
RECENT EXECUTIVE OPINION

IMMIGRATION LAW — OFFICE OF LEGAL COUNSEL ISSUES OPINION ENDORSING PRESIDENT OBAMA'S EXECUTIVE ORDER ON DEFERRED ACTION FOR PARENTAL ACCOUNTABILITY. — The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (Nov. 19, 2014).

Recent executive actions on drugs, healthcare, and immigration have refocused public attention on an important but unsettled legal issue: the scope of the President's enforcement discretion.¹ If renewed attention has proven anything, it is that demarcating the precise boundaries of "prosecutorial" discretion is not easy.² When an act is either an appropriate exercise of discretion or an impermissible shirking of constitutional or statutory responsibilities, the line between lawful and unlawful nonenforcement can have especially far-reaching consequences for our coordinate branches of government.

Ongoing efforts to delimit the President's enforcement discretion took a new turn on November 20, 2014, when President Obama announced an initiative that would extend a form of temporary deportation relief known as "deferred action"³ to certain parents of U.S. citi-

¹ See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 671 (2014) (describing the Obama Administration as "abstaining from investigation and prosecution of certain federal marijuana crimes, postponing enforcement of key provisions of the Affordable Care Act, and suspending enforcement of removal statutes against certain undocumented immigrants"). For examples of renewed debate regarding the enforcement of immigration laws, see Bruce Ackerman, Op-Ed., *Like the Emancipation Proclamation, Obama's Order Forces Democracy*, L.A. TIMES (Nov. 21, 2014, 6:54 PM), <http://www.latimes.com/opinion/op-ed/la-oe-ackerman-obama-immigration-20141123-story.html> [<http://perma.cc/Y5UK-Z8XH>]; and Jeff Sessions, Op-Ed., *Sen. Sessions Reacts: We Must Stop Emperor Obama*, USA TODAY (Nov. 20, 2014, 8:24 PM), <http://www.usatoday.com/story/opinion/2014/11/20/obama-immigration-amnesty-reform-executive-action-overreach-imperial-emperor-column/19293813> [<http://perma.cc/788F-M7AM>].

² Some commentators begrudge the label "prosecutorial" to describe enforcement discretion when the relevant laws are noncriminal. See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (placing quotation marks around the term "prosecutorial discretion" throughout). "However, even agencies that do not prosecute or engage in law enforcement have been recognized as having discretion . . . in determining whether to enforce particular violations." KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 1 (2013).

³ Deferred action recipients may apply for work authorization and will temporarily cease to accrue "unlawful presence" time for certain statutory purposes. See The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., at 2 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/C7DF-GKMX>] [hereinafter The Opinion].

zens or lawful permanent residents (LPRs).⁴ Prior to the announcement, the Department of Justice's Office of Legal Counsel (OLC) published an opinion concluding that the new program was a permissible exercise of Department of Homeland Security (DHS) discretion to enforce the immigration laws.⁵ The same opinion determined that another proposal to extend the same protections to parents of Deferred Action for Childhood Arrivals⁶ (DACA) recipients was legally *impermissible*,⁷ reasoning that the latter proposal did not fulfill "congressional policies and priorities" as reflected in prior enactments.⁸ In this way, the OLC sought to draw a line in the sand, anticipating the litany of voices accusing the President of overreach.⁹ Though the OLC commendably sought to devise some means of cabining enforcement discretion in immigration, its "congressional priorities" analysis fell short of conveying a workable limiting principle.

The OLC opinion is principally concerned with addressing two questions: first, whether DHS could extend deferred action to the parents of U.S. citizens and LPRs; and second, whether DHS could also grant deferred action to the parents of recipients of DACA — a 2012 initiative according deferred action to certain aliens who had entered the United States before their sixteenth birthdays.¹⁰

The Opinion begins by identifying the source of DHS's authority to allow removable aliens to remain in the country.¹¹ The Immigration and Nationality Act¹² (INA) vests deportation authority in the execu-

⁴ See *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Apr. 1, 2015) [<http://perma.cc/EL2B-N2YR>]. This was one of several immigration-related executive orders. Other actions included enhancing border enforcement and prioritizing the deportation of felons. See *id.*

⁵ The Opinion, *supra* note 3, at 2.

⁶ Issued by policy memorandum in June of 2012, DACA granted a form of temporary administrative relief from deportation called *deferred action* to "certain people who came to the United States as children and [who met] several guidelines" focusing on criminal and educational or service history. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Mar. 10, 2015) [<http://perma.cc/CU2K-3SGJ>]. Eligible individuals could apply for deferred action and work authorization for a period of two years (later extended to three years), subject to renewal. See *Executive Actions on Immigration*, *supra* note 4.

⁷ The Opinion, *supra* note 3, at 2.

⁸ See *id.* at 31–33.

⁹ See, e.g., Delahunty & Yoo, *supra* note 2; Sessions, *supra* note 1.

¹⁰ The Opinion, *supra* note 3, at 1–2. The Opinion also stated that DHS could prioritize the deportation of certain classes of aliens. The three prioritization categories were as follows: (1) "aliens who pose particularly serious threats to national security, border security, or public safety"; (2) "aliens convicted of multiple or significant misdemeanor offenses"; and (3) "other aliens who have been issued a final order of removal on or after January 1, 2014." *Id.* at 8.

¹¹ See *id.* at 3–7.

¹² 8 U.S.C. §§ 1101–1537 (2012). The INA established a "comprehensive scheme governing immigration and naturalization." The Opinion, *supra* note 3, at 3.

tive, and federal agencies wield “discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action.”¹³ After all, the decision to enforce is a “complex judgment” involving multiple factors — from resource effects to deterrence value — that agencies are uniquely positioned to consider.¹⁴ The principles underlying this discretion apply “with particular force in the context of immigration,”¹⁵ wherein the Court has previously supported “broad discretion”¹⁶ as a “principal feature of the removal system.”¹⁷

Historically, discretion has encompassed a number of deferred action programs resembling the ones considered here. Though deferred action first “developed without express statutory authorization,”¹⁸ it has since “become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court.”¹⁹ In fact, widespread acceptance of deferred action has encompassed not only ad hoc, individualized relief,²⁰ but also *class*-based deferred action programs, which provide discretionary relief to discrete categories of aliens.²¹ As for Congress, it has “long been aware” of the executive’s deferred action policies and never once “acted to disapprove or limit the practice.”²² Lawmakers have enacted many statutes that have either “assumed that deferred action would be available . . . or expressly directed that deferred action be extended.”²³

Expansive though it is, the President’s enforcement discretion is not limitless. In the OLC’s analysis, legal constraints on non-enforcement derive ultimately from the Take Care Clause²⁴ and are spelled out in a series of judicial opinions following a focal 1985 case,

¹³ The Opinion, *supra* note 3, at 4.

¹⁴ *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

¹⁵ *Id.*

¹⁶ *Id.* at 5 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012)).

¹⁷ *Id.* (quoting *Arizona*, 132 S. Ct. at 2499) (internal quotation marks omitted).

¹⁸ *Id.* at 13 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999)) (internal quotation marks omitted).

¹⁹ *Id.*

²⁰ *See id.* at 14. This practice of granting ad hoc deferred action requests continues today. *Id.*

²¹ *Id.*; *see id.* at 15–18 (detailing five episodes in which the executive granted deferred action to entire classes of aliens: battered aliens, T- and U-visa applicants, students affected by Hurricane Katrina, widows and widowers of U.S. citizens, and childhood arrivals (DACA)).

²² *Id.* at 18.

²³ *Id.* The Opinion notes that when Congress reauthorized the Violence Against Women Act, it explicitly expanded the deferred action program under the Act. *See id.* at 18–19.

²⁴ *See id.* at 4 (locating the President’s enforcement discretion in his constitutional duty to “take Care that the Laws be faithfully executed” (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted)). The Opinion also acknowledges that executive nonenforcement discretion has often been policed politically. *See id.* at 6 (“Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief When Congress has been dissatisfied with Executive action, it has responded . . . by enacting legislation to limit the Executive’s discretion in enforcing the immigration laws.”).

Heckler v. Chaney.²⁵ The Opinion interprets this case law as standing for four general principles: (1) enforcement decisions must reflect “factors which are peculiarly within [agency] expertise”;²⁶ (2) enforcement actions must be “consonant with . . . the congressional policy underlying the [governing] statutes”;²⁷ (3) the executive cannot “consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities”;²⁸ and (4) “non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis.”²⁹

The Opinion next applies this framework to DHS’s proposal to extend deferred action to parents of U.S. citizens and LPRs.³⁰ DHS had justified the program on two grounds: resource constraints limiting annual deportations to a fraction of the total undocumented population and the humanitarian interest in uniting parents with their lawfully present children.³¹ Because courts have acknowledged both factors to be distinctively within agency expertise, prong one is satisfied.³² The Opinion then finds that prong two — whether the program would be consonant with congressional policy — is also met.³³ After all, “[n]umerous provisions of the [INA] reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status.”³⁴ Moreover, the proposed program’s benefits are “sharply limited in comparison to the benefits Congress has made available through statute.”³⁵ Because deferred action is a temporary remedy that confers no lawful status, it would not “circumvent the limits Congress has placed.”³⁶ Third, the proposed program would not amount to an “abdication” of statutory responsibilities because those parents of citizens and LPRs who are eligible for deferred action are already

²⁵ 470 U.S. 821 (1985).

²⁶ The Opinion, *supra* note 3, at 6 (quoting *Chaney*, 470 U.S. at 831) (internal quotation marks omitted).

²⁷ *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

²⁸ *Id.* at 7 (alteration in original) (quoting *Chaney*, 470 U.S. at 833 n.4) (internal quotation marks omitted).

²⁹ *Id.* (citing several lower court decisions, including *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994)).

³⁰ *See id.* at 25–31.

³¹ *See id.* at 25. DHS cited the fact that congressional appropriations enable DHS to deport fewer than 400,000 of 11.3 million undocumented immigrants annually. *Id.* at 1.

³² *See id.* at 25–26 (“[T]he need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency’s exercise of enforcement discretion.” *Id.* at 25.).

³³ *Id.* at 26–28.

³⁴ *Id.* at 26 (citing *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966)).

³⁵ *Id.* at 27.

³⁶ *Id.*

“near the bottom of the list of the agency’s [valid] removal priorities.”³⁷ The fact that the proposal also permits case-by-case discretion³⁸ — the fourth prong — only further “alleviates potential concerns that DHS has . . . created a categorical, rule-like entitlement” that would raise more serious abdication concerns.³⁹ Indeed the program “would resemble in material respects” other programs “Congress [had] implicitly approved in the past.”⁴⁰

Having endorsed deferred action for the parents of citizens and LPRs, the Opinion turns finally to the *illegality* of extending those protections to parents of DACA recipients. Based on perceived incompatibility with congressional policy, the Opinion distinguishes the programs in two ways: First, though the INA contains several provisions expressing congressional concern for uniting close relatives with those legally entitled to live in the United States, it “do[es] not express comparable concern for uniting persons who lack lawful status.”⁴¹ Second, extending deferred action to parents of DACA recipients “would represent a significant departure from deferred action programs that Congress has implicitly approved in the past.”⁴² By expanding the humanitarian rationale of family unity to include those lacking legal status, the proposed program “does not have a clear stopping point,” opening the door for relatives of relatives of relatives to also receive relief.⁴³

In the end, the Opinion draws a bright line between actions that are “consistent with the congressional policies and priorities embodied in the immigration laws” and those that are not.⁴⁴ In so doing, it places the President’s immigration powers within an administrative law framework, applying a model of delegated authority that hews closely to congressional priorities.⁴⁵ Assuming *arguendo* that the OLC chose

³⁷ *Id.* at 28.

³⁸ Even if an undocumented immigrant meets all of the deferred action criteria, a “USCIS official [has] substantial discretion to determine whether a grant of deferred action is warranted” if there are any other factors present that might make deferred action inappropriate. *Id.* at 29.

³⁹ *Id.* at 28–29.

⁴⁰ *Id.* at 29. The Opinion also assessed whether the proposed program would be legally problematic by virtue of its size, given that an estimated four million individuals (of approximately eleven million total) would be eligible. *Id.* at 30. It found size to be unproblematic because the program covered a population to which “Congress has granted a prospective entitlement to lawful status without numerical restriction,” and because eligible applicants would be only a “fraction” of the total number of undocumented immigrants in the United States. *Id.* at 30–31.

⁴¹ *Id.* at 32 (citing various INA provisions: 8 U.S.C. § 1151(b)(2)(A)(i) (2012), which allows citizens to petition for parents, spouses, and children, and 8 U.S.C. § 1229b(b)(1), which permits cancellation of removal for relatives of LPRs and citizens).

⁴² *Id.*

⁴³ *Id.* at 33.

⁴⁴ *Id.*

⁴⁵ *Cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 474 (2009) (describing how, accompanying the rise of the administrative state, a “strong

the proper legal framework, its application of the purposive principle suffers from two flaws: it seems to preclude the legality of DACA, and it does not grapple seriously enough with the genuine complexities attendant to discerning Congress's immigration goals.

First, when taken to its logical conclusion, the Opinion's application of its limiting principle throws into doubt the validity of earlier programs that the OLC explicitly endorses.⁴⁶ In trying to cast deferred action for parents of citizens and LPRs as qualitatively distinct from a similar program for parents of DACA recipients, the Opinion focuses on how "[m]any provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members."⁴⁷ But if legal status were dispositive, then the OLC had little reason to validate DACA in 2012, which granted deferred action to populations brought to the United States as children.⁴⁸ DACA's eligibility criteria do not reference ties to individuals with legal status.⁴⁹

The necessary conclusion is that the OLC justified DACA by some congressional priority besides family ties to legal residents. But because the OLC did not publish its 2012 oral endorsement of DACA,⁵⁰ little is publicly known. The fullest exposition of its DACA analysis is contained in footnote eight of the Opinion, which summarizes two reasons for validating DACA: first, DACA was to be implemented on a "case-by-case basis," and second, "the concerns animating DACA were . . . consistent with the types of [humanitarian] concerns that have customarily guided the exercise of immigration enforcement discretion."⁵¹ Since both deferred action programs contemplated in the Opinion employ "case-by-case" discretion, the first reason does not set DACA apart from the other programs. And because the Opinion neglects to specify in any way the "concerns that have customarily guided" discretion,⁵² it remains unclear what congressional priorities authorized DACA but not deferred action for parents of DACA recipients.

Of course, one can conceive of several plausible policy reasons for supporting DACA, including the idea that heightened forgiveness should be given to less blameworthy individuals who were brought to

conception of delegation . . . came to define . . . immigration law," in contrast to "inherent authority" justifications for executive power in immigration).

⁴⁶ See Steve Legomsky, *Why Can't Deferred Action Be Given to Parents of the Dreamers?*, BALKINIZATION (Nov. 25, 2014), <http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html> [<http://perma.cc/7JY8-GU4Q>].

⁴⁷ The Opinion, *supra* note 3, at 32.

⁴⁸ See *id.* at 17–18.

⁴⁹ See *id.* at 17.

⁵⁰ See *id.* at 18 n.8.

⁵¹ *Id.*

⁵² See *id.*

this country as children.⁵³ But for culpability considerations to constitute a *legal* argument under the OLC's framework, they would have to be somehow rooted in congressional priorities. The OLC has publicized no such argument. As such, because the Opinion does not justify DACA on the basis of any specific congressional priority, and because the only operative priority expressed in the Opinion itself is that of uniting families with lawful residents, the OLC's reasoning casts doubt upon the legality of a program that the OLC has previously and again, in this Opinion, expressly affirmed.⁵⁴

The inconsistency between the Opinion's reasoning and the OLC's justification for DACA illustrates some of the broader difficulties with applying "congressional priorities" as a constraint on discretion. These difficulties are particularly acute when attempting to discern priorities from U.S. immigration laws, which are notoriously complex and saddled with overlapping goals.⁵⁵ Given this, the OLC should have done more to anticipate and address the foreseeable criticism that it had cherry-picked provisions or manipulated levels of generality.⁵⁶ Consider the section of the Opinion highlighting the absence of congressional concern with uniting family members without legal status. As several commentators note, the INA actually "includes humanitarian-based waivers and other forms of discretion that permit considerations of family ties without regard as to whether those family members are U.S. citizens or lawful permanent residents."⁵⁷ In this view, "[f]amily unity is a value that exists separate and apart from status, and its promotion through broad deferred action is consistent with the legal authority delegated to the President."⁵⁸ Unfortunately, the Opinion

⁵³ Shades of this argument can be found in President Obama's presidential remarks announcing DACA: "[These young people] were brought to this country by their parents — sometimes even as infants — and often have no idea that they're undocumented . . ." Remarks on Immigration Reform and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. 483, at 1 (June 15, 2012), <http://www.gpo.gov/fdsys/pkg/DCPD-201200483/pdf/DCPD-201200483.pdf> [<http://perma.cc/Z7MG-RP2N>].

⁵⁴ See The Opinion, *supra* note 3, at 18 n.8.

⁵⁵ See MANUEL & GARVEY, *supra* note 2, at 18 (pointing to "multiple — sometimes inconsistent — enforcement mandates from Congress" in immigration law).

⁵⁶ See, e.g., Adam Cox & Cristina Rodríguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014), <http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html> [<http://perma.cc/9CND-N4K7>] (pointing to the Opinion's "level-of-generality problem").

⁵⁷ Alina Das, *Refocusing the Debate on Policy, Not Legal Authority*, BALKINIZATION (Nov. 24, 2014), <http://balkin.blogspot.com/2014/11/refocusing-debate-on-policy-not-legal.html> [<http://perma.cc/SV4X-E2RW>]. Another commentator has noted that the "INA contains a host of discretionary relief provisions . . . [that] reflect other humanitarian and practical reasons for granting relief, independently of family." Legomsky, *supra* note 46 (pointing to "section 212(h)(1)(A), which waives inadmissibility based on criminal convictions when the relevant activities occurred at least 15 years earlier; section 208 (asylum); and section 249 (registry)"].

⁵⁸ Das, *supra* note 57.

expends very little effort in justifying how it arrived at its legal-status formulation of intent, citing three INA provisions without considering alternatives.⁵⁹ Nor does it acknowledge contrary evidence when stating that “immigration laws do not express comparable concern for uniting persons who lack lawful status . . . in the United States.”⁶⁰

In fact, one might read other provisions of the INA as reflecting congressional priorities that are actually subverted by deferred action for parents of citizens and LPRs. This, too, receives little attention in the Opinion. Consider the INA’s requirement that only U.S. citizens who are at least twenty-one years old can sponsor their parents for immigration.⁶¹ At least one commentator has drawn from this provision a strong congressional intent to “deter undocumented [immigrants] from leveraging post-entry US citizen children.”⁶² If true, then a deferred action program for parents of U.S. citizens would fly in the face of a clear congressional purpose to strictly limit any benefits that might accrue to foreign nationals who deliberately bear children on American soil.⁶³ But alternatively, one might read this provision more narrowly as reflecting a congressional desire to limit only full legal-status benefits for this class of foreign nationals. Because deferred action is a form of temporary relief that confers no legal status, implementing deferred action for parents of citizens and LPRs would not frustrate legislative priorities. This is not to take one reading of the statute over another, but to point instead to ways in which the Opinion’s limiting principle presents much thornier challenges than the OLC’s Opinion suggests.

In these ways, the Opinion does comparatively little to address the serious challenges attendant to applying “congressional priorities” as its limiting principle. A tighter analysis would have highlighted why alternative interpretations, such as a more general emphasis on family unity irrespective of legal status, should or should not have been rejected. The OLC should have also explicitly justified DACA under the same analytic framework it applied to the new proposals, a consistency in approach that would have allayed concerns over mercurial reasoning. But it did not. As a result, the OLC’s analysis of deferred action — though not necessarily wrong — remains vulnerable to several internal criticisms that may continue to haunt the Administration’s efforts to place its nonenforcement choices upon firm legal footing.

⁵⁹ See The Opinion, *supra* note 3, at 26–27.

⁶⁰ *Id.* at 32.

⁶¹ 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

⁶² Peter Margulies, *President Obama’s Immigration Plan: Rewriting the Law*, LAWFARE (Nov. 23, 2014, 4:15 PM), <http://www.lawfareblog.com/2014/11/president-obamas-immigration-plan-rewriting-the-law> [<http://perma.cc/2T7L-5XW7>].

⁶³ See *id.*