

THE NEW ERA OF EXECUTIVE ACTION

PROTECTING UNDOCUMENTED IMMIGRANTS FROM DEPORTATION

May 5, 2015

Background

There are approximately 11 million undocumented immigrants living in the United States, or roughly 3.5 percent of the population. Nearly half of the country's undocumented individuals have children who are minors, many of whom were born in the United States.

Since President Barack Obama took office, an estimated 2 million immigrants have been deported. In 2012, 47 percent of those deported for committing crimes were convicted of only immigration or traffic offenses. Between 2010 and 2012, 205,000 parents of children who are U.S. citizens were deported. In 2011, at least 5,100 citizen children of undocumented immigrants were living in foster care because their parents had been deported or detained.

The nation's record levels of deportation are doing very little to solve our immigration crisis, yet many deportations undermine families, foster fear in immigrant communities, and cost taxpayers millions of dollars per year. Political leaders in both parties have long agreed that our immigration system is broken, but Congress has consistently failed to pass comprehensive reform.

Action

On November 20, 2014, President Barack Obama announced his Immigration Accountability Executive Actions, which would protect as many as 5 million undocumented immigrants from deportation and provide many of them with permits to work in the United States. This builds on the Deferred Action for Childhood Arrivals (DACA) executive action—which was announced in June 2012 and began accepting applications in August 2012—to cover people who entered the United States before their sixteenth birthday and who have lived continuously in the United States since January 1, 2010.

This brief is part of The Century Foundation initiative, The New Era of Executive Action, which is available online at <https://tcf.org/atavist.com/executive-action>.

What It Does

The president's sweeping actions rely primarily on what is called "prosecutorial discretion"; that is, the power of the executive to decide whether—and to what degree—to enforce the law. As a November 19, 2014 memo from the Department of Justice Office of Legal Counsel affirms, it is permissible for the Department of Homeland security to "prioritize the removal" of certain categories of undocumented immigrants, especially given the department's limited resources and therefore the infeasibility of deporting all people unlawfully residing in the United States. The executive's discretionary authority regarding immigration enforcement is well established in the courts and has been employed by Presidents Ronald Reagan, George H. W. Bush, Bill Clinton, and George W. Bush.

The president undertook the following under his prosecutorial discretion authority:

- Expand the existing Deferred Action for Childhood Arrivals (DACA) program—which was announced in June 2012 and began accepting applications in August 2012—to cover people who entered the United States before their sixteenth birthday and who have lived continuously in the United States since January 1, 2010. People who were "aged out" of DACA under the old rules (because they were older than age 31 on June 15, 2012) can now apply. Approximately 300,000 people will benefit from these changes—that is in addition to the approximately 1.2 million who already qualified for DACA.
- Establish the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program, which allows undocumented people who have lived in the United States continuously since January 1, 2010, and whose son or daughter is a citizen or lawful permanent resident to apply for protection from deportation and work authorization for three years. An estimated 4.1 million people will qualify for this program.

The president also undertook the following under his regulatory authority:

- Expanding the Provisional Waiver Program to allow the spouses and children of lawful permanent residents and the adult children of U.S. citizens and lawful permanent residents to apply. The waivers, which were hitherto available only to spouses and children of U.S. citizens, allow people to avoid long stays abroad or trouble with reentry during the process of applying for green cards.

The president's batch of actions also included measures to:

- Strengthen border security. An elaboration of the Southern Border and Approaches Campaign, first announced in May.

- Revise removal priorities. Implementation of new DHS-wide policy prioritizing removal of national security threats, felons, gang members, and illegal entrants apprehended at the border.
- End Secure Communities and replace it with the Priority Enforcement Program. The new program will still allow ICE to examine fingerprint records maintained by local police and prisons, but they will have to specify that the person in question has a removal order against them or is likely deportable.
- Reform ICE Officer pay and work classification. Intended to bring ICE agents and officers pay in line with other law enforcement personnel.
- Revise immigration parole rules for talented entrepreneurs.
- Enable U.S. businesses to hire and retain highly skilled foreign-born workers.

Status

On February 16, 2015, Judge Andrew S. Hanen of Federal District Court of the Southern District of Texas ruled in favor of Texas and twenty-five other states seeking injunctive relief to prevent them from having to implement the president's deferred deportation programs. Judge Hanen did not rule on the constitutionality of President Obama's executive actions, but decided there was sufficient merit to the states' case to warrant a suspension of the programs while the case proceeds through the courts. U.S. Citizenship and Immigration Services (USCIS) had been set to begin accepting applications for the expanded DAPA/DACA program on February 18, 2015.

The Department of Justice immediately appealed Hanen's decision and filed a motion to stay his ruling. Hanen rejected the federal government's timeline, so on March 12, 2015, the department filed for an emergency stay in the Court of Appeals for the Fifth Circuit of New Orleans. If the appeals court grants the stay, the deferment programs could move forward while their constitutionality is adjudicated by the courts.

Impact

As of June 2014, the DACA program had already provided relief from deportation to 581,000 young immigrants.

If allowed to proceed by the courts, the White House estimates that the Immigration Accountability Executive Actions would make deportation relief available to some 5 million undocumented immigrants—parents and children—under DACA and DAPA.

The White House Council of Economic Advisors (CEA) anticipates substantial economic gains as a result of the executive actions, including:

- Between 0.4 percent (\$90 billion) and 0.9 percent (\$210 billion) increases in GDP over the next ten years.
- Decrease in federal deficits by \$25 billion to \$60 billion over the next ten years.

The CEA anticipates no negative impact on employment among U.S.-born workers, as the “the additional demand associated with the expanded economy would offset the additional supply of workers.”

The Center for American Progress estimates an increase in payroll tax revenues of \$2.9 billion in the first year, and \$21.2 billion over five years, as well as an average wage increase of 8.5 percent over one year for undocumented immigrants eligible for new and expanded deferred action.

Response

Pro-Immigrant groups have applauded the order:

- Labor unions—including the AFL-CIO, Service Employees International Union (SEIU), United Auto Workers (UAW), and Communications Workers of America (CWA)—applauded the president taking a major step toward fixing the broken immigration system and defending undocumented workers from abuse by employers who would exploit their precarious status.
- U.S. Catholic Bishops praised the action for “protect[ing] people who need to come out of the shadows.”
- Planned Parenthood and Human Rights Campaign have also supported the action.

On December 29, 2014, an amicus brief by the following immigration, civil rights, and labor groups was filed in *State of Texas v. United States* defending the president’s actions:

- Service Employees International Union
- Counsel for American Immigration Council
- American Immigration Lawyers Association
- Define American
- National Immigrant Justice Center
- National Immigration Law Center
- Southern Poverty Law Center
- United We Dream

An amicus brief was also filed by fourteen states, joining the Department of Justice in calling on the appeals court to lift the injunction imposed by Judge Hanen. Furthermore, a group of 136 legal

scholars who reviewed the president's legal rationale have affirmed that the immigration actions are within the legal authority of the executive branch.

The executive actions are not without their critics, however. Republican leaders have charged that President Obama overstepped the authority of the presidency, ignoring the will of the people, and undermining efforts to forge a permanent solution using legislation. And twenty-six states with conservative leadership have joined a lawsuit charging that the costs of supporting undocumented immigration would cause them irreparable harm.