

MEMORANDUM

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To: Interested Parties

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Re: Executive Branch Authority Regarding Implementation of Immigration Laws
and Policies

The role of executive branch authority with respect to the implementation of immigration laws and policies has been well documented. This memorandum offers a short overview of the scope of executive branch authority and provides examples of its use in the immigration context.

Exercising Executive Authority

The authority of law enforcement agencies to exercise discretion in deciding what cases to investigate and prosecute under existing civil and criminal law, including immigration law, is fundamental to the American legal system. Every prosecutor and police officer in the nation makes daily decisions about how to allocate enforcement resources, based on judgments about which cases are the most egregious, which cases have the strongest evidence, which cases should be settled and which should be brought forward to trial.

The Supreme Court has made it clear that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”¹

In the immigration context, prosecutorial discretion is exercised at every stage in the enforcement process—which tips or leads will be investigated, which arrests will be made, which persons will be detained, which persons will be released on bond, which cases will be brought forward for removal hearings or criminal prosecution, and which removal orders will be executed.

Despite the massive allocation of resources Congress has dedicated to immigration enforcement activities, the funding has limits and the agency must make thoughtful decisions about prosecutorial priorities. In fact, the President has repeatedly announced that the Administration’s interior enforcement priority is the prosecution and removal of immigrants who have committed serious crimes. To ensure that this and other prioritization decisions are followed and implemented, it is not uncommon for law enforcement agencies within and outside of the immigration context to provide clear guidance and training to its officers about the exercise of prosecutorial discretion. This type of guidance is not unusual. In fact, numerous memos have been issued by the DHS and its predecessor INS over the years setting forth agency priorities and seeking to provide its officers with clear guideposts for carrying out those priorities. The challenge is often in ensuring that such guidance is understood and followed on the frontlines of immigration enforcement.

Prosecutorial discretion can be exercised on a case-by-case basis with respect to individuals who have come into contact with law enforcement authorities. Or the government can exercise prosecutorial discretion by allowing individuals from explicitly defined groups that it does not consider to be enforcement priorities to ask affirmatively that discretion be applied in their case. This exercise of executive authority is not contrary to current law, but rather a matter of the extension and application of current law to contemporary national needs, values and priorities.

Deferred Action

The executive branch, through the Secretary of Homeland Security, can exercise discretion not to prosecute a case by granting “deferred action” to an otherwise removable (colloquially referred to as “deportable”) immigrant.

The former INS had guidelines in the form of “Operations Instructions” regarding the granting of deferred action. These guidelines provided for deferred action in cases where “adverse action would be unconscionable because of the existence of appealing humanitarian factors.”²

Currently, deferred action is considered to be “a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process.”³

¹ *Heckler v. Chaney* 470 U.S. 821, 831 (1985).

² *See* (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii)(1975).

DHS has also described deferred action as an exercise of agency discretion that authorizes an individual to temporarily remain in the U.S. Regulations describe deferred action as “an act of administrative convenience to the government which gives some cases lower priority” (for enforcement action).⁴ DHS has stated in recent correspondence with the Hill that factors to be considered in evaluating a request for deferred action include the presence of sympathetic or compelling factors.

Deferred action does not confer any specific status on the individual and can be terminated at any time pursuant to the agency’s discretion. DHS regulations, however, do permit deferred action recipients to be granted employment authorization.⁵

Deferred action determinations are made on a case-by-case basis, but eligibility for such discretionary relief can be extended to individuals based on their membership in a discrete class. For example, in June 2009, the Secretary of DHS granted deferred action to individuals who fell in to the following class: widows of U.S. citizens who were unable to adjust their status due to a statutory restriction (related to duration of marriage at time of sponsor’s death).⁶ Congress subsequently enacted a change in the law to address this particular problem.

Another recent example of the exercise of such executive authority to a class is the grant of deferred action to VAWA (Violence Against Women Act) applicants whose cases were awaiting the promulgation of regulations by DHS. Nearly 12,000 individuals were granted deferred action in 2010 under this exercise of executive authority.

Extended Voluntary Departure/Deferred Enforced Departure

Before the addition of “Temporary Protected Status” to the Immigration and Nationality Act in 1990, the Attorney General used his/her executive authority to temporarily suspend the removal of people from particular countries from the United States because of political strife, natural disasters, or other crises. Temporary relief known as “Extended Voluntary Departure” (EVD) was granted to citizens of Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, Ethiopia, and China in response to various periods of political upheaval and natural disaster between 1960 and 1990.

In the Immigration Act of 1990, Congress enacted the “Temporary Protected Status” (TPS) program. The statute set forth guidelines restricting the Secretary’s authority to grant relief from

³(See “*Response to Recommendation #32, Deferred Action*”, August 7, 2007, at http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf).

⁴ 8 C.F.R. 274a.12(c)(14).

⁵ See 8 C.F.R. § 274a.12(c) (14).

⁶See “*Guidance Regarding Surviving Spouse of Deceased U.S. Citizens and their Children*”, June 15, 2009, at <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/June%202009/surviving-spouses-deferred-action-guidance.pdf>.

removal exclusively on the basis of nationality.⁷ TPS can only be granted if, after consultation with the foreign government, there is a determination that it is unsafe for foreign nationals to return home due to armed conflict, natural disasters, or other extraordinary conditions.

Those TPS restrictions, however, only limit the exercise of agency discretion when the sole criterion for providing protection from removal is nationality. They do not limit the *President's* exercise of class or group-based discretion under what has come to be known as “Deferred Enforced Departure” (DED). The president may direct that DED be granted to any group of foreign nationals pursuant to his foreign relations powers and his prosecutorial discretion authority. The president may grant DED for any specific amount of time and it typically is accompanied by employment authorization.

Executive authority in the form of “Deferred Enforced Departure” (DED) relief was exercised by President George W. Bush in 2007, and extended by President Obama in 2009, for certain nationals of Liberia.⁸

Executive authority granting “Deferred Enforced Departure” was also exercised by President George H.W. Bush for Chinese nationals in the wake of Tiananmen Square events,⁹ and by President Clinton for certain Haitian nationals.¹⁰

Humanitarian Parole or Parole in Place

Under current law, the executive branch, through the Secretary of Homeland Security, has the authority to “parole” or permit the entry of a person into the United States for “urgent humanitarian reasons or significant public benefit.”¹¹ When applied to persons already living in the U.S., this authority is referred to as “parole in place” (PIP). Congress has limited this authority to individual, “case-by-case” determinations, precluding prior practice of using parole authority to admit certain classes of refugees.

Signing Statements

⁷ See INA § 244.

⁸ See “*Fact Sheet: Liberians Provided Deferred Enforced Departure (DED)*,” September 12, 2007, at http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm; see also “*Deferred Enforced Departure*” at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnexto id=fbff3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=fbff3e4d77d73210VgnV CM100000082ca60aRCRD>.

⁹ see *Executive Order 12,711*, April 11, 1990, at <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-30133/0-0-0-39631/0-0-0-39863.html>.

¹⁰ See “*Deferred Enforced Departure for Certain Haitian Nationals*,” December 23, 1997, at http://www.ice.gov/doclib/foia/dro_policy_memos/deferredenforceddepartureforcertainhaitiannalions12231997.pdf.

¹¹ See INA § 212(d)(5)(A).

Another example of how every Administration makes interpretive judgments regarding how they view and plan to enforce the law is through signing statements.

Every Administration brings its own view and interpretations to bear as it implements newly-enacted laws. These views have commonly been expressed in Presidential “signing statements” that indicate how the President intends to implement any given law and whether he considers any specific provisions of a law to be unconstitutional. For example, when President George H.W. Bush signed the Immigration Act of 1990 into law, he took specific exception to the provision of law making Temporary Protected Status the sole basis for allowing noncitizens to remain temporarily in the United States based on nationality or region of origin. He stated, “I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions.”¹²

Signing statements often serve as the basis for shaping regulations and other administration policy determinations. Thus, when President Clinton expressed his displeasure over the unequal treatment of different nationalities in the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), he directed the Attorney General to take the history and background of the people covered as well as the “ameliorative” nature of the law into account when drafting regulations.¹³

More recently, President George W. Bush issued 161 signing statements affecting over 1,100 provisions of law in 160 Congressional enactments. Similarly, President Obama most recently indicated in a signing statement that he considered a budget rider concerning the appointment of certain personnel unconstitutional, writing “Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.”¹⁴

¹² Statement on the Signing of the Immigration Act of 1990, November 29, 1990, available from the American Presidency Project: www.presidency.ucsb.edu , <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#ixzz1KvDIYZql>.

¹³ Statement on the Signing of District of Columbia Appropriations Legislation, November 19, 1997, available at: <http://www.presidency.ucsb.edu/ws/index.php?pid=53588#axzz1KvDSsLP8>.

¹⁴ Statement by the President on H.R. 1473, April 15, 2011, available at: <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473>