

## What Legal Authority Does President Obama Have to Act on Immigration?

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Since the November mid-term elections, commentators have continually predicted that passing major immigration reform legislation in 2011 will be extremely difficult if not impossible. Community leaders and elected officials have nonetheless continued to call for Congress and President Obama to prioritize immigration on the domestic policy agenda and pass reform this year. In addition to calls for legislative action, some have urged the President to use his executive authority to fix problems in the immigration system.

On April 13, twenty-two U.S. Senators sent a letter to the President asking that deferred action be granted for high achieving undocumented immigrant students who would benefit from legislation like the DREAM Act. Congressman Luis Gutierrez, a trusted leader and voice within Latino communities, has launched a nationwide campaign asking for the President to take executive action—specifically by granting parole to thousands of immigrants and their families (Gutierrez, 3/31/11). Community leaders have launched efforts like the Change Takes Courage campaign to call on the President to end the deportations of people in compelling circumstances, students, and others who have contributed to the U.S. (Fair Immigration Reform Movement).

What the President intends to do still remains a question. In the first four months of 2011, he talked about immigration in his State of the Union address and has made other high profile statements about his commitment to reform. In the State of the Union he said:

I strongly believe that we should take on, once and for all, the issue of illegal immigration. And I am prepared to work with Republicans and Democrats to protect our borders, enforce our laws and address the millions of undocumented workers who are now living in the shadows. I know that debate will be difficult. I know it will take time. But tonight, let's agree to make that effort. And let's stop expelling talented, responsible young people who could be staffing our research labs or starting a new business, who could be further enriching this nation (Obama, 1/25/11).

More recently, on April 19, he convened a meeting with key stakeholders including leaders from labor, business, faith, and immigration advocacy communities to identify a path forward. The President has signaled, however, that he does not intend to grant protection from removal for a large class of people—such as young men and women who have done well in school and show promise of

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contributing to the economic growth of the country or giving back to the U.S. through military service. In answering a question about his ability to stay deportations at a March townhall meeting televised on *Univision*, President Obama said:

With respect to the notion that I can just suspend deportations through executive order, that's just not the case... There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as president (Obama, 3/28/11).

Inevitably, with a subject as controversial as immigration any speculation that the President might take action will result in charges that he is stepping beyond his authority. Last July, an internal draft memorandum not yet finalized by DHS caused a firestorm of controversy and drew allegations that the Administration was circumventing Congress by considering options for executive action that would grant relief to certain populations (USCIS, 7/10).

This article explores three concepts — prosecutorial discretion, deferred action, and parole — that are being discussed in public debates but are frequently misunderstood. Mention of these ideas often leaves people asking "Can the President take such steps? What is the legal basis authorizing the executive branch to act? Or, would the President be overstepping the bounds of his power?"

#### *Prosecutorial Discretion*

In April 2009, shortly after he assumed office, Attorney General Eric Holder addressed a group of newly minted Assistant U.S. Attorneys. "Your job as assistant U.S. attorneys is not to convict people" Holder said, according to press reports, "Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do

something other than that is to be ignored. Any policy that is at tension with that is to be questioned and brought to my attention. And I mean that (AP, 4/9/09)."

Prosecutorial discretion is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The exercise of discretion is central to American law enforcement and upholding the rule of law. All law enforcement agencies, including those that enforce immigration laws, have the authority to decide who within their jurisdictions to investigate, arrest, detain charge, and prosecute. When it comes to immigration law, the exercise of prosecutorial discretion not only conserves limited enforcement resources, but also protects core American values of humanitarianism and fairness. At every step in the law enforcement process, immigration officers, government attorneys, and their superiors must make choices as to whether to pursue a course of action. This may involve the decision to question someone, or issue a formal charging document that initiates immigration removal proceedings, or pursue a case to the fullest extent the law allows, or even terminate action in a case. A decision to act in one instance by necessity means a choice to forego pursuit of action in another.

On several occasions Secretary Janet Napolitano has stated that DHS's enforcement of immigration laws must be done in pursuit of clear priorities designed to protect the United States from those who pose serious threats to our public safety and national security. While in El Paso, TX in January, she said:

Our approach to the enforcement of immigration laws is guided by a common sense premise that is based on sound prosecutorial practice: implement the measures that best protect public safety and produce the most significant results. This approach focuses on identifying criminal aliens and those who pose the greatest risk to our communities, and

prioritizing them for removal. (Napolitano, 1/31/11)

These broad statements are backed by a constellation of internal department guidelines, such as a June 2010 memorandum issued by the Director of Immigrations and Customs Enforcement (ICE) John Morton which sets forth a hierarchy of which non-citizens ICE officers will target for investigation, arrest, and deportation. The memo lists those convicted of felony crimes as the top enforcement priority (Morton, 6/30/10).

DHS and legacy Immigration and Naturalization Service (INS) have also issued several memos in the past decade that specifically address the exercise of prosecutorial discretion. The most comprehensive of these is a November 2000 memorandum by former INS Commissioner Doris Meissner:

The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law.

[INS] officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process... In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice (Meissner, 11/17/10).

These memoranda provide a clear framework for DHS's prerogative to exercise prosecutorial discretion. Though discretion can be exercised in many different forms and at all stages of enforcement, the recent calls for deferred action and parole have drawn significant attention and accordingly they are given further consideration.

### *Deferred Action*

Like many other forms of prosecutorial discretion, deferred action is an act of administrative convenience available to the government to give lower priority for prosecution in certain cases. It is founded in DHS's overall authority for the administration and enforcement of the immigration law set forth in INA § 103, 8 U.S.C. § 1103, the regulations, 8 C.F.R. § 274a.12(c)(14), and legacy INS Operations Instructions. Typically, deferred action is granted by the agency for a specific period of time during which the DHS may refrain from taking any number of enforcement actions against an individual. Accordingly, it can be granted at any stage of enforcement, before a removal order is entered or after an order becomes final which would then delay the execution of the order during the period of the grant.

Deferred action is merely a temporary relief that confers no legal immigration status upon the noncitizen and therefore does not provide long-term stability for the individual. DHS can initiate enforcement actions when the deferred action grant expires. But by temporarily choosing to delay an enforcement action against a foreign national, the agency can address humanitarian concerns which would otherwise be triggered by arrest, detention or removal. The regulations enable DHS to grant travel authorization for recipients of deferred action. DHS also has the authority to grant employment authorization for those granted deferred action.

In this regard, deferred action provides a solution that temporarily suspends the enforcement of immigration laws when DHS determines that execution of enforcement is not warranted at that particular time.

Though deferred action is typically done on an individual, case-by-case basis, in the past DHS has designated certain categories of individuals as eligible for deferred action, such as battered immigrants under the Violence Against Women Act

(VAWA). Prior to regulations being issued relating to U nonimmigrant visas, DHS announced that potential beneficiaries of U visas were eligible, under certain circumstances, for deferred action. Similarly, DHS granted deferred action to foreign academic students who had been affected by Hurricane Katrina.

In June 2009, Secretary Napolitano granted a two-year period of deferred action to widows and widowers of U.S. citizens (including their unmarried children under 18 years-old) who were residing in the United States and were married less than two years at the time of the U.S. citizen's death. Deferred action was extended to those who had entered without inspection, in addition to those who had been inspected and admitted. Secretary Napolitano stated:

"Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved" (Napolitano, 6/9/09).

Recently, DHS has granted deferred action on an individual basis to many individuals who have been present in the United States since childhood and frequently have other compelling equities such as educational and vocational achievement. Often called Dreamers due to their apparent eligibility for relief if the DREAM Act were enacted, these cases are good opportunities for DHS to exercise discretion given the strong balance of equities in favor of deferred action.

**Long-Term Options for Those Granted Deferred Action.** By itself, deferred action would not provide any legal immigration status to the grantee. But grantees who become gainfully employed in the future, for example in a professional or specialty occupation, could be eligible for an employment-based nonimmigrant or immigrant visa. Similarly, a

deferred action grantee may become eligible for permanent residence upon marriage to a U.S. citizen. In each of these instances, it is likely that the individual would have to overcome other legal obstacles, such as having been present unlawfully in the U.S., before obtaining legal status. These obstacles would not be cured by the grant of deferred action.

#### *Parole*

DHS also has the authority to grant parole for individuals to enter the U.S. on a temporary basis for urgent humanitarian reasons or significant public benefit. See INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Typically parole is intended for individuals who have been residing outside of the United States, such as those who have urgent medical needs requiring treatment in the United States. For example, in January 2010 following the devastating earthquake in Haiti, DHS announced a humanitarian parole policy allowing certain orphaned Haitian children to enter the U.S. on a temporary basis. The policy was established to support the disaster recovery efforts and required review on an individual basis of each child's case (DHS, 1/18/10).

Though it is most frequently made available to those outside the country, parole can be granted to individuals already present in the United States, including those who entered without inspection, so long as they do not have a final order of removal. DHS may grant parole to individuals already present in the United States by paroling them "in place." Currently, DHS is "paroling in place" the spouses of active service military in select situations. The use of parole was designed to aid the thousands of spouses married to service members who would otherwise be forced to leave the country and endure a long period of separation from their spouses before being eligible for a visa to reunify. Several members of Congress from both major political parties urged the President to implement that policy.

For the beneficiary, parole differs most significantly from deferred action in that it confers lawful immigration status. Parole constitutes a legal immigration status and accordingly would stop the continuing accrual of unlawful presence that happens for anyone in the U.S. without authorization. Parole also allows the grantee to obtain employment authorization. Those who have a final order of removal may still be paroled if the government agrees to reopen their cases retroactively.

Only President Obama knows for sure whether he will act on any of the options described above—be it on an individual basis or on behalf of a larger category of individuals. One thing we can be sure of is that, if he does implement a major executive action, he will be promptly accused for transgressing the limits of his legal powers. Such allegations would be baseless. The executive branch has well-established authority as well as the duty to exercise prosecutorial discretion at all times in the enforcement of our immigration laws. Whether it is deferred action, parole, or something else, these concepts are grounded in statute, regulations and sound principles of law enforcement. Those who assail the President will no doubt have lots of arguments to draw upon. But the President's lack of executive branch power is not one of them.

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