a new program, Deferred Action for Parental Accountability (DAPA).

Prosecutorial discretion in immigration law enforcement

Both November 20 executive actions relating to deferred action are exercises of prosecutorial discretion. Prosecutorial discretion refers to the authority of the Department of Homeland Security to decide how the immigration laws should be applied.² Prosecutorial discretion is a long-accepted legal practice in practically every law enforcement context,³

¹ See Letter to the President of the United States, Executive authority to protect individuals or groups from deportation (Sep. 3, 2014), <https://pennstatelaw.psu.edu/file/Law-Professor-Letter.pdf>

² See Thomas Aleinikoff, David Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 778-88 (7th ed. 2012); Stephen H. Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* 629-32 (5th ed. 2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341.

³ Notably, in criminal law, prosecutorial discretion has existed for hundreds of years. It was a common reference point for the immigration agency in early policy documents describing prosecutorial discretion. See Doris Meissner, Immigration and Naturalization Service (INS) Commissioner, *Exercising Prosecutorial Discretion 1* (Nov. 17, 2000) [hereinafter Meissner Memo], <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>; Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976),

unavoidable whenever the appropriated resources do not permit 100 percent enforcement. In immigration enforcement, prosecutorial discretion covers both agency decisions to *refrain* from acting on enforcement, like cancelling or not serving or filing a charging document or Notice to Appear with the immigration court, as well as decisions to *provide* a discretionary remedy like granting a stay of removal,⁴ parole,⁵ or deferred action.⁶

Prosecutorial discretion provides a temporary reprieve from deportation. Some forms of prosecutorial discretion, like deferred action, confer “lawful presence” and the ability to apply for work authorization.⁷ However, the benefits of the deferred action programs announced on November 20 are not unlimited. The DACA and DAPA programs, like any other exercise of prosecutorial discretion do *not* provide an independent means to obtain permanent residence in the United States, nor do they allow a noncitizen to acquire eligibility to apply for naturalization as a U.S. citizen. As the President has emphasized, only Congress can prescribe the qualifications for permanent resident status or citizenship.

Statutory authority and long-standing agency practice

Focusing first on statutes enacted by Congress, § 103(a) of the Immigration and Nationality Act (“INA” or the “Act”), clearly empowers the Department of Homeland Security (DHS) to make choices about immigration enforcement. That section provides: “The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens”⁸ INA § 242(g) recognizes the executive branch’s legal authority to exercise prosecutorial discretion, specifically

<http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>. See also, e.g., Angela J. Davis, *Arbitrary Justice* (2007); Hiroshi Motomura, *Prosecutorial Discretion in Context: How Discretion is Exercised Throughout our Immigration System*, American Immigration Council 2-3 (April 2012), http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf; Stephen H. Legomsky, Legal Authorities for DACA and Similar Programs (Aug. 24, 2014), <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/Editorial-Opinion/Graphics/executive%20action%20legal%20points.pdf>.

⁴ 8 C.F.R. § 241.6.

⁵ INA § 212(d)(5).

⁶ 8 C.F.R. § 274a.12(c)(14).

⁷ Under INA § 212(a)(9)(B)(ii), a person will not be deemed unlawfully present during any “period of stay authorized by the Attorney General” (now the Secretary of Homeland Security). The Department of Homeland Security has authorized such a period of stay for recipients of deferred action. See Donald Neufeld, Lori Scialabba, & Pearl Chang, U.S. Citizenship and Immigration Services (USCIS), *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF; U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (updated June 5, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

⁸ INA § 103(a).

by barring judicial review of three particular types of prosecutorial discretion decisions: to commence removal proceedings, to adjudicate cases, and to execute removal orders.⁹ In other sections of the Act, Congress has explicitly recognized deferred action by name, as a tool that the executive branch may use, in the exercise of its prosecutorial discretion, to protect certain victims of abuse, crime or trafficking.¹⁰ Another statutory provision, INA § 274A(h)(3), recognizes executive branch authority to authorize employment for noncitizens who do not otherwise receive it automatically by virtue of their particular immigration status. This provision (and the formal regulations noted below) confer the work authorization eligibility that is part of both the DACA and DAPA programs.

Based on this statutory foundation, the application of prosecutorial discretion to individuals or groups has been part of the immigration system for many years. Longstanding provisions of the formal regulations promulgated under the Act (which have the force of law) reflect the prominence of prosecutorial discretion in immigration law. Deferred action is expressly defined in one regulation as “an act of administrative convenience to the government which gives some cases lower priority” and goes on to authorize work permits for those who receive deferred action.¹¹ Agency memoranda further reaffirm the role of prosecutorial discretion in immigration law. In 1976, President Ford’s Immigration and Naturalization Service (INS) General Counsel Sam Bernsen stated in a legal opinion, “The reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to enforce all of the rules and regulations presently on the books.”¹² In 2000, a memorandum on prosecutorial discretion in immigration matters issued by INS Commissioner Doris Meissner provided that “[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process,” and spelled out the factors that should guide those decisions.¹³ In 2011, Immigration and Customs Enforcement in the Department of Homeland Security published guidance known as the “Morton Memo,” outlining more than one dozen factors, including humanitarian factors, for employees to consider in deciding whether prosecutorial discretion should be exercised. These factors — now

⁹ INA § 242(g); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

¹⁰ INA § 237(d)(2); 204(a)(1)(D)(i)(II,IV).

¹¹ 8 C.F.R. § 274a.12(c)(14).

¹² Bernsen, *supra* note 3.

¹³ Meissner Memo, *supra* note 3. Notably, the Meissner memorandum was a key reference point for related memoranda issued during the Bush administration, among them a 2005 memorandum from Immigration and Customs Enforcement legal head William Howard and a 2007 memorandum from ICE head Julie Myers on the use of prosecutorial discretion when making decisions about undocumented immigrants who are nursing mothers.

updated by the November 20 executive actions — include tender or elderly age, long-time lawful permanent residence, and serious health conditions.¹⁴

Judicial recognition of executive branch prosecutorial discretion in immigration cases

Federal courts have also explicitly recognized prosecutorial discretion in general and deferred action in particular.¹⁵ Notably, the U.S. Supreme Court noted in its *Arizona v. United States* decision in 2012: “A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all”¹⁶ In its 1999 decision in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court explicitly recognized deferred action by name. This affirmation of the role of discretion is consistent with congressional appropriations for immigration enforcement, which are at an annual level that would allow for the arrest, detention, and deportation of fewer than 4 percent of the noncitizens in the United States who lack lawful immigration status.¹⁷

Based on statutory authority, U.S. immigration agencies have a long history of exercising prosecutorial discretion for a range of reasons that include economic or humanitarian considerations, especially — albeit not only — when the noncitizens involved have strong family ties or long-term residence in the United States.¹⁸ Prosecutorial discretion, including deferred action, has been made available on both a case-by-case basis and a group basis, as are true under DACA and DAPA. But even when a program like deferred action has been aimed at a particular group of people, individuals must apply, and the agency must exercise its discretion based on the facts of each individual case. Both DACA and DAPA explicitly incorporate that requirement.

¹⁴ John Morton, Director, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. [hereinafter Morton Memo].

¹⁵ See e.g., *Lennon v. Immigration & Naturalization Service*, 527 F.2d 187, 191 n.5 (2d Cir. 1975); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979).

¹⁶ See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

¹⁷ 525 U.S. 471 (1999). One source suggests that DHS has resources to remove about 400,000 or less than 4% of the total removable population. See Morton memo, supra note 14.

¹⁸ For example, of the 698 deferred action cases processed by Immigration and Customs Enforcement between October 1, 2011, and June 30, 2012, the most common humanitarian reasons for a grant were: Presence of a USC dependent; Presence in the United States since childhood; Primary caregiver of an individual who suffers from a serious mental or physical illness; Length of presence in the United States; and Suffering from a serious mental or medical care condition. See Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345, 356-69 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758. See also, Shoba Sivaprasad Wadhia, *Relics of Deferred Action*, The Hill (2014), <http://thehill.com/blogs/congress-blog/civil-rights/224744-relics-of-deferred-action>.

Historical precedents for deferred action and similar programs for individuals and groups

As examples of the exercise of prosecutorial discretion, numerous administrations have issued directives providing deferred action or functionally similar forms of prosecutorial discretion to groups of noncitizens, often to large groups. The administrations of Presidents Ronald Reagan and George H.W. Bush deferred the deportations of a then-predicted (though ultimately much lower) 1.5 million noncitizen spouses and children of immigrants who qualified for legalization under the Immigration Reform and Control Act (IRCA) of 1986, authorizing work permits for the spouses.¹⁹ Presidents Reagan and Bush took these actions, even though Congress had decided to exclude them from IRCA.²⁰ Among the many other examples of significant deferred action or similar programs are two during the George W. Bush administration: a deferred action program in 2005 for foreign academic students affected by Hurricane Katrina,²¹ and “Deferred Enforcement Departure” for certain Liberians in 2007.²² Several decades earlier, the Reagan administration issued a form of prosecutorial discretion called “Extended Voluntary Departure” in 1981 to thousands of Polish nationals.²³ The legal sources and historical examples of immigration prosecutorial discretion described above are by no means exhaustive, but they underscore the legal authority for an administration to apply prosecutorial discretion to both individuals and groups.

Some have suggested that the size of the group who may “benefit” from an act of prosecutorial discretion is relevant to its legality. We are unaware of any legal authority for such an assumption. Notably, the Reagan-Bush programs of the late 1980s and early 1990s were based on an initial estimated percentage of the unauthorized population (about 40 percent) that is comparable to the initial estimated percentage for the November 20 executive actions. The President could conceivably decide to cap the number of people who can receive prosecutorial

¹⁹ See Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. Times (March 5, 1990), <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>.

²⁰ See 67 Interpreter Releases 204 (Feb. 26, 1990); 67 Interpreter Releases 153 (Feb. 5, 1990). Bush’s policy followed a narrower 1987 executive order by President Reagan’s immigration commissioner that applied only to children. 64 Interpreter Releases 1191 (Oct. 26, 1987). Congress later in 1990 legislatively provided some of them a path to legalization. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 301, 104 Stat. 4978, <http://www.justice.gov/eoir/IMMACT1990.pdf>.

²¹ See Shoba Sivaprasad Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. See Also 59, n.46 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195735, citing Press Release, U.S. Citizenship and Immigration Services, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf.

²² DED Granted Country- Liberia, U.S. Citizenship and Immigration, <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia> (last visited Nov. 22, 2014).

²³ Legomsky & Rodriguez, *Immigration and Refugee Law and Policy*, *supra* note 2, at 1115-17; See also David Reimers, *Still the Golden Door: The Third World Comes to America* 202 (1986).

discretion or make the conditions restrictive enough to keep the numbers small, but this would be a policy choice, not a legal issue.²⁴ For all of these reasons, the President is not “re-writing” the immigration laws, as some of his critics have suggested. He is doing precisely the opposite — exercising a discretion conferred by the immigration laws and settled general principles of enforcement discretion.

The Constitution and immigration enforcement discretion

Critics have also suggested that the deferred action programs announced on November 20 violate the President’s constitutional duty to “take Care that the Laws be faithfully executed.”²⁵ A serious legal question would therefore arise if the executive branch were to halt all immigration enforcement, or even if the Administration were to refuse to substantially spend the resources appropriated by Congress. In either of those scenarios, the justification based on resource limitations would not apply. But the Obama administration has fully utilized all the enforcement resources Congress has appropriated. It has enforced the immigration law at record levels through apprehensions, investigations, and detentions that have resulted in over two million removals.²⁶ At the same time that the President announced the November 20 executive actions that we discuss here, he also announced revised enforcement priorities to focus on removing the most serious criminal offenders and further shoring up the southern border. Nothing in the President’s actions will prevent him from continuing to remove as many violators as the resources Congress has given him permit.

Moreover, when prosecutorial discretion is exercised, particularly when the numbers are large, there is no legal barrier to formalizing that policy decision through sound procedures that include a formal application and dissemination of the relevant criteria to the officers charged with implementing the program and to the public. As DACA has shown, those kinds of procedures assure that important policy decisions are made at the leadership level, help officers to implement policy decisions fairly and consistently, and offer the public the transparency that government priority decisions require in a democracy.²⁷

²⁴ For a broader discussion about the relationship between class size and constitutionality, *see* Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, *supra* note 20.

²⁵ U.S. Const. art. II, § 3.

²⁶ U.S. ICE, FY 2013 ICE Immigration Removals, <http://www.ice.gov/removal-statistics/> (last visited Nov. 22, 2014); Marc R. Rosenblum & Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*, Migration Policy Institute (April 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

²⁷ For a broader discussion of the administrative law values associated with prosecutorial discretion, *see* Hiroshi Motomura, *Immigration Outside the Law* 19-55, 185-92 (2014); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012) (also providing a proposal for designing deferred action procedures), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443.

Conclusion

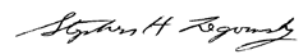
Our conclusion is that the expansion of the DACA program and the establishment of Deferred Action for Parental Accountability are legal exercises of prosecutorial discretion. Both executive actions are well within the legal authority of the executive branch of the government of the United States.



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