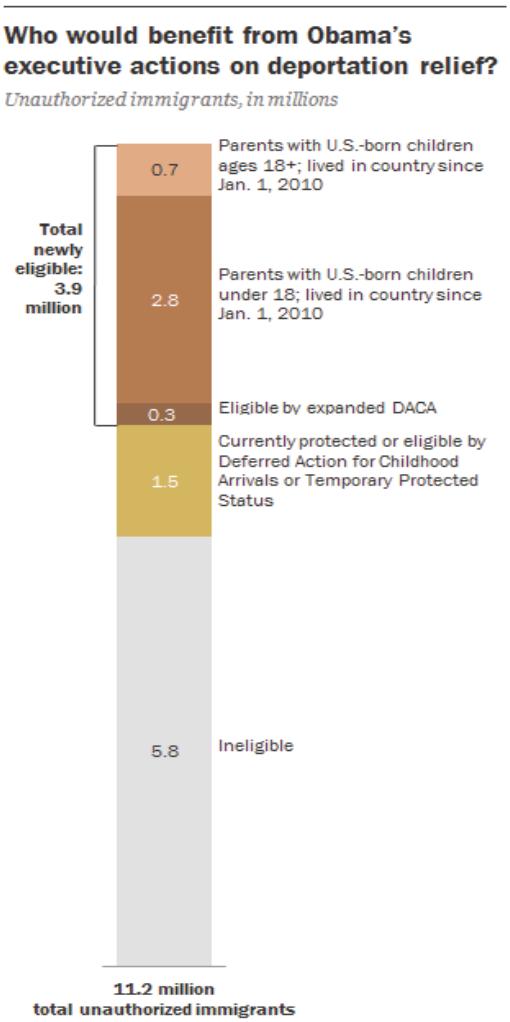
President Obama's use of executive discretion could have unintended consequences if Donald Trump becomes our next president.
By Nolan Rappaport

President Barack Obama's use of executive discretion to make temporary lawful status available to millions of undocumented immigrants has made it easier for Donald Trump to carry out his plan to deport the 11.2 million undocumented aliens in the United States if he is elected to the presidency. In 2012, President Obama established the Deferred Action for Childhood Arrivals (DACA) Program, which grants temporary lawful status to young adults who came to the United States as children. Then, in November 2014, he established the Deferred Action for Parents of Americans (DAPA) Program, which grants the same relief to the undocumented immigrants in that group, and he expanded the DACA Program. The DACA and DAPA applications will provide the government with the names and addresses of millions of undocumented immigrants who have acknowledged that they are aliens and that their status is unlawful. The PEW Research Center has estimated on the basis of a 2012 American Community Survey that 5.4 million immigrants will participate in these programs.[1]



President Obama also has set a precedent by stretching the limits of executive discretion that Trump is likely to take advantage of if he becomes the president. According to President Obama, the Department of Homeland Security (DHS) cannot respond to every immigration violation or deport every person who is in the United States illegally. He has exercised prosecutorial discretion to prioritize the use of enforcement personnel, detention space, and removal assets accordingly. This makes sense and seems desirable, but in addition to setting a precedent for Trump to follow, the implementation of this policy has been confusingly convoluted, which has made it very difficult for enforcement officers to do their jobs and resulted in a situation in which aliens who manage to reach the interior of the country are safe from deportation unless they are convicted of a serious crime. For further information, see my article, "Is DHS Enforcing Our Immigration Laws."[2] Trump, however, could stretch executive discretion in the other direction if he becomes the next president. He could issue his own executive order cancelling all of President Obama's immigration directives and severely restrict merits hearings and relief requests using limited resources as his justification too. In fact, he would be right that it is not feasible to give full, individual hearings to 11.2 million undocumented immigrants in addition to the already crushingly voluminous caseload that immigration judges have to carry. According to TRAC Reports, the immigration court had a backlog of 474,025 cases as of January 2016,[3] and there are only 250 immigration judges.[4] That is a backlog of 1,896 cases per judge.

Possibility of criminal prosecution.

Although under the Obama Administration, DHS is prohibited from using information from the DACA applications as a basis for putting the applicants in removal proceedings, there are exceptions and other unfavorable actions are possible. Moreover, current restrictions on the use of this information would not necessarily apply if Trump becomes the president. The Obama Administration's policies on how the information can be used are explained in the answer to the 19th question on the DACA Frequently Asked Questions page on the U.S. Citizenship and Immigration Services (USCIS) website:

> **Q19: Will the information I share in my request for consideration of DACA be used for immigration enforcement purposes?**
>
> **A19:** Information provided in this request is protected from disclosure to ICE and CBP for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance www.uscis.gov/NTA . Individuals whose cases are deferred pursuant to DACA will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of DACA, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor. This policy, which may be modified, superseded, or rescinded at any time without notice, is

> not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.[5]

Would deportability be difficult to establish in removal proceedings?

No, DACA and DAPA participants already have acknowledged that they are aliens and that they are in the United States with unlawful status. Why else would they be in a program that grants temporary lawful status to aliens? This is sufficient to establish deportability under section 237(a)(1)(B) of the Immigration and Nationality Act (INA), the pertinent part of which provides as follows:

> Any alien … in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
> ….
> (B) Present in violation of law. - Any alien who is present in the United States in violation of this Act or any other law of the United States…is deportable.[6]

Would removal hearings take a lot of time?

No, Trump could used his executive discretion to expedite the removal hearings. The Executive Office for Immigration Review (EOIR) already permits the immigration judges to consolidate cases,[7] and Trump could promulgate regulations that would expand the use of consolidated hearings. The regulations could require the immigration judges to divide hearings into two segments when appropriate, a deportability segment, which would be conducted on a large group basis for situations such as hearing millions of DACA and DAPA cases, and a relief segment, which would be conducted with individual hearings.

In the absence of contrary information, acknowledging participation in DACA or DAPA would support deportability findings, but the immigration judges almost certainly would ask if the people at the hearings were aliens and if so whether they were in the United States in unlawful status. Then the immigration judge could restrict individual hearings on relief applications to aliens who make an acceptable offer of evidence to show that they would be able to establish eligibility for relief and that it would be warranted as a matter of discretion, if the relief sought were discretionary, which is their statutory burden of proof.[8] The immigration judge could then offer voluntary departure in lieu of deportation to the ones who would not be going on to individual relief hearings. Deportation would make it very difficult for them to return to the United States lawfully, whereas voluntary departure would not.

Would the aliens be able to appeal to the Board of Immigration Appeals?

Aliens currently can delay the finality of their deportation orders by appealing to the Board of Immigration Appeals, and they cannot be deported while their appeals are pending, which would be an insurmountable problem if 11.2 million undocumented

aliens were found deportable and they all exercised their right to appeal to the Board. But Trump could use his executive discretion as the president to eliminate this obstacle very easily. The Board is not a statutory body. It was created by federal regulations, which specify its jurisdiction and powers,[9] and the president can promulgate new regulations.

Trump could reduce the Board's size and limit its function to providing guidance to the immigration judges with precedent decisions, as opposed to reviewing and rendering a decision on every appeal that it receives. This would save a lot of money and eliminate the unnecessary delay created by letting aliens delay their departures with frivolous or dilatory appeals. Or Trump could just eliminate the Board and let that function be served by decisions from the Attorney General, which could be written by the Office of Legal Counsel. That office already drafts the legal opinions that the Attorney General issues when she wants to reverse or modify Board decisions.[10] In either of these situations, aliens and DHS representatives would continue to have the right to appeal immigration judges' decisions to the federal court system.[11]

What forms of relief would be available to DACA and DAPA aliens?

Asylum is the most likely application for aliens who do not have citizen or Lawful Permanent Resident spouses or parents, but it would not be available to DACA participants. To be eligible for the DACA program, the applicant must have continuously resided in the United States since June 15, 2007,[12] and asylum is not available to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within one year after the date of alien's arrival in the United States.[13] The same time limit probably would preclude DAPA participants from applying for asylum too. Also, asylum is discretionary and the INA provides that DHS and the Justice Department will set the requirements and procedures for asylum hearings. The pertinent part of the provision reads as follows:

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) OF the INA. (Emphasis supplied).[14]

In another provision, the INA provides that, "The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum."[15]

Trump could establish an expedited system for asylum applications that is similar to the statutory one that is used in expedited removal proceedings at the border, which limits asylum hearings to aliens who are determined to have a "credible fear of persecution."[16] The standard he could develop to limit asylum hearings in regular removal proceedings to asylum applications that have been shown to have merit would have to withstand judicial

scrutiny, but that should be possible, particularly if the courts provide guidance, which they almost certainly would if they are not satisfied with the one Trump establishes.

If they have a strong persecution claim, they also could seek relief under section 241(b)(3) of the INA, which states that, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[17] This requires proof of a higher likelihood of persecution than is necessary to establish asylum eligibility, and it does not entitle the alien to remain in the United States or lead to lawful status. Relief under this provision only prohibits deporting the alien to the country where he or she would face the threat of persecution.

Cancellation of Removal under section 240A of the INA[18] is another possibility, but it is limited to aliens who have a spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence, and the applicant has to satisfy the following eligibility requirements:

> **1) IN GENERAL**.-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-
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> > **(A)** has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> > **(B)** has been a person of good moral character during such period;
> > **(C)** has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3), subject to paragraph (5); and
> > **(D)** establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[19]

What is the solution?

The solution is to stop trying to fix our broken immigration system with the president's executive discretion. We have swung far in the liberal direction with President Obama, and Trump almost certainly would swing in the opposite direction if he were to become our next president. If Trump does become our next president and the republicans are relieved that it is their turn to make such changes, they should pause to consider the fact that their changes would be subject to reversal the next time we have a democratic president. The solution is a comprehensive immigration reform bill that meets the essential political needs of both parties. It is not likely that either party would be happy with such a bill, but it would be a great improvement over the situation we are facing now in which each president will swing implementation of the immigration laws in favor of his party's positions with little regard for United States immigration laws.

[1] Pew Research Center, "Who would benefit from Obama's executive actions on deportation relief?" (January 19, 2016), http://www.pewresearch.org/fact-tank/2016/01/19/key-facts-immigrants-obama-action/ft_16-01-17_dapa_benefit/
[2] "Is DHS Enforcing Our Immigration Laws?" (June 17, 2013), http://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/archive/2013/06/17/nolan-rappaport-is-dhs-enforcing-our-immigration-laws.aspx
[3] TRAC Reports, "Immigration Court Backlog Tool" (Fiscal Year 2016), http://trac.syr.edu/phptools/immigration/court_backlog/
[4] Executive Office for Immigration Review, "Office of the Chief Immigration Judge," https://www.justice.gov/eoir/office-of-the-chief-immigration-judge
[5] Deferred Action for Childhood Arrivals, "Frequently Asked Questions," https://www.dhs.gov/deferred-action-childhood-arrivals
[6] Section 237(a)(1)(B) of the Immigration and Nationality Act, Present in violation of law, https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5684.html#0-0-0-246
[7] Immigration Court Practice Manual, Chapter 4.21, Combining and Separating Cases (a) Consolidated cases, https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf#page=68
[8] Section 240(c)(4) of the Immigration and Nationality Act, "Applications for Relief From Removal," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6156.html#0-0-0-252
[9] Organization, jurisdiction, and powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1, https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-33286/0-0-0-33359.html
[10] U.S. Department of Justice, Office of Legal Counsel, https://www.justice.gov/olc
[11] Section 242 of the Immigration and Nationality Act, "Judicial Reviews of Orders of Removal," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html#0-0-0-264
[12] Consideration of Deferred Action for Childhood Arrivals (DACA), "Guidelines," https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca https://www.uscis.gov/sites/default/files/USCIS/Resources/daca.pdf
[13] Section 208(2)(B) of the Immigration and Nationality Act, "Time limit," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html#0-0-0-192
[14] Section 208(3)(b)(1) of the Immigration and Nationality Act, "Eligibility," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html#0-0-0-192
[15] Section 208(3)(b)(2)(C) of the Immigration and Nationality Act, "Additional limitations," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html#0-0-0-192
[16] Section 235(b)(1)(B)(ii) of the Immigration and Nationality Act, "Referral of certain aliens," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5389.html
[17] Section 241(b)(3) of the Immigration and Nationality Act, "Restriction on removal to a country where alien's life or freedom would be threatened," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6643.html#0-0-0-262
[18] Section 240A of the Immigration and Nationality Act, "Cancellation of Removal," https://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6349.html#0-0-0-256
[19] *Supra*, at subsection 240A(b)(1) of the INA, "In General."

About The Author

Nolan Rappaport was an immigration counsel on the House Judiciary Committee. Prior to working on the Judiciary Committee, he wrote decisions for the Board of Immigration Appeals. He also has been a policy advisor for the DHS Office of Information Sharing and Collaboration, and he has spent time in private practice doing visa petitions for the Catholic Church and international corporations at Steptoe & Johnson.