A TAXONOMY OF DISCRETION: REFINING THE LEGALITY DEBATE ABOUT OBAMA'S EXECUTIVE ACTIONS ON IMMIGRATION

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On November 21, 2014, President Obama ordered a package of immigration policy reforms by the Department of Homeland Security and Department of Justice, including promises of work permits for parents of children who are U.S. citizens or legal residents.[1] The November announcements expanded a program the president announced in 2012, known as Deferred Action for Childhood Arrivals (DACA), through which certain young immigrants may request two-year promises of deferred action and employment authorization.[2] Even before that, President Obama's Director of Immigration and Customs Enforcement John Morton issued memoranda (known as the Morton Memos) summarizing factors that immigration enforcement officers should use in the exercise of prosecutorial discretion.[3]

With legislative immigration reform stymied in Congress, broad executive action has been the Obama administration's signature contribution to American immigration policy. The centerpiece of Obama's immigration actions has been expanded use of "deferred action" policies by which the Department of Homeland Security promises to refrain from seeking the deportation of certain people and offers them authorization to seek employment. The Obama administration has also made much more transparent how it categorizes and prioritizes noncitizens for immigration enforcement purposes. The result is that many immigrants who are unlawfully present according to the Immigration and Nationality Act

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1. *Fixing Our Broken Immigration System Through Executive Action—Key Facts*, U.S. DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/immigration-action (last visited Jan. 6, 2015).

2. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

3. Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to agency personnel, *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; Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to agency personnel, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf [hereinafter, collectively, Morton Memos].

(INA) now can secure the opportunity to work legally and receive written promises that the government has no immediate intention of seeking their removal.

Since the president had no new Congressional authorization to take these measures, his actions drew immediate objections from Republican lawmakers.[4] A few lawmakers, joined by at least one prominent immigration law scholar, have cited the president's actions on immigration as potential grounds for impeachment.[5] Within less than two months of the president's announcement, two federal district courts had reached opposite conclusions about whether the president's policies should be ruled unconstitutional by the judiciary.[6] Meanwhile, a coalition of 26 states has filed a complaint in another federal district court challenging the president's constitutional authority to implement the new policies and alleging that the president is acting to unilaterally change or suspend the law.[7]

Some legal scholars allege that the president's executive actions indicate a refusal to faithfully execute the law as required by the Constitution.[8] By contrast, the White House and a number of immigration

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4. *See, e.g.*, Eric Bradner & Jedd Rosche, *Republicans Hammer Legal Case Against Obama on Immigration*, CNN.COM (Nov. 21, 2014), http://www.cnn.com/2014/11/20/politics/republican-response-obama-immigration-speech/; Erin Kelly, *Congress Responds to Obama with Bitter Partisan Split*, USA TODAY (Nov. 20, 2014), http://www.usatoday.com/story/news/politics/2014/11/20/immigration-executive-action-congressional-reaction-boehner/70031622/.

5. *See, e.g.*, Alexander Bolton, *White House Taking Impeachment Seriously*, THE HILL (July 25, 2014), http://thehill.com/homenews/senate/213329-white-house-gop-might-try-to-impeach; Ahiza Garcia, *GOPer: Impeachment 'a Possibility' if Obama Moves Ahead on Immigration*, TALKING POINTS MEMO (Nov. 10, 2014), http://talkingpointsmemo.com/livewire/joe-barton-impeach-obama-immigration; Andrew C. McCarthy, *Amnesty and Impeachment*, NAT'L REVIEW ONLINE (Nov. 8, 2014), http://www.nationalreview.com/article/392345/amnesty-and-impeachment-andrew-c-mccarthy; Peter H. Schuck, *Why Congress Can Impeach Obama*, N.Y. TIMES (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/opinion/the-impeachment-of-obama-on-immigration-may-be-legal-but-its-wrong.html?_r=0 (immigration scholar arguing that Obama's actions are illegal); Katie Zezima, *Obama Action on Immigration Should Spark Impeachment Talk, GOP Lawmaker Says*, WASH. POST (Aug. 3, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/08/03/obama-action-on-immigration-should-spark-impeachment-talk-gop-lawmaker-says/.

6. *See* United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 779–797 (W.D. Pa. 2014) (in a case concerning a criminal conviction, concluding that the Obama policies are unconstitutional). *Compare* Arpaio v. Obama, 27 F. Supp. 3d 185, 208 n.12 (D.D.C. Dec. 23, 2014) (disputing the *Juarez-Escobar* decision on jurisdictional grounds and defending the norm of prosecutorial discretion).

7. *See* Complaint, Texas v. United States, No. 1:14-cv-00254, 2014 WL 6806231 (S.D. Tex. Dec. 3, 2014); Press Release, Attorney General of Texas Ken Paxton, Attorney General Ken Paxton Announces Majority of States Now Part of Immigration Lawsuit; Tennessee, Nevada Officially Join (Jan 26, 2015), *available at* https://www.texasattorneygeneral.gov/oagnews/release.php?id=4936.

8. *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).

law scholars have argued that Obama administration is merely exercising prosecutorial discretion and that there are many examples of previous presidents taking similar actions.[9] They argue that limited enforcement resources and the need to address humanitarian concerns in individual cases require such discretion and that such discretion is routinely exercised by law enforcement agencies.

Both sides of this debate fail to account for the variety of actions that the Obama administration has undertaken without obtaining Congressional approval and the different legal issues that arise with each type. Because backers of executive action have focused on precedents from previous administrations, their arguments imply that there is nothing substantively new about President Obama's actions. By contrast, claims that the president is refusing to enforce the law fail to address the reality that executive agencies routinely decide not to enforce laws rigidly in every possible case. As a result, the legal debate about the scope of the president's authority to change immigration policy has not fully recognized what is actually innovative about the Obama policies, and it has not focused with precision on those areas where the president is acting within well-established authority and those areas where he has taken executive discretion into uncharted territory.

This Commentary aims to add new focus to the debate about President Obama's executive actions by defining five different types of presidential discretion: Congressionally authorized discretion, discretion to not enforce the statute in every case, discretion to authorize employment, publicizing nonenforcement policies, and establishing categorical criteria for deferred action. Table 1 summarizes this typology, with examples of each.

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9. *See Executive Grants of Temporary Immigration Relief, 1956-Present*, AM. IMMIGRATION COUNCIL 1 (Oct. 2, 2014), http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_5.pdf ("[H]istory books reveal[] that President Obama's action follows a long line of presidents who relied on their executive branch authority to address immigration challenges."); Stephen H. Legomsky, *Legal Authorities for DACA and Similar Programs* (Aug. 24, 2014), *available at* http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/Editorial-Opinion/Graphics/executive%20action%20legal%20points.pdf; Tanya Somanader, *Here's What the President is Doing to Fix Our Broken Immigration System*, THE WHITE HOUSE BLOG (Nov. 20, 2014, 6:00 PM), http://www.whitehouse.gov/blog/2014/11/20/here-s-what-president-doing-fix-our-broken-immigration-system ("Every U.S. president since President Eisenhower has used his executive authority to address immigration issues.").

TABLE 1:
TAXONOMY OF EXECUTIVE DISCRETION ON IMMIGRATION IN THE OBAMA ADMINISTRATION (SELECTIVE EXAMPLES)

TYPE I: Congressionally authorized discretion

- discretion authorized by statute for narrowly defined categories such as asylees, victims of crime with minor marijuana offenses, children of domestic violence victims
- expanded waiver eligibility for certain grounds of inadmissibility

TYPE II: Discretion to not enforce the statute in every case

- Morton Memo factors (2011–November 20, 2014)
- Civil Immigration Enforcement Priorities (Nov. 20, 2014–)[10]
    - Priority 1: migrants caught at the border, criminal street gang members, convicted felons under state law, convicted aggravated felons under federal law, suspected terrorists
    - Priority 2: noncitizens convicted of three or more misdemeanors or "significant misdemeanors" as defined by Department of Homeland Security (among others)
    - Priority 3: other noncitizens issued a removal order after Jan. 1, 2014

TYPE III: Discretion to authorize employment

- beneficiaries of deferred action on an individual basis
- DACA (Deferred Action for Childhood Arrivals) (2012–2014 two year employment authorization; beginning 2015 expanded criteria with three-year employment authorization)
- DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) (beginning 2015, with promised three-year employment authorization)

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10. *See infra* note 55.

TYPE IV: Publicizing nonenforcement policies

- release of Morton Memos (2011)[11]
- Presidential Remarks on Immigration (DACA announcement) (2012)
- presidential statements on new immigration actions (November 2014)
- Department of Homeland Security websites describing enforcement and deferred action policies, such as:
    - http://www.dhs.gov/immigration-action
    - http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca

TYPE V: Establishing categorical criteria for deferred action

- DACA (Deferred Action for Childhood Arrivals)
- DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents)

The Commentary summarizes the distinct legal issues that arise with each type of discretion. I have organized them as a continuum of legality with Type I and Type II having well-established legal foundations. The types at the other end of the spectrum, especially Type V, raise important separation of powers questions because they may be construed as a form of legislative rulemaking that conflicts with the terms of the INA. To be clear, I argue no more than that these types of executive action raise important questions about the extent of executive authority. I do not actually argue that they go beyond the president's constitutional powers, and I suspect that as implemented so far they are, in fact, permissible. But I leave that question for another day. In this essay I suggest simply that the debate over President Obama's immigration actions should be more narrowly focused on these types of programs.

This continuum is depicted in Table 2.

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11. Morton Memos, *supra* note 3.

TABLE 2:
CONTINUUM OF LEGALITY FOR DIFFERENT TYPES OF IMMIGRATION DISCRETION

CLEARLY WITHIN EXECUTIVE AUTHORITY

TYPE I: Congressionally authorized discretion

TYPE II: Discretion to not enforce the statute in every case

TYPE III: Discretion to authorize employment

TYPE IV: Publicizing nonenforcement policies

TYPE V: Establishing categorical criteria for deferred action

LESS DEFINED OR QUESTIONABLE AUTHORITY

TYPE I: CONGRESSIONALLY AUTHORIZED DISCRETION

There are many parts of immigration law where the INA authorizes an executive agency to exercise discretion in order to carry out statutory mandates.[12] Congress has in fact authorized deferred action by name in specific situations.[13] The Obama administration has used such provisions to liberalize immigration laws in certain ways. For example, the INA imposes three- and ten-year bars on readmission of noncitizens who were previously unlawfully present in the United States for more than 180 days or more than a year, respectively.[14] But under the statute, the Department of Homeland Security (DHS) has discretion to waive the bar in certain cases where it would impose a particular kind of hardship.[15] In 2012, DHS issued new rules allowing noncitizens to apply to these waivers while still unlawfully present in the country, preventing applicants from becoming trapped abroad when their applications are denied, while also in effect making it somewhat easier for certain unauthorized immigrants to obtain a visa.[16]

Because these exercises of discretion are authorized by statute, there is little controversy about such decisions being within the powers of the executive. But some have made a more ambitious argument that these statutory authorizations to use discretion and explicit references to deferred action legitimize broader discretionary authority for the executive.[17] This strikes me as a difficult argument to sustain. The narrow specificity of these statutory provisions indicates that Congress did not want to authorize broader discretion.[18] By comparison, Canada's immigration statute explicitly gives the minister broad authorization to

12. *See, e.g.*, 8 U.S.C. § 1182(h) (2012) (providing that the Attorney General may "in his discretion" waive inadmissibility for noncitizens convicted of a single offense of marijuana possession); 8 U.S.C. § 1229c(a) (providing that the Attorney General "may permit" voluntary departure for certain deportable aliens). Many roles assigned in the statute were re-delegated to DHS by subsequent legislation. *See infra* note 38, and accompanying text.

13. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i) (prescribing a child of a domestic violence victims "is eligible for deferred action and work authorization").

14. 8 U.S.C. § 1182(a)(9)(B)(iii)(II).

15. 8 U.S.C. § 1182(a)(9)(B)(v).

16. *See generally* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 77 Fed. Reg. 19901 (Apr. 2, 2012) (to be codified at 8 C.F.R. pt. 103).

17. *See, e.g.*, Legomsky, *supra* note 9 (arguing that Congress' acknowledgement of the existence of deferred action shows the legality of prosecutorial discretion).

18. *Cf.* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL OF RTS. J. 463, 478 (2012) (explaining how Congress has reduced the zones of authorized discretion in the INA since the 1970s).

allow any immigrant to remain in the country.[19] The American immigration statute does not contain any such explicit grant of broad discretionary authority.

TYPE II: DISCRETION TO NOT ENFORCE THE STATUTE IN EVERY CASE

When the executive branch decides not to attempt to deport a noncitizen who is technically present in violation of the INA, the executive must rely on its implicit authority to exercise prosecutorial discretion. The most obvious form of prosecutorial discretion is the decision not to prosecute at all, and it is not unique to immigration law. Police do this as well as prosecutors when they decide not to arrest or cite people whom they know are technically in violation of the law. For example, most people believe that traffic police will not normally pull drivers over for driving just barely over the speed limit.[20] A common justification for nonenforcement is that law enforcement agencies have limited resources and must prioritize their work.

Although the Obama administration has brought new attention to deferred action policies, previous research has documented that such measures in the field of immigration date back at least to the Nixon administration.[21] Although limited resources are often given as a rationale for prioritizing enforcement against some people and not others, nonenforcement is also justified by more subjective value judgments. There are equitable concerns in individual cases where rigid enforcement of the law might seem harsh or cruel.[22] There are also situations where law enforcement agencies may decide that statutes still on the books are out of step with new social mores, even if the legislature has not repealed the measure.[23]

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19. Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25.1–2 (Can.). *See also* Maria A. Fufidio, *"You May Say I'm A Dreamer, But I'm Not the Only One": Categorical Prosecutorial Discretion and Its Consequences for US Immigration Law*, 36 FORDHAM INT'L L. J. 976, 1000 (2013).

20. *See, e.g.*, Philip Reed, *Top 5 Ways to Get Pulled Over by the Cops*, EDMUNDS.COM (Oct. 6, 2011), http://www.edmunds.com/driving-tips/top-5-ways-to-get-pulled-over-by-the-cops.html.

21. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

22. *See id.* at 244–245 (observing that prosecutorial discretion is typically justified by both resource and humanitarian concerns).

23. For instance, even before *Lawrence v. Texas*, it was actually quite rare for consenting adults to be prosecuted under sodomy laws that were still on the books in many states. *See generally* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2012). A similar practice may exist in some localities where police and prosecutors decide not to penalize people for low-level marijuana usage, even if it is technically still a crime.

Nonenforcement discretion has received broad endorsement by the Supreme Court in the context of administrative law, and specifically in the context of immigration law. In *Heckler v. Chaney*, the Court found that a decision by an agency to not enforce a particular law in a particular case is "presumptively unreviewable."[24] In the immigration context, the Court found in *Reno v. American-Arab Anti-Discrimination Committee* that the executive has wide discretion to decide whether to initiate or continue deportation proceedings "for humanitarian reasons or simply for its own convenience."[25] In 2012, the Court issued its ruling on Arizona's anti-immigrant SB 1070 bill shortly after President Obama announced the DACA program. The *Arizona* majority reiterated that "broad discretion" is a "principal feature" of the immigration system.[26]

The *Arizona* Court expanded on the necessity for federal officials to use discretion as part of its explanation for why states should not be able to interfere in federal prerogatives about how immigration laws should be enforced:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.[27]

These considerations endorsed by the *Arizona* Court provide authority for the executive to defer enforcement based on equitable factors, not only because of limited resources.[28] The factors endorsed in *Arizona* also broadly mirror the factors listed as considerations for deferred action in the Morton Memos.[29]

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24. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

25. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S 471, 484 (1999).

26. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

27. *Id.*

28. In a dissent in the *Arizona* decision which was issued by the Supreme Court just a few weeks later, Justice Scalia argues that limited resources cannot fully explain the DACA program because the government requires resources to process applications for the program. *Arizona*, 132 S. Ct. at 2521–22 (J. Scalia, dissenting). But applicants are required to pay a filing fee of $380 to U.S. Citizenship and Immigration Services to process their applications, plus $85 for biometric security screening. *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#filing%20process (last visited Jan. 6, 2015).

29. *Compare* Morton Memos, *supra* note 3.

Even critics of the Obama policies concede that the president has some discretionary authority to prioritize enforcement of the law against some people and choose nonenforcement with others.[30] But these judicial precedents appear to speak only to the simple decision to refrain from taking enforcement action. They do not appear on their texts to deal with more affirmative actions, nor to the kinds of categorical rules and application procedures that the Obama administration has put into effect. Nonenforcement is the absence of an action; it involves the government simply deciding not to enforce the law against a certain person. In a strict sense, simple nonenforcement does not even require the knowledge of the beneficiary.

Deferred action in immigration typically includes something more affirmative: the Notice of Action that is sent to beneficiaries states that the Department of Homeland Security "has decided to defer action in your case," which is analogous to a prosecutor telling a suspect that she has decided not to press charges at the present time.[31] The deferred action notice indicates that the decision remains in place "unless terminated."[32] Thus, DACA grants a reprieve, but not a visa. But because the law enforcement agency informs the beneficiary of the decision, deferred action is conceptually distinct from many other forms of prosecutorial discretion. But this distinction does not mean that deferred action goes beyond the normal patterns of prosecutorial discretion. Traffic police who choose not to pull over every speeder they see do not tell most of the violators that they have been allowed a free pass. But police do sometimes let violators go with just a warning, and prosecutors do sometimes tell potential defendants that the state will not press charges even if legally it could sustain a prosecution.

TYPE III: DISCRETION TO AUTHORIZE EMPLOYMENT

Under DACA, deferred action notices come with the promise that "an Employment Authorization Document (EAD) will arrive separately in the mail."[33] This EAD, a credit card-sized identification document, affords the right to obtain a Social Security number.[34] In many states, an EAD can be

30. *See* Delahunty & Yoo, *supra* note 8, at 792–94 .

31. *See* Dep't of Homeland Security I-797 Notice of Action in a deferred action case handled by the Thomas & Mack Legal Clinic (on file with author).

32. *Id.*

33. *Id.*; *see also Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 28.

34. *See RM 10211.420 Employment Authorization for Non-Immigrants*, SOCIAL SECURITY

the basis for obtaining a driver's license or even facilitate professional licensure.[35] While simple nonenforcement of immigration law has a clear analogy to prosecutorial discretion in the criminal context, prosecutors do not actually issue permits to let people continue to engage in unlawful activity. While nonenforcement of the law leaves people essentially as they were, the grant of employment authorization leaves them substantially better off. Thus, on the surface it appears that the Obama administration is granting significant immigration benefits to people who, according to statute, are ineligible to even enter the country.[36] In the words of one Republican senator: "I can understand he can prioritize prosecution and deportation, and he has, but where does the president get the authority to issue work permits for millions of people?"[37]

The answer is that Congress gave the executive branch this authority, at least implicitly. The INA defines the categories of noncitizens who are authorized to be employed differently than the categories of those who are permitted to be in the country. The statute defines a noncitizen who is not authorized to work as an "alien [who] is not at that time either an alien lawfully admitted for permanent residence, or authorized to be so employed by this chapter *or by the* [*Department of Homeland Security*]."[38] Thus, the statute implicitly envisions that some noncitizens who are not authorized to work by the statute may be so authorized by the executive. The regulations that implement this section provide that employment authorization may be granted to noncitizens who benefit from deferred action.[39] Thus, the executive branch has the authority to affirmatively grant employment authorization because Congress has allowed it to do so.[40]

ADMIN. (Oct. 22, 2014), https://secure.ssa.gov/poms.nsf/lnx/0110211420.

35. *See Access to Driver's Licenses*, NAT'L IMMIGR. L. CENTER (last visited Jan. 6, 2015), http://www.nilc.org/driverlicenses.html.

36. *See, e.g.*, 8 U.S.C. § 1182 (defining classes of excludable noncitizens).

37. Cindy Saine, *GOP Vows to Counter Obama on Immigration*, VOICE OF AMERICA (Nov. 20, 2014), http://www.voanews.com/content/republicans-obama-immigration-reform/2528477.html (quoting Sen. John Cornyn of Texas).

38. 8 U.S.C § 1324a(h)(3) (emphasis added). The text of the statute refers to authorization "by the Attorney General," who previously supervised the Immigration and Naturalization Service (INS). When the INS was abolished in 2002, Congress transferred these functions to the Department of Homeland Security. 8 U.S.C. § 1103. *See also* 8 U.S.C. § 1324a(a)(1) ("It is unlawful for a person or other entity to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section).").

39. 8 C.F.R. § 274a.12(a)(11) (2014); 8 C.F.R § 274a.12(c)(14).

40. The lack of strict statutory regulation about which noncitizens may legally work is consistent with the overall policy orientation of the INA. Congress opted to focus deterrence of illegal employment of immigrants against employers, not the immigrants themselves. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002). While the statute prohibits employers from

In the context of the taxonomy that I am presenting here, there would be reasonable grounds to consider the authorization of employment a variety of Type I discretion, given that it is authorized by statute. But I have categorized it separately because the statute is less explicit about employment authorization than it is about other specific exercises of discretion. The statute clearly envisions executive authority to authorize employment in some cases, but it is not clear that Congress ever imagined that this authority would be used to grant employment authorization to large numbers of people who, according to the statute, should not be in the country. Administrative law permits the executive to reasonably interpret ambiguous statutes through regulations.[41]

The wide availability of employment authorization under the Obama deferred action programs is within the explicit terms of the regulation. Nevertheless, Congress did not authorize such programs with the clarity through which it authorized other types of discretion, and it would be a stretch to suggest that Congress meant to do so. In the type of discretion at issue here, the executive is relying on the ambiguity of a statute rather than on a clear delegation of power from Congress. Since there is a reasonable argument to be made that the administration is going beyond Congressional intentions, this type of discretion is on somewhat more tenuous legal grounds than Type I.

TYPE IV: PUBLICIZING NONENFORCEMENT POLICIES

While nonenforcement discretion has been a part of immigration policy for many decades, one of the Obama administration's most important innovations in the area of immigration discretion has been its decision to publish its nonenforcement policies. Previous administrations had devoted considerable efforts to keeping their immigration enforcement policies shielded from public scrutiny.[42] Public knowledge that such policies even existed came about through the high-profile deportation case in the 1970s involving John Lennon and ensuing Freedom of Information Act litigation by his attorney, Leon Wildes.[43] In 2007, the United States Citizenship and Immigration Services (USCIS) Ombudsman

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hiring unauthorized workers, Congress chose not to explicitly prohibit or penalize unauthorized immigrants for seeking or accepting employment, so long as they do not do so by fraud. *See* 8 U.S.C. § 1324a(a); Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 231 (2d Cir. 2006).

41. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

42. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510–30 (2009) (showing that presidential discretion is usually not subject to public scrutiny).

43. *See* Wadhia, *supra* note 21, at 246–52.

recommended publishing "basic information on deferred action," including criteria and instructions on how to apply, but the Bush-era USCIS director declined, citing the discretionary and "case-by-case" nature of the program.[44]

This approach rapidly changed after President Obama took office. In June 2009, the Obama administration published a press release announcing that it would grant deferred action to certain children and spouses of deceased U.S. citizens.[45] In 2011, the Morton Memos were made available to the public.[46] When the president initiated DACA, he announced it in a televised speech in the White House Rose Garden.[47] In November 2014, the president's announcement of new executive actions was accompanied by immediate publication of at least 12 memoranda and additional fact sheets providing information about how the administration would exercise discretion going forward.[48] To be clear, it is not new that immigration agencies have guidelines about how they should exercise discretion.[49] Rather, what is new since 2009 is that federal immigration agencies publicly announced and disseminated these guidelines.

There are good reasons to conclude that this new transparency may be beneficial to democracy. Before she was on the Supreme Court, Elena Kagan argued that presidents should use the power of regulatory agencies to achieve policy goals because they can be subject to political accountability through elections.[50] But she noted that this political accountability could only function if the president's politics are disclosed to the public.[51] From this perspective, the launch of the DACA program was particularly laudable, because the president announced it in a Rose Garden ceremony during an election year, debated it with his opponent, and won re-election.

There is certainly room for objections. Disseminating such information to the public may have the downside of eliminating any deterrent effect that may come from leaving the public guessing about how

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44. *Id.* at 262–63.

45. *Id.* at 263.

46. *See* Morton Memos, *supra* note 3.

47. Remarks by the President on Immigration, *supra* note 2.

48. *See Fixing Our Broken Immigration System Through Executive Action—Key Facts*, *supra* note 1, and accompanying links.

49. Wadhia, *supra* note 21, at 246–52.

50. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2369 (2001).

51. *Id.* ("The President's involvement, at least if publicly disclosed, vests the action with an increased dose of accountability, which although not (by definition) peculiarly legislative in nature, renders the action less troublesome than solely bureaucratic measures from the standpoint of democratic values.").

the government decides whom to target for enforcement.[52] Announcing that the law will not be enforced against certain people might appear to be a means for an executive to unilaterally rewrite the law. Nevertheless, policy disagreements about whether to make discretion criteria public can be resolved through the political process. If the president is within his authority to decide not to rigidly enforce the law against every person, it is difficult to see why he would be prohibited from informing the public how he intends to use this discretion.

TYPE V: ESTABLISHING CATEGORICAL CRITERIA FOR DEFERRED ACTION

The Morton Memos set out a long list of factors favoring and disfavoring enforcing immigration law in different cases, but they are ambiguous about how these conflicting factors should be weighted in a specific case.[53] The Morton Memos purport only to guide enforcement priorities, and state that ICE officers "may exercise discretion."[54] They do not require it.[55] But where the Morton Memos were open-ended, DACA's criteria are specific and unambiguous. For DACA, USCIS set up a website and application procedure that looks much like those that the agency has established for visa programs that are authorized by statute.[56] Various sources have called this "class-based" or "categorical" discretion.[57] This seems to be the pattern that USCIS is likely to follow with the new deferred action program for parents of U.S. citizen children and legal residents.

DACA may represent the first time that federal immigration authorities established a formal application procedure for a purely

52. *Cf.* Freedom of Information Act, 5 U.S.C. § 552(b)(7) (making an exception for information compiled for law enforcement purposes, if disclosure would increase the rate of law breaking by revealing law enforcement strategies and guidelines).

53. *See* Morton Memos, *supra* note 3.

54. *Id*.

55. November 2014 revisions of the Morton Memos make this emphatic: *see* Memorandum from Jeh Charles Johnson, Sec'y of the U.S. Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir., U.S. Customs and Immigration Enforcement, et al. 5 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf ("Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein.").

56. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 28.

57. *See, e.g.*, The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, slip op. O.L.C. at 15, 18, 20, 33 (Nov. 19, 2014) [hereinafter "OLC opinion"], *available at* http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (referring to "class-based deferred action" and to the "categorical variety" of deferred action).

discretionary form of deferred action that has no specific statutory basis.[58] Because it involves clear criteria and a set procedure with little room for case-by-case decision making, the DACA program appears to have "the hallmarks of a statement of law."[59] If DACA had been issued in order to apply an ambiguous statutory provision, it probably would have required a notice and comment process because it bears the characteristics of a legislative rule under the Administrative Procedures Act.[60] In fact, some have argued that deferred action policies should be enforceable in court, on the theory that issuing detailed policy guidance strips these programs of their discretionary character.[61]

Matters of discretion are not typically subject to judicial review under the Administrative Procedure Act.[62] But there is another important distinction at the heart of DACA. Immigration agencies often issue detailed rules governing the administration of a visa program that is authorized by statute.[63] These situations often call for discretion—what I have called Type I discretion—because it is explicitly required and authorized by Congress. But what makes DACA distinctive is that it is not based on any statutory provision at all.[64] DACA's beneficiaries are people who are inadmissible and/or deportable according to the explicit terms of the statute.[65] Thus, the strongest criticism of DACA is that by writing categorical rules that benefit people who are excluded by statute, President Obama is acting in defiance of the law rather than exercising discretion about how to apply the law.[66]

The quasi-legislative character of the DACA rules does bring prosecutorial discretion into uncharted constitutional territory. By unilaterally establishing a new immigration program, complete with

58. *See* Mike Warley, Note, *Deferred Action for Childhood Arrivals: A Case of Prosecutorial Discretion or Inappropriate Agency Rulemaking?*, 26 GEO. IMMIGR. L.J. 683, 685 (2012).

59. *See* Delahunty & Yoo, *supra* note 8, at 844–45.

60. *See* Warley, *supra* note 58, at 695–706.

61. *See* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 57–63 (2013) (arguing that deferred action decisions may be judicially reviewable under the Administrative Procedures Act). *Cf.* Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437 (2013) (describing the failure to apply Morton Memo criteria in a particular case).

62. 5 U.S.C. § 701 (2012).

63. *See, e.g.*, 8 C.F.R. § 214.14 (establishing rules to implement the U Visa).

64. Instead of a notice and comment process, when USCIS established an application procedure for DACA, it published a "30-Day Notice of Information Collection Under Review" to solicit comments on the proposed process. Comment Request, 77 Fed. Reg. 49451 (Aug. 16, 2012).

65. 8 U.S.C. § 1182(a)(6)(A) (an alien present without being admitted or paroled is inadmissible); 8 U.S.C. § 1227(a)(1)(B) (an alien present in violation of the INA is deportable).

66. *See* Delahunty & Yoo, *supra* note 8, at 844–45.

specific criteria and a formal application procedure, the Obama administration has made Congressional action somewhat less necessary to achieve its policy goals.[67] Perhaps this is a power that the president has always had. In *Heckler*, the Supreme Court suggested in a footnote that there is some threshold at which an executive's exercise of discretion becomes "so extreme as to amount to an abdication of its statutory responsibilities."[68] The Court has also warned that presidential power is "at its lowest ebb" if the executive takes actions that are "incompatible with the expressed or implied will of Congress."[69] The trouble is that we do not know where or how to draw the line between nonenforcement that is a natural consequence of prosecutorial discretion and nonenforcement that is so prescribed that it amounts to an executive rewriting of the law.

The seriousness of these concerns is illustrated by the Office of Legal Counsel's (OLC) review of the November 2014 executive actions.[70] OLC signaled that "class-based" deferred action programs posed a particular problem unless they incorporate an individualized, case-by-case review with room to deviate from general rules in individual cases.[71] OLC blocked a proposed deferred action program for parents of DACA recipients, while permitting one for parents of U.S. citizens, on the theory that Congress has in the past shown an inclination to approve interim deferred action for noncitizens who will eventually become eligible for a visa.[72] Under current law, U.S. citizens can sponsor their parents once they turn 21; by contrast, DACA recipients have no legal right to remain the country and cannot sponsor another person.[73] However, this attempt to draw a limit on deferred action is subject to at least two major objections. First, a program is not authorized by Congress because previous Congresses have authorized similar programs.[74] Second, not all

67. *Cf.* OLC opinion, supra note 57, at 6 ("[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.").

68. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

69. Medellin v. Texas, 552 U.S. 491, 525 (2008) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (J. Jackson, concurring).

70. OLC opinion, *supra* note 57.

71. *Id.* at 18 n.8, 22–23.

72. *Id.* at 29, 32.

73. *Id. Compare* 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 (arguing that DACA and deferred action for parents of DACA recipients can be justified on humanitarian grounds).

74. *Cf.* Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014), http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html (commending in part OLC's search for implicit Congressional priorities, but casting doubt on whether such priorities can be clearly discerned from the INA).

beneficiaries of Obama's deferred action programs will ever be eligible for visas under current law.[75] Most DACA beneficiaries never will.[76]

The strained reasoning by which OLC justified DACA and newly expanded deferred action should be a warning for advocates of such policies. Executive discretion cannot be limitless. Some line must be drawn, even if OLC did not draw the line coherently.[77] The central defense of President Obama's actions has been that the executive has inherent authority to use discretion to reflect resource and humanitarian realities. But these rationales apply more easily to simple nonenforcement. By contrast, specifically defining beneficiaries and establishing an application procedure create more danger of the executive usurping the role of the legislature. This is the type of discretion that deserves the most focused debate.

CONCLUSION

By one view, DACA is an illegal action, signaled by the fact that OLC could not articulate a coherent rationale for its existence. But it is also possible that OLC was overly cautious. It may be that the Obama immigration actions are all defensible simply because they grant such tenuous rights, if that is even the right word. At their core, they simply provide an unenforceable promise not to deport.[78] It is also important to note that the Administration can make a strong case that it has enforced immigration law energetically, deporting record numbers of noncitizens.[79] Thus, President Obama cannot be seriously accused of abdicating responsibility to enforce immigration law.[80] Moreover, many aspects of

75. *See also* OLC opinion, supra note 57, at 19 n.14.

76. *See* Ahilan Arulanantham, *Two Rationales for Administrative Relief*, BALKINIZATION (Nov. 21, 2014), http://balkin.blogspot.com/2014/11/two-rationales-for-administrative-relief.html (noting that the OLC rationale seems to cast doubt on DACA itself); David A. Martin, *Concerns About a Troubling Presidential Precedent and OLC's Review of Its Validity*, BALKINIZATION (Nov. 25, 2014) http://balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html (same).

77. *See* Martin, *supra* note 76 ("It's almost as though OLC felt it had to draw a line in the legal sand somewhere or else there would be no end to the pressures on the executive branch to add new groups to the deferred action list.").

78. *Cf.* Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889) (affirming, under the theory of plenary power, the government's decision to revoke a promise to re-admit a Chinese person who had left the country expecting to be able to return).

79. *See* JOHN F. SIMANSKI, OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2013 6 Fig. 2 (Sept. 2014), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

80. *Cf.* David. A. Martin, *A Lawful Step for the Immigration System*, WASH. POST (June 24, 2012), http://www.washingtonpost.com/opinions/a-lawful-step-for-the-immigration-system/2012/06/

Obama's executive actions on immigration law stand on solid legal foundations. But President Obama has done some things that are new, particularly in terms of announcing his prosecutorial discretion policies, and in establishing specific eligibility criteria and a formal application process. These measures take discretion into uncharted constitutional territory, and these are the areas on which the debate about the legality of the president's executive actions on immigration should be focused.

24/gJQAgT0O0V_story.html (arguing that the President must maintain a high level of immigration enforcement because Congress has appropriated funds to do so).