THE PRESIDENT'S DISCRETION, IMMIGRATION ENFORCEMENT, & THE RULE OF LAW

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SUMMARY

The President has the legal authority to make a significant number of unauthorized migrants eligible for temporary relief from deportation that would be similar to the relief available under the Deferred Action for Childhood Arrivals (DACA) program.

The reasons include three main points:

1. The President is only considering temporary reprieves. He would not be unilaterally changing the rules for granting permanent residence or citizenship. Decisions about whether and when to grant temporary reprieves are part of the prosecutorial discretion that the President must exercise as the executive branch official ultimately in charge of enforcing immigration law.

2. The U.S. immigration system is one of selective admissions that has historically not met the U.S. economy's needs for an adequate labor force. Unauthorized migrants are a significant share of the workers who are essential to the economy. Congress funds enforcement capacity at a fraction of what would be needed to reduce the unauthorized population significantly. As a consequence, immigration enforcement is necessarily selective. In effect, Congress has created and funded a system that relies heavily on prosecutorial discretion, especially on enforcement priorities and a system for applying them.

3. The President, in order to respect the rule of law in exercising prosecutorial discretion, must make sure that discretionary decisions to apply enforcement priorities are uniform, predictable, and nondiscriminatory. One permissible approach is to adopt prosecutorial discretion guidelines, as the Obama administration did in 2011. The DACA program reflected a decision—fully within the President's legal authority—to go beyond mere guidelines to adopt a formal process for ensuring that the priorities were carried out consistently, predictably, and without discrimination. Likewise, the President has the legal authority to extend temporary administrative relief to a wider circle of noncitizens, as long as he is exercising his discretion to administer enforcement priorities.

The analysis set out here appears in much fuller form, and in broader context, in Chapters One and Chapter Six of *Immigration Outside the Law* (Oxford University Press July 2014).

INTRODUCTION

The Deferred Action for Childhood Arrivals (DACA) program, announced by President Obama in June 2012, made over one million young people eligible for a temporary deportation reprieve—the technical term is "deferred action."[1] More recently, the President announced in June 2014 that he would study options for making similar administrative relief available to many more of the 11 million people who are in the United States without lawful status.[2]

Others, however, have cast DACA and any other form of administrative relief as "lawless" or contrary to the "rule of law," apparently believing that such measures would exceed the President's legal authority. In one of the last votes in the House of Representatives before its 2014 August recess, it approved legislation that would have gutted the DACA program and barred the President from granting deferred action to a broader circle of unauthorized migrants.[3]

Certainly, there are political limits to what the President can do. Any decision on immigration policy is bound to draw some legislative and public criticism. But what are the legal limits? If the President grants DACA-style relief or any other form of administrative reprieve to more noncitizens, is he overstepping his authority by not taking care that "the laws be faithfully executed," as the U.S. Constitution requires? More fundamentally, what does the "rule of law" mean in this setting?

These are complex questions, and the President's immigration authority has real limits. But none of these limits keeps him from curtailing deportations by granting deferred action or other temporary administrative relief to other groups of noncitizens who meet certain threshold criteria, as long as any such relief is granted as a matter of prosecutorial discretion. This authority is firmly grounded in the limited nature of administrative relief, and in rule of law principles as applied to the practical realities of the immigration system that Congress has established and that the President must administer.

THE LIMITED NATURE OF ADMINISTRATIVE RELIEF

First, it is important to understand what executive action would *not* do. Administrative relief would not change the laws that govern how noncitizens may become lawful permanent residents (green card holders) or U.S. citizens. Everyone concedes these are issues for Congress. Instead, deferred action and other administrative measures provide only temporary relief that falls well short of a green card.

Similarly, critics were wrong to accuse the President of using DACA to "enact" the DREAM Act. That legislation, if it becomes law, would offer a path to permanent residence and citizenship to a large number of young people. In contrast, DACA is only a two-year reprieve. Applicants must satisfy minimum eligibility criteria and follow an application procedure that requires a substantial fee. There is no guarantee of approval, which is a discretionary decision by federal government officials. In case of denial, there is no appeal process within the executive branch, let alone in the courts.

Administrative relief would not change the laws that govern how noncitizens may become lawful permanent residents.

One might object that DACA can give protection to individual noncitizens that might be hard to rescind as a practical, political matter. *That*, however, is a decision for Congress and future administrations, and it does nothing to diminish the authority of this or any President to adopt temporary, discretionary measures.

In context, then, the President's power to curtail deportations is minimal when compared to Congress' power to enact statutes that govern when noncitizens may enter and remain in the United States. Administrative relief is only a temporary reprieve from deportation as a matter of prosecutorial discretion. But what gives the President this discretionary authority?

THE GAP BETWEEN LAW ON THE BOOKS AND LAW IN ACTION

The President, as head of the federal executive branch, is ultimately in charge of enforcing the immigration laws of the United States. In turn, he must make discretionary decisions about whether and when to prosecute immigration law violators through deportation and other sanctions. The President delegates these discretionary decisions to the Secretary of Homeland Security and the Attorney General, who in turn delegate to officials within their agencies.[4] At each step, enforcement reflects both general priorities for prosecution and countless determinations about individuals who should or should not be targeted for deportation.

This is a familiar role for criminal prosecutors, who decide whether and when to file or drop charges, how to approach plea bargaining, and when and how to bring cases to trial. In immigration enforcement, discretion plays at least as great a role as it does in criminal justice. To see why, let's start with the basic numbers.

The unauthorized population of the United States is over 11 million.[5] The federal government's capacity to compel their departure is limited to a fraction of this number. John Morton, former head of the Immigration and Customs Enforcement (ICE), has officially estimated that the U.S. government's deportation capacity is about 400,000 per year.[6] This number of deportations is substantial, and the Obama administration has carried out deportations in this order of magnitude, but the unauthorized population has not declined significantly.

In this setting, the chances are low that any given unauthorized migrant will be arrested and ultimately deported. To be sure, deportation is a harsh consequence that federal legislation in 1996 made much more likely.[7] And the odds of being apprehended have escalated with the expanded state and local role in immigration enforcement under programs like Secure Communities. But the federal government's practical ability to deport people remains limited. Among unauthorized migrants without criminal convictions who pose no national security risks, only the unlucky are arrested and deported.

HOW WE GOT HERE

Why is the immigration system this way, and the unauthorized population so large today? The number of unauthorized migrants in the United States was once much smaller. As recently as the mid-1980s, when the Immigration Reform and Control Act (IRCA) established a major legalization program, the unauthorized population was under 4 million.[8] Now it is three times as many. The major reason is the broad gap between the needs of the U.S. economy for a labor force and the type and number of workers admitted under current immigration law.

Until the 1960s, the number of immigrants allowed to come to the United States from Latin America was unlimited. And each year, several hundred thousand temporary workers were admitted from Mexico under the Bracero program. This regime had many troubling aspects, especially its

exploitation of migrant workers, but it allowed a large work force to come as temporary workers and as immigrants. The legacies of this system include institutionalized, decades-long reliance within many industries in the United States on foreign labor, as well as migration patterns central to the fabric of communities in sending countries and throughout the United States.[9]

All of this changed in the 1960s, with the most severe impact falling on immigrants from Mexico. Some of the shift was long overdue, in particular the end of a discriminatory admission system that favored European immigrants. But around the same time, Congress capped the number of immigrants from Latin America for the first time in history. The Bracero program ended with no comparable new path for temporary workers. New admission restrictions made it virtually impossible for workers without close U.S. citizen relatives or a college degree to immigrate lawfully. People who could have come lawfully before the 1960s could no longer do so. All of a sudden, they had no line to stand in.[10]

Why didn't Congress just fund the deportation system more fully, and why didn't the executive branch just enforce the new laws? Part of the answer is that social and economic patterns that had emerged over generations would not disappear just because Congress changed the rules. At the same time, Congress understandably found it impractical or politically unpalatable to build an impervious border fence, to police every workplace and neighborhood where unauthorized migrants might be found, and then to arrest and deport them.

More fundamentally, the U.S. economy continued to rely on these workers to fill jobs, which in turn allowed employers to stay profitable, so that they could keep U.S. citizens and lawful permanent residents employed. For example, there was no federal law against hiring unauthorized workers until 1986. That year, Congress adopted a system of employer sanctions nominally meant to abolish unauthorized work, but the law was ineffective from the start and as a practical matter could not keep employers from hiring unauthorized workers. Migrants, driven by harsh economic and political conditions, especially in Latin America, came to take jobs that employers were ready to offer—often outside the law, for there was no other way. The U.S. immigration system became one that looked stringent on paper, but which tolerated and acquiesced in employment patterns that would soon lead to a large unauthorized population.[11]

BROAD DISCRETION AS INHERENT IN IMMIGRATION ENFOCEMENT

Congress has poured resources into immigration enforcement, especially since the 1990s, and it has enacted laws that facilitate the deportation of individuals once they are detected and put into the enforcement system. But nothing has changed the key facts: the extremely selective system of lawful admissions that offers no pathway for millions of people who readily find work in the United States. A large unauthorized population that is a significant part of the workforce has become an inherent, core feature of the immigration system. In turn, enforcement against millions of unauthorized migrants had to become selective and highly discretionary.

In this immigration system created and funded by Congress, the discretion that federal employees exercise to enforce the law (or not) in any given setting or against any given person is as practically important as the letter of the law, if not more so. The U.S. Supreme Court emphasized this outsized role of executive branch discretion in its landmark *Arizona v. United States* decision in 2012. In explaining how the content of immigration law was to be found not in federal immigration statutes, but rather in immigration law as it is actually enforced, the Court explained: "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."[12]

The traditional distinction between Congress' authority to make law and the President's authority to enforce law—always a very imprecise line to begin with—has little practical meaning in the immigration context. The reason is that Congress has created a system that requires the executive branch to create classifications for hands-on enforcement purposes, which in turn define the actual substance of immigration law. The President is the ultimate supervisor of executive branch officials who make countless discretionary decisions that determine who will be forced to leave the United States, and who can stay even if they are here unlawfully.

To be consistent with the rule of law, these discretionary decisions should be based on consistent and uniform application of enforcement priorities. Sometimes, government decisions to grant relief from deportation are made in the public eye. For example, immigration judges exercise judicial discretion on a daily basis, to grant relief in court hearings that follow criteria set out in statutes and case law. But far less visible are executive branch decisions about how to spend funds appropriated for enforcement, when to conduct raids at some homes and factories but not others, or whether to try to deport some noncitizens but not others. And historically, this sort of prosecutorial discretion has been exercised in ways that are sometimes inconsistent, unpredictable, and even discriminatory, and thus in conflict with the rule of law.[13]

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Recognizing the central role of discretion in immigration and the need for consistency, predictability, and non-discriminatory enforcement, the federal government started in the 1990s to issue prosecutorial discretion guidelines. Unsurprisingly, national security threats and persons with serious criminal convictions are a high priority. In 2011, the Obama administration reaffirmed and refined these guidelines, articulating general enforcement priorities and identifying categories of persons who might be suited for the favorable exercise of prosecutorial discretion. These included noncitizens who were brought to the United States as young children, who qualify for lawful status but are waiting in line, who have U.S.-citizen family members, who are long–term residents, or who have particular vulnerabilities.[14]

There is no serious doubt about the President's legal authority to issue these guidelines. Working within this zone of prosecutorial discretion, the guidelines were a sensible measure to bring consistency, predictability, and non-discrimination to enforcement. Put differently, the guidelines applied rule of law principles to an immigration system whose hallmarks are selective admissions and selective enforcement, and which in turn relies heavily on prosecutorial discretion.[15] These decisions were all in the exercise of the President's legal authority, and indeed his obligation to faithfully execute the immigration laws.

It bears emphasis that the guidelines sought not only to achieve consistency and predictability, but also to minimize discrimination. For execution of the immigration statutes to be faithful to the rule of law, it is essential to keep government officials, including state and local officials with a growing enforcement role, from targeting some noncitizens based on race or ethnicity. Caution and prudence do not require proof of pervasive discrimination. What is crucial is that discrimination may occur, and that if it does, it will be hard to detect and remedy. More generally, written public guidelines are far superior to checking sporadically and after the fact for inconsistency, unpredictability, or discrimination. With these guidelines, the administration moved toward a rational system for exercising prosecutorial discretion within the immigration system that it inherited.

FROM GUIDELINES TO DACA

Young people brought by their parents to the United States, generally known as the DREAMers, were a low priority group for deportation and especially suited to favorable prosecutorial discretion. These young people were integrated and acculturated in U.S. society, and they were broadly viewed as innocent of the decision to come to the United States. They had little direct connection with the countries that their parents had left.

Despite the guidelines, the exercise of discretion in cases involving DREAMers was erratic and inconsistent. In many cases, it took media campaigns and congressional interventions to release DREAMers from detention or prevent their deportation. It became clear that guidelines alone were not enough to conform discretionary decisions in the field to the administration's enforcement priorities.

The administration responded with a formal process for ensuring that its priorities were carried out consistently and predictably. This was DACA, the system for applying prosecutorial discretion guidelines to these young people. If they met criteria relating to their residence in the United States, age at arrival, education, and good behavior, they could receive a discretionary grant of temporary relief. In effect, each DACA recipient gets confirmation that he or she is a low deportation priority, as the guidelines had previously announced.

Why did the President go beyond prosecutorial discretion guidelines to a more formalized procedure like DACA? Does he have the legal authority to do so? The answer to both questions is that the faithful execution of the immigration laws requires the responsible exercise of discretion, which in turn requires—and certainly allows—adherence to values consistent with the rule of law. DACA establishes a real process, with initial eligibility criteria, an application form and fee, and documentary proof requirements, followed by decisions to grant or deny. Without such a system, predictability, uniformity, and safeguards against discrimination would remain elusive and probably unattainable.

DACA relief is granted or denied on a case-by-case basis. Though the President articulated the rationale for DACA in categorical terms and set out threshold requirements, no applicant has a right to be granted DACA. But even if one were to view the DACA procedure as categorical decision-making, it would remain within the President's authority as a legitimate exercise of prosecutorial discretion. The reason is that the legal authority to exercise prosecutorial discretion comes with the authority—indeed, the obligation—to adopt a system that is consistent with the rule of law. Designing and implementing such a system may need to rely heavily on categories.

More generally, the choices required in designing a system to administer prosecutorial discretion need to pursue the values of predictability, uniformity, and non-discrimination against other considerations. Those considerations may include whether temporary reprieves from deportation, or an accompanying grant of work authorization, might reduce the deterrent effect of immigration statutes, or might prompt more immigration to the United States.

On the merits of these points, it is far from clear that discretionary relief from deportation reduces deterrence. On the contrary, the information submitted by DACA applicants may later facilitate the denial of future immigration benefits to them, or even their deportation. And the choice to grant or deny work authorization as an aspect of temporary relief is part of the discretionary calculus, as the long-

standing governing regulations make clear. And what prompts or deters anyone to come to the United States is an exceedingly complex question at the heart of discretionary decisions about enforcement. More importantly, no matter how one might debate how the President should weigh these considerations, the fact remains that this is a policy debate. There is no doubt that the authority to exercise prosecutorial discretion includes the authority to adopt enforcement priorities, and to implement those priorities by establishing a system that calibrates the nature of temporary relief and balances categorical versus individualized decision-making.

Indeed, the enforcement rank-and-file's response to the pre–DACA prosecutorial discretion guidelines underscores why the President's authority allows him to consider compelling reasons to go beyond mere guidelines. The union of ICE agents responded to the guidelines by not allowing its members to participate in training sessions. Its president, Chris Crane, openly criticized the guidelines.[16] Then, once the President adopted DACA, the ICE agents union sued the federal government to block DACA's implementation.[17] Their very resistance shows why it was so crucial to apply prosecutorial discretion to this group of unauthorized migrants through a formal process rather than discretionary decisions in the field.

One other factor deserves discussion. The adoption of DACA in 2012 reflected not only the prosecutorial discretion guidelines, but also the awareness that several Congresses have actively considered legalization for the same group. A year later, a strong bipartisan majority in the U.S. Senate passed S. 744, which included broad-scale legalization. This is another factor in designing a prosecutorial discretion system that tries to be faithful to the rule of law—the choice to preserve the status quo pending legislation that is under serious consideration in Congress.

EXPANDING DACA

The President is now considering a similar approach to a larger group of noncitizens, such as persons who have close relatives who are DACA recipients or U.S. citizens, or persons who have been in the United States for a certain period of time. The same considerations that laid the legal foundation for DACA also authorize its expansion or to adopt similar temporary measures, as long as these things are done correctly. The President must be exercising his prosecutorial discretion by setting up a system to administer determinations to provide only temporary reprieves from deportation. The system must reflect his choices as prosecutor-in-chief to administer enforcement in the huge gap between the unauthorized population of over 11 million and the annual enforcement capacity of less than five percent of that figure. To do so, he can, for example, make the system predictable, consistent, non-discriminatory, and minimally disruptive for a significantly larger group of unauthorized migrants while Congress considers the issue. As long as the President does these things, he is faithfully executing the immigration laws within the system that he has inherited.

To sum up, some of the President's critics argue that he exceeded his legal authority with DACA, and that he lacks authority to make other groups of unauthorized migrants eligible for similar temporary relief. But that view is wrong because it ignores key facts. No one is suggesting that the President unilaterally change the rules for granting permanent residence or citizenship. All that is on the table are temporary reprieves. More fundamentally, the U.S. immigration system is one of selective admissions, selective enforcement, and broad executive branch discretion. As this system's chief prosecutor, the President must establish enforcement priorities, and then make sure that discretionary decisions to apply those priorities are uniform, predictable, and nondiscriminatory. As long as the President acts within this role, exercising his prosecutorial discretion to administer enforcement consistent with rule of law principles, he remains well within his legal authority.

ENDNOTES

[1] See Jeanne Batalova, Sarah Hooker, and Randy Capps, *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action* (Washington, DC: Migration Policy Institute 2014).

[2] See Julie Hirschfeld Davis and Julia Preston, "Obama Says He'll Order Action to Aid Immigrants," *New York Times*, July 1, 2014.

[3] Ed O'Keefe and Robert Costa, "House Passes Two Republican Measures in Response to Surge of Child Migrants," *Washington Post*, August 1, 2014.

[4] See Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a).

[5] See Andorra Bruno, *Unauthorized Aliens in the United States: Policy Discussion* (Washington, DC: Congressional Research Service, 2014), pp. 1-2.

[6] See John Morton, Director, U.S. Customs and Immigration Enforcement, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011.

[7] See Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[8] See U.S. Pub. L. No. 99-603, 100 Stat. 3359 (1986); Ruth E. Wasem, *Unauthorized Aliens Residing in the United States: Estimates Since 1986* (Washington, DC: Congressional Research Service, 2012), pp. 2-3.

[9] See Hiroshi Motomura, *Immigration Outside the Law* (New York, NY: Oxford University Press, 2014), pp. 34-42.

[10] Ibid., pp. 41-46.

[11] Ibid., pp. 22-55.

[12] *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (citation omitted).

[13] See Julia Preston, "Deportations Under New U.S. Policy Are Inconsistent," *New York Times*, November 13, 2011, p. A16. On racial or ethnic profiling in federally authorized local enforcement, see, e.g., Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Berkeley, CA: Chief Justice Earl Warren Institute on Law and Social Policy, 2009). On discrimination in immigration law, see Hiroshi Motomura, *Immigration Outside the Law* (New York, NY: Oxford University Press, 2014), pp. 31-52, 128-38.

[14] See Hiroshi Motomura, *Immigration Outside the Law* (New York, NY: Oxford University Press, 2014), pp, 26-29.

[15] Ibid., pp. 185-92.

[16] See Julia Preston, "Agents' Union Stalls Training on Deportation Rules," *New York Times*, January 8, 2012, p. A15.

[17] See Julia Preston, "Judge Dismisses Suit to End Deportation Deferrals," *New York Times*, August 1, 2013, p. A12.