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The New Era of Presidential Immigration Law

Michael Kagan*

I. INTRODUCTION

At the dawn of the Obama Administration, Professors Adam Cox and Cristina Rodríguez wrote: “[T]he inauguration of a new President can bring with it remarkable changes in immigration policy.”1 At the time they wrote that, this proposition was in some ways more a matter of advocacy than a description of reality. Despite its perennial role at the top of the nation’s domestic policy agenda, immigration policy was marked by political stalemate in Congress coupled with considerable institutional inertia in the executive branch.2 Professors Cox and Rodríguez, along with Professor Hiroshi Motomura, Professor Shoba Sivaprasad Wadhia and many others, played an important role in pushing President Obama to use prosecutorial discretion openly and aggressively to change how immigration law was enforced, especially once it became clear that Congress would not pass comprehensive immigration reform during his time in office. Although this was not President Obama’s preferred course of action, his use of executive action has dramatically changed the ways and means of immigration policy.3

As we approach the election of a new president in 2016, we finally live in the world that Professors Cox and Rodríguez advocated. The election of a new President will likely carry significant immediate consequences for immigration policy, regardless of whether Congress

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2. For an insightful account of this political inertia, see Mariano-Florentino Cuéllar, The Political Economies of Immigration Law, 2 UC IRVINE L. REV. 1 (2012).
3. See President Barack Obama, Remarks by the President on Immigration, WHITEHOUSE.GOV (June 15, 2012), https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/HDS8-EYJR] (“I have said time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away.”); President Barack Obama, Remarks by the President in Address to the Nation on Immigration, WHITEHOUSE.GOV (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/EC4T-KPHT] (“I worked with Congress on a comprehensive fix, and last year, 68 Democrats, Republicans, and independents came together to pass a bipartisan bill in the Senate.”).
reforms the Immigration and Nationality Act ("INA"). My goal in this short space will be to focus on how this new role of the presidency in setting immigration policy will change the practice of immigration law. I hope to do three things. First, I will attempt to articulate the historically significant change that I believe has occurred. Second, I will outline how, in this new era, it is possible for immigration lawyers to assist many people who until recently were entirely out of luck. Third, I will highlight the reality that presidential immigration policy is inherently unstable, which has important implications for the practice of immigration law.

II. WHAT IS DIFFERENT NOW

It is something of a paradox that there is still some dispute whether the steps President Obama has taken truly represent anything different from steps that Presidents have taken in the past. Since backers of President Obama's actions have defended them as being consistent with immigration measures used by previous administrations, it is more difficult to be clear about the degree to which President Obama has also done something new, and to give him due credit. In arguing that President Obama has made a historically significant change in how immigration policy is made, it is important to note that history has been invoked in at least two different ways in reference to immigration discretion. One role of history has been as a foundation for advocacy. But the other is more descriptive.

The advocacy use of history can be seen in the contributions of legal scholars to the development of the Obama Administration's policies. The central point has been that the Obama Administration did not invent prosecutorial discretion in immigration law. As Professor Wadhia has extensively discussed, discretion generally and deferred action specifically have been part of American immigration policy for decades. These precedents provided the essential justification for President Obama's actions. The main point of the May 28, 2012 letter from law professors, organized by Professor Motomura (and which, in the interest of full and proud disclosure, I also signed), was that "there is clear executive authority for several forms of administrative relief" for sympathetic noncitizens who were theoretically deportable under the statute.

4. One can see this in the discussion between Professor Wadhia and Professor Motomura in this Issue.
6. Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School
For advocacy purposes, establishing this legal authority and historical record was important. Although executive action on immigration was not really new, previous Presidents had generally given these policies a lower profile, and had often resisted revealing them to the public. This may have served a useful political purpose. If the public did not understand that the President has wide discretion to change immigration enforcement policy, then a President could easily deflect blame for the harsh human consequences that ensue when our largely unworkable, and often illogical, immigration laws are enforced. However, once it became clear (at least amongst President Obama’s supporters) that the President has discretion about how the law should be enforced, pressure built for the President to use it—of course President Obama has.

The results are significant. The Deferred Action for Childhood Arrivals (“DACA”) and the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) programs have the potential to reach millions. New enforcement policies announced by the Department of Homeland Security (“DHS”) in November 2014 indicated that unlawfully present noncitizens without significant criminal records will not be priorities for deportation. Taken together, a recent study reported that the Administration’s prosecutorial discretion policies may benefit as many as eighty-seven percent of the unauthorized immigrants in the United States.

There continues to be debate about precisely how far the President’s authority to change immigration policy goes under the separation of powers doctrine. Litigation has delayed expansion of the
DACA program and of the implementation of the DAPA program, which the President announced in November 2014.\textsuperscript{11} This litigation has focused in part on whether the Administrative Procedure Act ("APA") requires a notice-and-comment process to change deferred action policies.\textsuperscript{12} However, the technical details of President Obama's policies, and the question of whether some of them should have gone through a formal rulemaking process, may matter less in the long run than the simple fact that it is now widely understood that the President can do a great deal to change immigration policy without Congressional action. The Supreme Court may need to resolve how far the President may go to establish categorically-defined discretionary programs.\textsuperscript{13} Large scale deferred action programs like DACA are a major part of the historic shift that has taken place, but so is setting transparent enforcement priorities, such as President Obama's policy that the DHS should deport "felons, not families."\textsuperscript{14}

When he ran for president in 2008, President Obama said he wanted to bring immigrants "out of the shadows." President Obama has also taken a significant step to bring immigration policy out of the shadows. Previously key prosecutorial discretion policies would have been revealed only through the Freedom of Information Act.\textsuperscript{15} This fact that immigration enforcement policies are now easily accessible, and the fact that they are written with categorical specificity, means that it should now be more possible for immigrants and their lawyers to anticipate how the laws will be enforced. This opens up new opportunities for lawyers to advise and represent clients, as I will explain below.

The other use of history is to describe, in a more scholarly vein, how immigration policy has evolved to this point, and to suggest where it may be going. Professor Motomura's Article in this Issue offers a cogent view about how recent changes under the Obama Administration bring order to a previously ad hoc situation. To borrow

\begin{enumerate}
\item Id.
\item See Texas, 2015 WL 6873190, at *2 (adding a “substantive APA” ground in addition to the procedural APA ground).
\item President Barack Obama, \textit{Remarks by the President in Address to the Nation on Immigration}, supra note 3.
\item Cf. Shoba Sivaprasad Wadhia, \textit{My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE}, 27 GEO. IMMIGR. L. J. 345 (2013) (describing the author's efforts to obtain deferred action policies from previous administrations, which had not been initially disclosed to the public).
\end{enumerate}
phrases that Professor Motomura has aptly used, immigration outside the law has long been a feature of immigration in the United States.\footnote{See generally HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014).} As a direct consequence, we have long had de facto immigration policy through which federal authorities decide whom among this larger group to deport and whom to allow to remain outside the letter of the law.\footnote{See Motomura, The Presidents Dilemma, supra note 10, at 19 (describing “a large gap emerged between immigration law on the books and immigration law in action.”).} President Obama has provided both the public and the frontline enforcement officers clear guidelines about how this previously shadowy area of immigration policy should operate.

With this historical context, I would propose that there are three ways in which President Obama has significantly changed the dynamics of immigration policy.

First, his actions are substantial in scale. Rather than targeting a single discrete group, his actions impact nearly every unauthorized immigrant in the country. In essence, the Obama policies divide unlawfully present immigrants into three categories. They designate a minority as a priority for deportation. They inform a second group (probably the largest) that they are not likely to be targeted for enforcement, so long as they avoid arrest for criminal activity. Finally, the new policies allow a third group to apply for deferred action (DACA and possibly DAPA), and to receive employment authorization.

Second, his policies are highly transparent with clear, easily understandable criteria for discretion published and formal application procedures established for potential beneficiaries. In the past an unlawfully present immigrant would have little choice but to live in fear of arrest and deportation, even if the actual risk remained low for most. Now, an unlawfully present immigrant can find out which category they fall into by consulting an easily located government website, and possibly filing an application form.\footnote{Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#request%20DACA [http://perma.cc/A4CC-8VQ8].}

Third, President Obama has deliberately sought substantial publicity and political attention for his policies by announcing them in major speeches and promoting them through the use of the bully pulpit. He has thus injected discretionary immigration policy into national politics at the highest level, rather than leave it in the technocratic world of administrative agency operations.
III. NO LONGER OUT OF LUCK

Someone once told me that the most important immigration status to understand in the United States is “SOL.” 19 Until recently, this statement was as true as it was blunt. For the eleven million unauthorized immigrants in the country, our immigration laws simply offer no remedy. This is of course the nut of the immigration reform debate. It is also a paramount feature of immigration law practice. Many practicing immigration lawyers have been asked to help someone fix their immigration situation, often by someone who believes that if they just find the right lawyer, there will be a solution. But most unlawfully present immigrants are unlawfully present because they are ineligible for a visa according to the INA. This situation is a great boon for morally corrupt attorneys and notarios, who can easily sell false hope to the desperate. 20 But for the honest lawyer, there is often no good advice to give. Immigration is a rare area of law that actually penalizes people for bringing themselves into compliance. Even if unlawfully present noncitizens leave the country—which is presumably what Congress wants them to do—the unlawful presence bars will attach, making it harder for them to ever come back. 21

President Obama has not solved this problem—only legislative immigration reform can do that. However, he has significantly improved the situation so that many people are no longer completely out of luck. The greatest gains come to those who are able to receive deferred action, since they receive employment authorization. A 2015 survey reported that ninety-six percent of DACA recipients were employed or in school, and that they are buying automobiles at higher rates than pre-DACA. Nearly seventy percent reported moving to a job with better pay, with average wages for DACA recipients increasing from $11.92 to $17.29 per hour. 22 But the greatest number of beneficiaries are those immigrants who may not qualify for deferred action, yet do not have a serious criminal record, and thus do not fall under the enforcement priorities announced by the DHS. 23 They will

23. Id.
not receive a written notice that the government is exercising prosecutorial discretion, nor an employment authorization document. But they may be able to rest more easily, knowing that they stand a very good chance of simply being left alone.24

The clarity and transparency of the Obama policies has important implications for the practice of immigration law because it allows lawyers to give concrete advice about how discretion would be exercised in these cases. Before 2012, immigration lawyers could give concrete advice only about those immigration benefits that are based in the statute or regulations—eligibility for family or employment visas, the possibility of winning asylum or cancellation of removal, and so on. Resourceful lawyers could try to obtain deferred action, parole, or other discretionary relief for their clients, but it would have been difficult to advise a client definitively about her chances, or even to provide assurance that she would not be put into removal proceedings if unsuccessful.25 Because DACA has such clear criteria, as well as a clear application procedure, lawyers can now provide more definitive advice to people whose only hope is to benefit from the exercise of discretion.

Beyond telling clients if they are currently eligible for deferred action, lawyers now also have the ability to advise clients prospectively regarding the ways they can improve their standing under current DHS policies. In this light, the DHS enforcement priorities raise some interesting questions for legal practitioners. The criteria used to define the priorities are nearly as clear as the eligibility guidelines for DACA. But unlike deferred action, the DHS will not normally send the person a written statement assuring them that they are not going to be subject to deportation. This policy replaced the Morton Memos, which seemed, when they were issued, to offer the hope of more discretion, but proved to change little in practice regarding the DHS's pursuit of noncitizens for deportation.26 In part, this is because the Morton Memos were inherently ambiguous. Even though the Obama policy is considerably more clear cut, for many lawyers, it may take considerable time to gain confidence that the enforcement priorities policy will be reliably

24. See infra discussion at 11–12.
The clarity of the new policy would allow a lawyer to advise a client about where he stands vis-à-vis DHS’s enforcement priorities, and to try, if at all possible, to not be a priority for DHS. The most important arena where this new tool may be used is probably in criminal defense. This is because the most operative criteria distinguishing priority cases from others are criminal convictions. For legal immigrants, it is a Sixth Amendment right to be advised about the risk of deportation that might ensue from a proposed plea bargain.27 The Supreme Court has said that in borderline cases it wants defense attorneys and prosecutors to “plea bargain creatively” in order to craft a plea that may satisfy the penal interests of the state while avoiding an aggravated felony or other offense considered removable in immigration law.28 The DHS enforcement priority policies invite defense attorneys representing unlawfully present immigrants to make a similar effort to craft pleas that will prevent their clients from becoming priorities for DHS removal.

I am regularly involved in plea negotiations exactly like this. In my role as co-director of the Immigration Clinic at the University of Nevada, Las Vegas, I consult with the Clark County Public Defender on cases involving noncitizen defendants. From this experience, let me offer a provocative scenario to illustrate how attorneys might use the DHS enforcement priorities to help their clients. Imagine an unlawfully present noncitizen who is charged with grand larceny, a Nevada felony, and who is desperate to stay in the United States if at all possible. Assume that the prosecution case is strong, and negotiating a favorable plea is the most prudent strategy for the defense. The district attorney might offer to let the defendant plea to attempted grand larceny, also a felony, but offer to suspend a one year prison sentence. However, this plea is unattractive for a noncitizen because it would likely constitute an aggravated felony, subjecting the defendant to mandatory detention by the DHS, which would be followed by near certain deportation.

For a legal permanent resident in this situation, there are a number of creative pleas that the defense might try to reach as an alternative. The easiest would be to offer to plead to an offense under Nevada law that is not an aggravated felony under the federal immigration statute.29 A more favorable option for the defense would be to persuade the prosecutor to accept a plea to a gross misdemeanor instead of a felony. This may require a harder bargain with the prosecutor, such as offering

28. Id.
29. For example: Nevada burglary is not an aggravated felony. See NRS § 205.060 (2013) (Nevada burglary definition); Descamps v. United States, 133 S. Ct. 2276 (2013) (similar California burglary statute is categorically not an aggravated felony).
to pay a higher fine, more restitution, or even offering to serve actual prison time instead of a suspended sentence. But it is typically harder for an unauthorized immigrant to develop such a plea bargaining strategy. Note that, before November 2014, an unlawfully present defendant would be on very uncertain ground, even if a prosecutor were willing to entertain a creative approach to the plea negotiation. Previously, even if the defendant avoids the felony, the DHS might nevertheless have pursued deportation. This uncertainty reduced the benefits of plea bargaining for a well-advised defendant.

In this situation, the clarity of the new DHS enforcement priorities could be a game changer. The defendant now knows that he can avoid being a priority for deportation by avoiding a felony conviction, avoiding any conviction with a prison sentence of ninety days or more, and avoiding incurring three or more misdemeanor convictions. The defendant thus has a very strong incentive to avoid a felony, and has some guidance about what he could offer the district attorney in exchange. The noncitizen could offer to accept two gross misdemeanor convictions, instance, rather than just one count. Or, more boldly, he could offer to actually serve up to eighty-nine days in prison when the prosecutor originally offered a suspended sentence.

Let me be clear: as a practicing attorney, I would be cautious about pursuing such a deal, though I would not rule it out so long as the defendant is well-advised about the risks. This scenario envisions a defendant offering to pay a significant price in terms of hard time in prison to avoid deportation, based on trust that the DHS will adhere to policies that ultimately are unenforceable. For now at least, a defendant would need to understand that this strategy is fraught with risk because no attorney can guarantee that the DHS will strictly follow its enforcement priorities. A nonpriority individual can still be deported—and someone who comes so close to the line may very well tempt the DHS to exercise its discretion to seek deportation regardless of the technicalities of the policy. All things being equal, would a defendant not want to try to be on the nonpriority side of that line if at all possible? What if five years from now there is empirical data showing that the DHS really is following the priorities strictly? To the degree that the DHS policies can be taken at face value, it is now possible for resourceful lawyers to use them to improve the situation of immigrants who only a few years ago would have been beyond help.

IV. ELECTIONS AND CONSEQUENCES

If the inauguration of a new President can herald major changes in immigration law, as Professors Cox and Rodríguez wrote, immigration
policy is destined to be highly unstable. This instability has been evident since DACA was introduced in 2012 by President Obama in a Rose Garden ceremony, during his re-election campaign. Because DACA is based on executive discretion, the durability of the program became immediately bound up in the question of who would win the election. In the summer of 2012, there were reports that some eligible people were hesitating to apply for DACA until after the election. Governor Mitt Romney said that if elected he would not issue new DACA grants, but he would honor those already issued. This left unclear what would happen when the initial two-year DACA grants began expiring in 2014. Media reports indicated that the rate of new DACA applications slowed in the weeks immediately before the election. A newspaper catering to the Filipino community in the United States headlined a 2012 post-election article succinctly: “DACA Program secure as Obama wins re-election.” Of course, it would have been more accurate to say, “secure for more four years.”

Discretionary immigration policy is now a major issue in presidential campaigns, meaning that the fate of millions of immigrants may be tied more directly than in the past to the outcome of the election. This reality was made abundantly clear on May 6, 2015, when former Secretary of State Hillary Clinton went to Las Vegas to make a major policy statement about immigration, less than a month after announcing her presidential campaign. She first called for comprehensive immigration reform and a path to citizenship for unauthorized immigrants, a position identical to Barack Obama’s in 2008. She then went on to address executive action, an issue that was largely absent from the 2008 campaign. She pledged that if Congress failed to act, as president she would keep the Obama executive actions, and “go even further,” specifically by expanding deferred action to include parents of childhood arrivals.

On the Republican side (to give just two examples), in April 2015

33. Id.
35. Id.
Governor Jeb Bush said that he would overturn DACA and DAPA.\(^{36}\) In April 2015, Senator Marco Rubio said he would bring DACA to an end gradually.\(^{37}\) It is a remarkable change that presidential candidates are staking out these positions on deferred action so early and prominently in the campaign cycle, given that not long ago deferred action was an obscure and largely shadowy aspect of American immigration law. In 2016, voters have clear choices to make, and their choices could lead to rapid shifts in immigration law enforcement.

This instability is a new feature of immigration law, because immigration law otherwise has been, if nothing else, quite durable. The basic structure of the INA dates to the 1960s, and some provisions go back to the nineteenth century.\(^{38}\) The last major immigration reforms were enacted in the Clinton Administration, though Congress has periodically tinkered with details or added new visa categories.\(^{39}\) This stability is the result of inertia, political stalemate, and of the difficulty of enacting legislation on a complex and fraught subject—even during periods when the House, Senate, and White House are controlled by the same political party. But it would be much easier for the Secretary of Homeland Security to simply issue a new memo changing enforcement priorities.

Instability may simply be the natural consequence of enhanced political accountability. There is currently an open question whether the kinds of immigration policies that the Obama Administration have enacted should go through a formal rule making process under the APA.\(^{40}\) This is the central contention that justified the initial preliminary injunction against DAPA and the expansion of DACA.\(^{41}\) If formal rule making is required, then the process would slow somewhat. I have argued elsewhere that this application of the APA would be an error.\(^{42}\) In part, I argue that it is a good thing for a new President to be

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able to rapidly change how immigration law is enforced, so long as the change is made transparently, because this enhances political accountability. In my view, it is good for democracy for law enforcement policies to be accountable to the electorate.43

However, the more that a new President has the ability to easily shift enforcement priorities, the more immigration policy will become unstable. Thus, while clearer discretionary policies allow lawyers to offer more useful advice to clients, it also requires them to be more sensitive to the potential for political change, and to advise clients accordingly. This is a normal role for lawyers to play. Our profession’s Model Rules of Professional Conduct state, “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”44 Lawyers advising corporations would routinely need to advise their clients about how the election of a Democrat or Republican to the White House might change the enforcement of environmental or antitrust law. Immigration lawyers increasingly will need to act the same way.

V. CONCLUSION

Immigration enforcement policy, and the discretionary choices that such enforcement entails are now a prominent part of presidential politics. This is new. As recently as the George W. Bush Administration, and even in President Obama’s first term, the President’s primary public role vis-à-vis immigration policy was to promote legislative change through Congress. That role remains, but it is now complimented by a parallel power to choose how and against whom to enforce the laws on the books. Just as important, the public knows that the President has this power, and expects to know how he or she will exercise it. My goal in this Essay has been to briefly highlight some ways in which this new reality will change the practice of immigration law. But even if I am off the mark about some potential impacts, my central contention is that we are living in a new era. It is not the substantial immigration law reform that President Obama or many immigration scholars wanted. But it is a substantial and mostly positive change nonetheless.

43. Id.
44. MODEL RULES OF PROF’L CONDUCT r. 2.1 (2013).