



Immigration Update

by Dr. Alicia Triche

Caesar or Chavez? President Obama's Polarizing Executive Action on Immigration

With new policies announced Nov. 20–21, 2014,

President Barack Obama has thrown his hat into a volatile ring. His new Immigration Accountability executive action has become one of the most hotly contested political actions of our time. Particularly subject to attack has been the program on Deferred Action for Parental Accountability (DAPA), which grants both temporary deferral of removal and employment authorization to certain parents of U.S. citizens (and permanent residents) who have continuously resided in the country since Jan. 1, 2010.¹ The Migration Policy Institute predicts that, combined with its predecessor program, Deferred Action for Childhood Arrivals (DACA), DAPA could help up to 5.7 million unauthorized immigrants—a number which constitutes nearly half of the current unauthorized population.²

The response has been polarized, visceral, and intense. Executive action has ushered in an era of fever-pitched debate regarding the extent of presidential authority over immigration enforcement. Supporters argue that the president's authority to conduct programs like DACA is settled and uncontroversial. In a public letter to the White House, 136 immigration law professors argue that executive authority over immigration enforcement "covers both agency decisions to *refrain* from acting on enforcement ... as well as decisions to *provide* a discretionary remedy," including, specifically, deferred action with employment authorization.³ However, in a lawsuit filed in federal court in Brownsville, Texas, several state officials have mounted a forceful challenge to DAPA and related policies. In *Texas v. USA*, DAPA is challenged by 20 states, four governors, and the attorney general of Michigan. Among other claims, the plaintiffs allege that DAPA is, in effect, an act of legislation, and they compare Obama to King James II before the American Revolution.⁴

It is not unusual for litigators to argue their side forcefully. But, as immigration policies go, DACA and DAPA are, in fact, unusual. Through sheer magnitude, if nothing else, they push prosecutorial discretion into a region it has not yet been. In this context of red hot political passion, executive action has now gone headlong into a legal area of gray. Detractors argue that

the president has violated the clear will of Congress but point to nothing in the Immigration and Nationality Act, nor in the congressional records for *existing* legislation, that explicitly forbids the use of deferred action. Supporters argue that the Code of Federal Regulations expressly allows deferred action—which is correct—but, despite repeated historical use, including Supreme Court and even congressional acknowledgement, there has been no explicit *statutory authorization* for deferred action (or for its requisite employment authorization benefit).

Congressional authorization—or, more to the point, separation of powers—is the real underlying issue in this equation. The power to grant long-term immigration benefits is traditionally understood to be congressional turf—an aspect of legislative power under Article I of the U.S. Constitution. By granting employment authorization to DACA and DAPA recipients, Obama has done more than just dismiss the case, as a criminal prosecutor might do. He has added a tangible benefit and created a de facto status for deferral recipients. Both sides in the *Texas v. United States* litigation point to one provision of the INA, 8 U.S.C. § 1324a(h)(3), which defines "unauthorized alien" as a person who has not been "authorized to be ... employed by this chapter or by the Attorney General." Combined with the legal history of Deferred Action/Deferred Enforced Departure, does this INA provision give the president power, as an aspect of his enforcement authority, to create categories of employment-eligible aliens? If it does not, does the reality of an enforcement grossly underfunded by Congress create such discretion? These questions will likely endure well beyond the *Texas* case, which is a good thing, because they need considered and reasoned debate. ☉

Endnotes

¹Full details of the announcement are *available at* www.uscis.gov/immigrationaction (last visited Jan. 12, 2015).

²MIGRATION POLICY INSTITUTE, PRESS RELEASE (Nov. 20, 2014), *available at* www.migrationpolicy.org/print/15137-VLQvTivF-So (last visited Jan. 12, 2015).

³HIROSHI MOTOMURA, SHOBHA WADHIA, STEPHEN LEGOMSKY, ET AL.,

