

The President's Broad Legal Authority to Act on Immigration

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Does the president have the authority to grant “administrative relief” to undocumented Americans — i.e., to temporarily delay their deportation without granting them a permanent legal immigration status (such as a green card or citizenship)? This issue brief summarizes the constitutional, legal, and historical grounds for the president’s authority to grant administrative relief.

What power does the president have to act on immigration issues?

As chief executive, the president not only has the duty to enforce laws, but also the authority to decide how to do so.

- Every law enforcement agency, including the agencies that enforce immigration laws, has “prosecutorial discretion” — the power to decide whom to investigate, arrest, detain, charge, and prosecute. Agencies may develop discretionary policies specific to the laws they’re charged with enforcing, the population they serve, and the problems they face.
- The U.S. Department of Homeland Security (DHS) may decide how to prioritize its resources in order to meet its stated enforcement goals.
- Executive authority to take action is thus “fairly wide,” as former INS Commissioner Doris Meissner has said.¹ The Supreme Court has emphasized the federal government’s “broad discretion,” which includes consideration of “immediate human concerns.”²

Where does the president’s authority to grant administrative relief come from?

As part of the executive branch’s authority to enforce the law, the president has broad legal authority under the law, regulations, and court rulings to grant several different types of administrative relief.

- **Deferred action.** Immigration law, regulations, and courts recognize *deferred action*, a decision to defer the removal of individuals as an act of prosecutorial discretion. Legal authority for deferred action comes from Congress’s grant of authority to DHS to administer and enforce the immigration laws.³ Regulations describe deferred action as “an act of administrative convenience to the government which gives some cases lower priority [for enforcement action].”⁴ Federal courts have acknowledged executive power to grant deferred action since at least the 1970s.⁵

¹ Josh Gerstein, “Barack Obama’s Immigration Moves Could Be Unstoppable,” *Politico*, July 29, 2014, www.politico.com/story/2014/07/barack-obama-immigration-legal-questions-109467.html.

² *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

³ INA § 103, 8 U.S.C. § 1103(a).

⁴ 8 C.F.R. 274a.12(c)(14).

⁵ The federal courts, including the U.S. Supreme Court, repeatedly have recognized the existence of deferred action and DHS’s authority to grant it. See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471,

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- **Parole in place.** Congress explicitly has authorized the executive branch to grant what's known as "parole in place." Under the immigration statute, the attorney general "may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States" (INA § 212(d)(5), 8 U.S.C. § 1182(d)(5)). The statute also requires that certain children of battered non-U.S. citizens and parents of battered noncitizen children be paroled into the U.S. (INA § 240A(b)(4), 8 U.S.C. § 1229b(b)(4)).⁶
- **Deferred enforced departure (DED).** DED derives from the president's power to conduct foreign relations and enforce immigration laws.⁷ Federal courts have recognized this authority as well.⁸ In the past, presidents have granted DED to people from countries where a natural disaster or domestic conflict had occurred that made it dangerous for people from those countries to return to them.

"Whether it is deferred action, parole, or something else, these concepts are grounded in statute, regulations and sound principles of law enforcement," according to David Leopold, past president of the American Immigration Lawyers Association.⁹

Have presidents acted before to grant administrative relief?

Several presidents, both Republican and Democratic, have granted administrative relief.

- Prosecutorial discretion actions such as the creation of the Deferred Action for Childhood Arrivals (DACA) program have been part of the immigration system for at least 35 years.
- In 1980, President Jimmy Carter exercised parole authority to allow Cubans to enter the U.S., and about 123,000 "Mariel Cubans" were paroled into the U.S. by 1981.
- In 1990, President George H.W. Bush issued an executive order that granted DED to certain nationals of the People's Republic of China who were in the U.S.
- In 1992, the Bush administration granted DED to certain nationals of El Salvador.
- In 1997, President Bill Clinton issued an executive order granting DED to certain Haitians who had arrived in the U.S. before Dec. 31, 1995.¹⁰
- In 2010 the Obama administration began a policy of granting parole to the spouses, parents, and children of military members.

483–84 (1999) (describing deferred action as a "practice . . . of exercising . . . discretion for humanitarian reasons or simply for [DHS's] own convenience"); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1211 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979)).

⁶ This section of the statute can be found at <http://tinyurl.com/m8nybho>.

⁷ These powers are granted by INA § 103(a); 8 USC § 1103(a). See *Presidential Memorandum—Deferred Enforced Departure for Liberians*, a memorandum for the secretary of Homeland Security from President Barack Obama, Mar. 23, 2009, www.whitehouse.gov/the-press-office/2013/03/15/presidential-memorandum-deferred-enforced-departure-liberians.

⁸ *Hotel and Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); *American Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 768 (N.D. Cal. 1989).

⁹ David Leopold, "What Legal Authority Does President Obama Have to Act on Immigration?," *Bloomberg Law Reports*, 2011, https://www.dropbox.com/s/5ap5bqhgryhhop4g/bloomberg_law.pdf.

¹⁰ A memo from the former Immigration and Naturalization Service's Office of Field Operations about DED for Haitians is available at <http://tinyurl.com/dxza4wk>.