

Immigration Inside The Law

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To many scholars, paradoxically, practical immigration law has little to do with actual immigration law. Professor Hiroshi Motomura, whose lecture inspired this symposium,¹ explains that over the last two decades of congressional inaction, “a large gap [has] emerged between immigration law on the books and immigration law in action.”² In light of limited resources and the vast discretion Presidents have exercised, Motomura admits quite candidly that the “traditional distinction between Congress’s authority to make law and the President’s authority to enforce law—always a very imprecise line to begin with—has *little practical meaning*” for immigration enforcement.³ Stated more directly, Motomura writes “[t]he discretion that federal employees exercise to enforce—or not enforce—the law in any given setting, or against any given person, is *practically more important* than the

* Associate Professor, South Texas College of Law, Houston. I have authored two articles explaining why DAPA is not within the President’s statutory or constitutional authority. Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing The Law*, 19 TEXAS REV. OF L. & POL’Y 215 (2015). I have filed two briefs before the Southern District of Texas and the Fifth Circuit Court of Appeals, supporting Texas’s constitutional challenge to DAPA. Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (1:14-cv-245), <http://www.scribd.com/doc/251997148/Texas-v-U-S-Amicus-Brief-of-Cato-Institute-Josh-Blackman-and-Jeremy-A-Rabkin> [<http://perma.cc/AJ5E-9SBF>]. Brief of the Cato Institute and Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees, *Texas v. United States*, No. 15-40238 (5th Cir. May 8, 2015). I testified before the United States House of Representatives Judiciary Committee during a hearing on the constitutionality of DAPA (C-SPAN Feb. 25, 2015), <http://joshblackman.com/blog/2015/02/25/video-my-testimony-before-the-house-judiciary-committee-on-the-constitutionality-of-dapa/> [<http://perma.cc/4S3F-EHWT>]. In this brief Essay, I will not repeat any of the statutory or constitutional arguments I made elsewhere.

1. I commend your attention to the contributions to this excellent symposium on DAPA. Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2015); Melissa L. Castillo, *How “Simple” Assault and Battery Became Distorted in the Context of Crimes Involving Moral Turpitude*, 55 WASHBURN L.J. 39 (2015); Patrick J. Charles, *The Sudden Embrace of Executive Discretion in Immigration Law*, 55 WASHBURN L.J. 59 (2015); Jill E. Family, *DAPA and the Future of Immigration Law as Administrative Law*, 55 WASHBURN L.J. 89 (2015); Amanda Frost, *When Two Wrongs Make a Right: Deferred Action and the Rule of Law A Response to Hiroshi Motomura*, 55 WASHBURN L.J. 101 (2015); Michael Kagan, *The New Era of Presidential Immigration Law*, 55 WASHBURN L.J. 117 (2015); Elizabeth Keyes, *Deferred Action: Considering What is Lost*, 55 WASHBURN L.J. 129 (2015); Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143 (2015); Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173 (2015); Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189 (2015); Jonathan Weinberg, *Demanding Identity Papers*, 55 WASHBURN L.J. 197 (2015).

2. Motomura, *supra* note 1, at 19.

3. *Id.* at 20 (emphasis added).

*letter of the law.*⁴ It is no coincidence that Motomura's magisterial tome is titled *Immigration Outside*—not inside—*The Law*.⁵

Viewed from the trenches, where executive discretion is the *sine quo non* of immigration law, and statutory law is an afterthought, it is not a particularly difficult reach for scores of immigration law professors to readily conclude that Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), President Obama's executive action on immigration, is well within his "constitutional and statutory authority."⁶ However, writing that statutes for purposes of immigration enforcement have "little practical meaning," and that executive discretion is "practically more important than the letter of the law," unduly discounts Congress's persistent, if not quiet role, in cabining executive discretion.⁷

The Obama administration accepted that these limits exist. The Office of Legal Counsel's ("OLC") opinion, justifying the legality of DAPA, highlighted the central role that Congress plays in defining the scope of the President's prosecutorial discretion: "an agency's enforcement decisions should be *consonant with, rather than contrary to*, the congressional policy underlying the statutes the agency is charged with administering."⁸ The touchstone of this inquiry was that Congress chose, in certain cases, to permit aliens to remain in the United States when they could demonstrate a qualifying familial relationship with a U.S. citizen or lawful permanent resident ("LPR").⁹ This justification "appears consonant with congressional policy embodied in the INA."¹⁰ The opinion explained that DAPA would "focus on the parents of U.S. citizens and LPRs thus tracks a congressional

4. *Id.* at 19 (emphasis added).

5. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008).

6. Motomura, *supra* note 1, at 1 (citing Letter from Shoba Sivaprasad Wadhia Samuel Weiss Faculty Scholar, Clinical Professor of Law Pa. State Univ. Dickinson School of Law, et al. to President Barack Obama (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [<http://perma.cc/52UL-8WWA>] [hereinafter Law Professors' September 3rd Letter]); Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law*, AMERICAN IMMIGRATION COUNCIL PERSPECTIVES (Aug. 2014); Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, et al., to President Barack Obama (May 28, 2012), <https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf> [<https://perma.cc/3C6D-F6NY>].

7. Motomura, *supra* note 1, at 19; see also Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1209–10 (2015) (noting Congress's consistent efforts in last twenty years to roll back executive discretion, e.g., by curbing executive practice of granting protracted periods of "extended voluntary departure" that permitted undocumented individuals to stay in the U.S. after receiving an order of removal).

8. *The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. 1, 6 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/4SUH-ANCC>] [hereinafter "OLC Opinion"]. For a discussion of how the Obama Administration opted for a formal OLC opinion, see CHARLIE SAVAGE, POWER WARS 660–664 (Little, Brown & Company 2015) and Josh Blackman, *Charlie Savage's "The Power Wars" on DACA and DAPA*, JOSH BLACKMAN'S BLOG (Nov. 2, 2015) <http://joshblackman.com/blog/2015/11/02/charlie-savages-the-power-wars-on-daca-and-dapa/> [perma.cc/ED3Z-DNQT].

9. *Id.* at 26.

10. *Id.*

concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.”¹¹

Specifically, “the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has *implicitly approved* in the past. . . .”¹² OLC thus recognized that there has not been explicit approval, so it must look to implicit congressional approval. This “acquiescence,” the opinion continued, “provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.”¹³ In effect, OLC argued, DAPA would comport with other forms of deferred action, to which Congress has acquiesced. This is a complete repudiation of the dogma that statutes have “little practical meaning” for immigration enforcement,” and that executive discretion is “practically more important than the letter of the law.”¹⁴ The government recognized that it is exactly the other way around. At all junctures, the President’s actions must comport with Congress. The role of Congress here was the “letter of the law,” and had dispositive “practical meaning.”¹⁵

Motomura presumably agrees with this reasoning, and has defended the government’s analysis justifying DAPA. He cites in his lecture a letter he sent to the President on September 3, 2014, signed by over 100 immigration law professors.¹⁶ This letter explains the President’s authority of “prosecutorial discretion” would be constitutional for “individuals or groups,” but it stops short of opining on whether it would be constitutional as to any specific groups. The only limit the letter identified was that “[a] serious legal question would arise if the administration were to halt all immigration enforcement, because in such a case the justification of resource limitations would not apply.”¹⁷

However, Motomura’s views go far beyond these positions. Not cited in the lecture is a November 3, 2014 letter Motomura sent to President Obama, which was also signed by fellow law professors Shoba Sivaprasad Wadhia, Stephen Legomsky, and Michael Olivas.¹⁸ Consistent with his prior writings, he explicitly endorsed statutory and constitutional rationales that Congress practically does not matter.

11. *Id.* at 27.

12. *Id.* at 29 (emphasis added).

13. *Id.* at 29.

14. Motomura, *supra* note 1, at 12–13, nn.56–58.

15. *Id.*

16. *See* Law Professors’ September 3rd Letter, *supra* note 6.

17. *See id.*

18. Letter from Shoba Sivaprasad Wadhia Samuel Weiss Faculty Scholar, Clinical Professor of Law Pa. State Univ. Dickinson School of Law, et al. to President Barack Obama (Nov. 3, 2014), <http://www.scribd.com/doc/249080684/Wh-Letter-Final-November-20142> [<http://perma.cc/88B6-4BBS>] [hereinafter Law Professors’ November 3rd Letter].

The professors wrote to the President that “there is *no legal requirement* that the executive branch limit deferred action or any other exercise of prosecutorial discretion to individuals whose dependents are lawfully present in the United States.”¹⁹ It makes no difference that, in the words of OLC, Congress had expressed a concern in the INA for “uniting the immediate families of individuals who have *permanent legal ties* to the United States.”²⁰ Under the professors’ views, it was irrelevant if the individual had *immediate family members*—let alone *dependents*—who were citizens of LPRs. This was a bridge too far for the Obama Administration: “[e]xtending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.”²¹

The professors explained quite candidly that “any other criteria for deferred action or other exercises of prosecutorial discretion—*are policy choices, not legal constraints*.”²² Based on this reasoning, *any group of aliens* the President determines warrant humanitarian relief, could be afforded deferred action. Therefore, Congress and the INA impose absolutely no constraints on the prosecutorial discretion of the President, so long as the President does not entirely stop deportations. OLC balked at such a radical understanding of prosecutorial discretion, where the INA offers no check:

We are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: [i]t would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives’ close relatives, and perhaps the relatives (and relatives’ relatives) of any alien granted any form of discretionary relief from removal by the Executive.²³

This parade of horrors is exactly the train of thought the professors endorsed. Based on the November 3rd letter, *all* of individuals in these groups could be afforded deferred action, along with the panoply of benefits attending that status. Though OLC did not cite the professors’ letters, the analysis was an express repudiation of the theories advanced by the four scholars. These are real legal constraints, not policy preferences. Even for President Obama—no shrinking violet to testing the bounds of executive power—immigration policy would be changed *inside*, not *outside* the law.

19. *Id.*

20. See Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. and the Counsel to the President at 31–33 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [perma.cc/8M53-3NJB] (emphasis added).

21. OLC Opinion, *supra* note 8, at 32.

22. Law Professors’ November 3rd Letter, *supra* note 18 (emphasis added).

23. Thompson, *supra* note 20 at 33.

The November 3rd letter, released by NBC News on December 3rd,²⁴ was sent during the pivotal final stages of when the administration was finalizing the precise executive action it would take. NBC News noted that “[m]any advocates and immigrants had hoped Obama would include the parents of children who came to the country or remained in it illegally in his executive action,” such as parents of DACA beneficiaries.²⁵ On November 12th, prominent Democrats circulated a letter urging the President to “prevent the separation of undocumented family members of . . . DACA beneficiaries,” explaining that the “legal authority [for taking executive action] is clear and substantial.”²⁶ The quartet’s letter explained the President had this exact authority.

Notwithstanding their admonition that “we take no position on which individuals the Administration should include in any future prosecutorial discretion program,” the import and timing of the letter—as this issue was being debated inside and outside the Administration—is apparent.²⁷ The letter was virtually indistinguishable from the September 3rd letter in substance, other than to insist that Congressional policy did not limit deferred action to “individuals whose dependents are lawfully present in the United States.”²⁸ This point was *not* in the previous letter signed by six-score other law professors. But this eleventh-hour lobbying effort by the core four—which was curiously not publicly released at the time—aimed to push the boundless policy in bounds and over the goal line.

The decision to publish the OLC Opinion, rather than limit it to “oral” advice—as was the case with the 2012 DAPA decision—was critical in rebutting the professor’s positions. In *POWER WARS*, Charlie Savage reports that White House Counsel Neil “Eggleston argued that showing that [OLC Chief Karl] Thompson had said some steps they had considered would not be lawful would show that they had really thought about it and obeyed legal limits.”²⁹ Lucas Guttentag, who was on leave from Stanford Law School as Senior Counsel to U.S. Citizen and Immigration Services,³⁰ reportedly argued against memorializing this memo, “saying it would preclude the executive branch from having the option of choosing to help [the parents of DACA

24. Suzanne Gamboa, *Law Profs: Legal to Include More Immigrant Parents in Exec Action*, NBC NEWS (Dec. 3, 2014, 2:01 PM), <http://www.nbcnews.com/storyline/immigration-reform/law-profs-legal-include-more-immigrant-parents-exec-action-n260551> [<http://perma.cc/3QMP-MLDE>].

25. *Id.*

26. Ed O’Keefe, *Democrats: Legal basis for Obama to act on immigration ‘clear and substantial,’* THE WASH. POST (Nov. 12, 2014), <http://www.washingtonpost.com/news/post-politics/wp/2014/11/12/democrats-legal-basis-for-obama-to-act-on-immigration-clear-and-substantial> [<http://perma.cc/VY8B-PMZP>].

27. Law Professors’ November 3rd Letter, *supra* note 18 at 1.

28. *Id.*

29. CHARLIE SAVAGE, *POWER WARS*, *supra* note 8 at 662.

30. Terry Nagel, *Stanford Law School’s Lucas Guttentag to Advise Obama Administration*, STANFORD LAW SCHOOL (Sept. 8, 2014) <https://law.stanford.edu/press/stanford-law-schools-lucas-guttentag-to-advise-obama-administration/s> [perma.cc/MHK7-7ZBF].

beneficiaries] in the future.”³¹ Guttentag, in line with Motomura and others, “believed that [OLC] had drawn the line too narrowly by focusing unduly on whether someone had a child who is an American citizen, to the exclusion of other grounds in the law that an immigrant could use to gain legal status.”³² But the White House rejected this scholarly consensus. As Savage recounts, Eggleston said “[t]his is the high-water mark. There is never going to be anything more after this.”³³ By putting the opinion into writing, the Obama Administration was setting in stone limits on the scope of immigration enforcement, based on the laws of Congress, that repudiated the capacious understandings advanced by the professoriate. This approach fits in with the modus operandi of the Obama Presidency with respect to executive power—rather than defining a broad conception of Article II, the Administration’s lawyers determined that a specific exercise of executive power is appropriate under “certain circumstances,” implicitly suggesting that it would not be appropriate in all other circumstances.³⁴

This episode reminds me of the ancient Indian parable of the “Elephant and the Blind Men.”³⁵ It tells the story of several blind men that approach an elephant, and do not know what it is. One grabs the tail, and says “it’s a rope.” Another reaches for the tusk, and says “it’s a pipe.” A third touches the belly, and proclaims, “it’s a wall.” The blind men argue with each other, until a fourth appears. He explains “each of you were only explaining the part of the elephant you touched. The elephant has *all* of the features you described.” The blind men quickly realized their error, and stopped arguing. The debate over DAPA is an apt illustration of this timeless adage.

So long as a gridlocked Congress refused to change the law, those on the trenches concentrated all of their attention on Article II. The most pressing problems in our unjust immigration system³⁶ gravitated around arbitrary and

31. CHARLIE SAVAGE, *POWER WARS*, *supra* note 8 at 662.

32. *Id.*

33. *Id.* at 663.

34. OLC Opinion at 18 (“Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice. On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in *certain circumstances*, or expressly directed that deferred action be extended to certain categories of aliens.”) (emphasis added). See Josh Blackman, President Obama Signs NDAA with Signing Statement, but it may be Unconstitutional in “Certain Circumstances,” JOSH BLACKMAN’S BLOG (Nov. 25, 2015) <http://joshblackman.com/blog/2015/11/25/president-obama-signs-ndaa-with-signing-statement-but-it-may-be-unconstitutional-in-certain-circumstances/> [perma.cc/KMT4-3WJN] (“The Obama approach purports to establish limits, and identify circumstances that would *not* justify the executive override.”) (emphasis in original).

35. A variant of this fable can be found at: <http://www.jainworld.com/literature/story25.htm> [http://perma.cc/P6F9-EBJN].

36. In briefs I filed in support of Texas’s challenge to DAPA, I have made clear that I “support comprehensive immigration reform that provides relief to the aliens protected by DAPA (among many other purposes).” Brief as Friends of the Court Supporting Plaintiffs of the Cato Institute and Law Professors at 6, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (1:14-cv-245), <http://www.scribd.com/doc/251997148/Texas-v-U-S-Amicus-Brief-of-Cato-Institute-Josh-Blackman-and-Jeremy-A-Rabkin> [http://perma.cc/AJ5E-9SBF]. Brief of the Cato Institute and Professor Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees at 2, *Texas v. United States*, No. 15-40238 (5th Cir. May 8,

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perhaps discriminatory enforcement.³⁷ But, like those grasping at a small part of the elephant, they lost sight of the big picture. Rather than embracing the entirety of the separation of power—often a hindrance to their causes—advocates construed a mere tail to be more important than the pachyderm itself. Whether or not Congress has actively engaged the immigration arena through new lawmaking, does not suggest they have relinquished their past authority. As the Supreme Court explained—particularly aptly in this case—Congress does not “hide *elephants* in mouseholes.”³⁸ Immigration advocates who ignore this venerable maxim will have scant protection if future presidents exercise discretion that is less congenial to their desired reforms.

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37. Motomura, *supra* note note 1, at 17–19.

38. *Texas v. United States*, 787 F.3d 733, 760 n.8 (5th Cir. 2015) (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).