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Getting back to basics in the raging debate over deportations



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By **Greg Sargent** November 18 at 10:16 AM

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Criticism of President Obama’s expected executive action to shield millions from deportations falls into two categories. Some treat it as self-evident that it will be “lawless” or a “shredding of the Constitution,” as if this is so obviously true that it requires no elaboration. They are not making a serious contribution to the debate.

Others have seriously engaged the legal argument underpinning Obama’s expected action, but have found it wanting. These critics either say the argument fails to show that the action is legal or, even if it is legal, that such action represents an unacceptable violation of “political norms” that will set a precedent for future mutations of the law by GOP presidents.

But some of those in this second category are either widely

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misunderstanding or misinterpreting the actual legal argument that is being made, or are failing to reckon with its nuances. A [lot of legal experts believe](#) the actions President Obama is reportedly mulling are legal. I think they make a good case, but I also acknowledge that this will take us into new and uncomfortable territory. Thus, the possibility that it is illegal — or a violation of political norms — is real. I haven't heard a convincing argument to that effect yet. But that doesn't mean there isn't one.

One thing is clear: Just because this *feels* like something new and strange doesn't make it illegal or even improper. There are some basic facts about our current immigration system and about the true nature of Obama's proposal and the arguments for it that should be reckoned with in making such pronouncements. Here are those facts as I understand them:

1) No matter what the President does — with or without an expansion of the numbers temporarily shielded from deportation — a tiny fraction of the undocumented population will continue to be removed each year.

It has long been a basic reality of immigration law that the federal government only *attempts* to remove a small fraction of the country's undocumented population. That's true today. As [Julia Preston observes](#): "Congress has provided only enough funding for the administration to carry out about 400,000 deportations each year. Mr. Obama, to the dismay of immigrant-rights advocates, has met that goal." That is a small fraction of the 11 million undocumented immigrants. The question is: How should

the enforcement bureaucracy choose *who* belongs to that small fraction, and how far can he go in setting down guidelines for determining that?

2) Even if Obama expands the numbers temporarily shielded from deportation, the enforcement machinery would still continue to deploy the same level of resources towards deportations.

Throughout the Obama era, the number of annual deportations has remained roughly consistent. This is true *even though* Obama instituted a system of enforcement (the “Morton Memo“) that made the removal of some (serious felons, national security threats, repeat offenders) a high priority and made the removal of others (the sick, minors and the elderly, longtime residents) a low priority. Thus, the resources expended on deportations can remain roughly constant *even as* some groups are deemed low priorities for removal, and their chances of removal become very low.

3) Congress has given the president wide latitude in temporarily shielding people for removal — including *whole categories* of people.

The “prosecutorial discretion” argument holds that immigration law confers upon the president wide discretion to set down enforcement priorities — *by category* — in determining how to deploy limited enforcement resources. The key is that the law also gives the executive discretion to *temporarily and formally shield people from removal*. As right-leaning legal

observers such as [Jonathan Adler](#) and [Margaret Stock](#) have noted, immigration *statute* — i.e., Congress — allows this discretion, and previous presidents have employed this discretion to shield *whole categories* of people from deportation.

Some say that if Obama expands his reliance on this authority, it will set a precedent for future presidents to do the same in other areas. But this elides the fact that in this particular area, the law *actually does give the president this authority*. As [Brian Beutler notes](#), what really matters in deciding whether this sets a precedent is whether the law actually grants the same wide discretion in these other areas.

4) Immigration statute empowers the president to deploy a specific tool — known as “deferred action” — to shield people from deportations, and courts have recognized executive authority to apply it to whole categories of people.

Well before the Obama presidency, Congress enshrined in statute the tools to institute such enforcement priorities. One tool is called “deferred action,” and this includes work authorization. This status is merely a *temporary reprieve* (more on this later) and *does not* make the path to eventual legal status any more assured.

As former top administration lawyer Steve Legomsky [explains in a memo](#), immigration statute expressly recognizes this status, and executive regulations have historically granted work authorization as part of it. What’s more, courts have consistently recognized very

broad executive authority to implement deferred action, including to whole categories of people.

Thus, the granting of this status, including work permits, to whole categories of people predates the Obama administration and its announcement of [Deferred Action for Childhood Arrivals](#), which grants “deferred action” status to certain categories of immigrants brought here illegally as children.

5) DACA is larger in scope than previous grants of deferred action, but that alone doesn’t make it illegal or even necessarily improper.

DACA differed from its predecessors in two ways. It granted deferred action status to more specific groups (people under 16 who came to the U.S. within the previous five years and were not convicted of a felony). As a result, it also granted that status to larger numbers of people than many previous iterations. But [under George H.W. Bush](#), some 1.5 million people were granted deferred action status by category — they were family members living with an immigrant in process of legalizing — and this included work authorization.

DACA is consistent with the president’s statutory authority to grant deferred action status, including work permits, previous presidential grants of this status by large category, and the courts’ recognition of this authority.

6) The President’s proposed expansion takes us deeper into new territory, but that alone doesn’t make it illegal or even necessarily improper.

The [best reporting](#) tells us Obama will likely grant deferred action to the parents of children who are U.S. citizens or legal permanent residents, and may also expand DACA. This could total a few million people. If DACA is consistent with the president's statutory to grant deferred action status, including work permits, previous presidential grants of this status by large category, and the courts' recognition of this authority, then this would also seem consistent with those things.

Is there a line that can be crossed into illegality or vague "power grab" territory? Yes, but it's unclear where that line is, and legal experts will disagree on it. But a plausible case can be made that if DACA is legal, then the new proposal also falls on the right side of this line. Those who claim these cross into illegality or "power grab" territory need to explain *why* this is the case, given all of the above statutory authority and precedent.

Indeed, conservatives who claim DACA *and* Obama's proposed plan are both illegal and violate political norms are actually making a more consistent argument than those who say DACA is legal and acceptable but that these new proposals aren't.

7) Does this mean "prosecutorial discretion" gives the president near unlimited power to shield people from deportation? No, it doesn't. In fact, the theory of prosecutorial discretion being employed *requires* the administration to continue to deploy the deportation machinery at consistent levels.

This is the rub of the matter. Ross Douthat [ridicules](#) the “prosecutorial discretion” argument as “specious,” arguing that under it

the president could “temporarily” legalize 99.9 percent of illegal immigrants and direct the Border Patrol to hand out work visas to every subsequent border crosser, so long as a few thousand aliens were deported for felonies every year.

In fact, this outcome would *not* be consistent with the theory of prosecutorial discretion being used here. As a group of lawyers who *favor* broad authority [have argued](#), “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.”

In other words, for this to be “prosecutorial discretion,” the administration must continue to fully deploy its deportation machinery even as some categories are not targeted by that machinery. There is nothing in the current proposals to suggest this would *not* be the case. Under Douthat’s formulation, we would indeed be seeing “non-enforcement” or “suspension of the law.” But if a few million are temporarily shielded from deportation, that leaves many millions as potential targets. As long as the administration continues to deploy deportation machinery in good faith, using the full resources allotted to it, this is not “non-enforcement.”

8) The fact that “deferred action” is temporary has

legal and practical significance. Some argue deferred action status will not prove temporary in practice, so it represents *de facto* legalization. But this falls short. First, President Ted Cruz really could revoke it, meaning people in this category have no long term legal security, which *actually matters* in describing their legal situation.

What's more, if you imagine a hypothetical situation in which most serious offenders were deported, the theory of prosecutorial discretion would *require* the president to refocus on deporting lower priority populations. If he *didn't* do that, one could no longer reasonably assert that the president is being guided by "prosecutorial discretion." But it can be plausibly argued that Obama's proposal is on the right side of this line — it can reasonably be described as "prosecutorial discretion." That is the standard: Can what Obama is proposing be reasonably described his way?

The bottom line of all this is that the exercise of prosecutorial discretion is not incompatible with "faithful execution of the law." Indeed, enforcement resource constraints *require* prosecutorial discretion to be a necessary component of "faithful execution of the law." Is it possible that the exercise of discretion could cross the line into violating faithful execution? Yes, but it is on critics to demonstrate *why* the proposed exercise of discretion actually would do that, provided that the deportation machinery continues to expend the same resources on removing people as it did before.

Greg Sargent writes The Plum Line blog, a reported opinion blog with a liberal slant – what you might call “opinionated reporting” from the left.
