

History Shows on Immigration: First Executive Action, Then Legislation¹

In June 2013, the U.S. Senate passed bipartisan legislation to reform immigration laws. After first repeatedly indicating his intention to enact immigration reform in the House, in June 2014 Speaker John Boehner told President Obama that he would not schedule any votes on immigration in this session of Congress. The president promptly announced that while he preferred the comprehensive and permanent reforms that could be achieved only by legislation, he would soon take executive action to do what he could to fix the broken immigration system.

The president's announcement stimulated an outcry from critics who assert that such action would be unprecedented unless first authorized by Congress. In fact, the record demonstrates the exact opposite. When it comes to immigration policy, in the modern era it's almost routine for presidents to act first to permit the entry of people outside normal immigration channels and/or to protect large numbers of people from deportation, with legislation ratifying executive action coming later.

In the midst of World War II in July 1942, President Roosevelt's secretary of agriculture initiated negotiations with the Mexican government for a temporary worker agreement that eventually became known

as the bracero program, an action Congress ratified a year later. When the authorization expired in 1947, the Truman administration continued to operate the program until it was reauthorized in 1951.² Before it ended in 1964, millions of workers had entered the U.S. under the auspices of the bracero program, hundreds of thousands under executive—not legislative—authority.

After the war ended in 1945, President Truman used his executive authority to permit 250,000 people from war-ravaged Europe to enter and/or stay in the U.S. outside normal immigration channels. It was only three years after this exercise of presidential discretion that in 1948 Congress passed the Displaced Persons Act, permitting some 400,000 additional entries.³

In April 1975, at the end of the Vietnam War, President Gerald Ford used his parole authority to authorize evacuation of up to 200,000 South Vietnamese to this country; it was not until a month later that Congress passed and the president signed the Indochina Migration and Refugee Act of 1975, which provided resettlement funding for some 130,000 of those parolees.⁴ Full legislative authorization to protect and resettle those fleeing Vietnam, Laos, and Cambodia did not come until 1980, when Congress eventually passed the Refugee Act, overhauling the nation's refugee and asylum policy, which resulted in the eventual permanent resettlement of some 1.4 million Indochinese in the U.S. Although technically most entered as bona fide refugees, hundreds of thousands were paroled into the U.S., both prior to 1980 and afterward when statutorily authorized numbers proved inadequate.⁵

But these broad exercises of discretion were unusual situations, limited to refugees fleeing shooting wars a long time ago, and are not applicable to people already here, right? Wrong. Presidents have exercised their discretion more than 20 times since the mid-1970s to permit people already in the U.S. from being returned to their home countries. Some, such as Czechoslovakians, Hungarians, Romanians, and Poles, sought to avoid being returned to a Soviet Bloc country. Iranians in the 1980s would have been forced to live under the regime that had occupied the American embassy and held our people hostage. Afghans in the 1980s and 1990s were protected first from the Soviet puppet state and later from the Taliban. Others, from Rwanda, Ethiopia, Uganda, Lebanon, Kuwait, and Serbia, would have been returned to face civil strife or civil war. Still others, from Sierra Leone and Burundi and several Central American countries in the 1990s, sought refuge from natural disasters such as famine-induced drought or hurricanes abroad.⁶ It was not until 2003, several decades after the practice of country-specific relief from deportation was first deployed, that Congress specifically authorized and codified the practice now known as "temporary protected status."⁷

Critics like to point out that most of these were temporary provisions for fairly small groups. However, the record shows that Congress made many executive orders of temporary relief permanent, often years after the fact. For example, just before and after Fidel Castro took power in Cuba in 1959, more than 900,000 Cubans fled to the U.S., the vast majority of whom were paroled into the country by Presidents Eisenhower, Kennedy, and Johnson. It was not until 1966, some seven years after the influx began, that the Cuban Adjustment Act was passed. The act theoretically only provides discretion to parole Cubans into the U.S. and eases access to lawful permanent resident status, although in practice few Cubans who reach U.S. soil are ever returned.⁸

Fourteen years later, in 1980, 130,000 Mariel Cubans and nearly 40,000 Haitians arrived in South Florida. Most, but not all, of the Cubans were paroled into the U.S. by President Carter. Haitians initially were protected from deportation only by successful litigation challenging the denials of their asylum claims; most of these Haitians, and some Cubans whose entry had been challenged, eventually received discretionary "Cuban-Haitian entrant status" in the Reagan administration. Six years later, the Immigration Reform and Control Act of 1986 (IRCA) created a process leading to lawful permanent resident status for Cuban-Haitian entrants.⁹

In 1987, President Reagan's attorney general, Edwin Meese, directed the Immigration and Naturalization Service (INS) to not deport any of the estimated 200,000 Nicaraguans in the U.S. without authorization, including those whose asylum claims had been denied. Subsequently, after Congress had in 1990 first authorized 18-month temporary protected status for Salvadorans fleeing their country's civil war, President George H.W. Bush instructed the attorney general to provide "deferred enforced departure status" to an estimated 190,000 Salvadorans. It was not until Congress passed the Nicaraguan and Central American Relief Act in 1997, more than a decade following Meese's initial

exercise of discretion, that all members of these groups were permitted to adjust to lawful permanent resident status.¹⁰

In 1989, President George H.W. Bush's attorney general, Richard Thornburgh, instructed the INS to provide temporary deferred enforced departure status to some 80,000 Chinese students in the U.S. who feared returning to the civil strife that eventually led to the Tiananmen Square massacre. Two years later, President Bush issued an executive order extending their deferred enforced departure status. Congress then passed the Chinese Student Protection Act in 1992, some three years following the attorney general's initial executive action, making the students eligible for lawful permanent resident status.¹¹

Okay, so major exercises of prosecutorial discretion have benefitted those fleeing war, seeking to avoid returning to civil strife, or whose situations involved Cold War foreign policy considerations, but never for domestic policy reasons, right? Wrong again. Broad executive actions have been used by virtually every modern administration on more than a dozen occasions to further purely domestic policy and humanitarian objectives. For example, in the aftermath of various domestic emergencies—the San Francisco earthquake, the 9/11 attack, Hurricanes Katrina and Ike, and wildfires in California and elsewhere—immigration and disaster relief officials typically have relaxed enforcement efforts, in part to advance public health and safety goals.¹² Every recent administration in office during a decennial Census, beginning with President Carter in 1980 and continuing through President Bush in 1990, President Clinton in 2000 publicly instructed immigration officials to reduce enforcement efforts across the country during the Census. While under President George W. Bush “immigration enforcement officials did not conduct raids for several months before and after the 2000 Census,” in 2010 under President Obama, the Department of Homeland Security issued far more circumscribed guidance instructing immigration officials not to interfere with the Census.¹³

Other exercises or discretion have gone well beyond specific emergencies or events like the Census. In 1977, President Carter's attorney general, Griffin Bell, temporarily suspended the deportation of an estimated 250,000 people in the so-called “Silva class” who had successfully argued in federal court that they had unfairly been denied visas by a quirk in the allocation process. It was not until nearly a decade later, via IRCA in 1986, that all of these cases were resolved.¹⁴

In 1990, George H.W. Bush's INS commissioner, Gene McNary, issued a “Family Fairness” policy deferring the deportation of and granting work authorization to 1.5 million immediate family members of people who had qualified for legalization under IRCA, building on an earlier, more limited exercise of discretion in 1987 by Edwin Meese. It was not until late 1990, more than three years following Meese's original executive action, that Congress codified the practice in the Immigration Act of 1990, making all of those affected eligible for permanent residence.¹⁵

In 1997, President Clinton provided deferred enforced departure status to some 40,000 Haitians previously paroled into the U.S. who had applied for asylum before December 1, 1995. At the end of the 105th Congress a year later, legislation allowing these Haitians to adjust their status was enacted.¹⁶

The historical record is clear: presidents of both parties have used their discretionary powers on multiple occasions to protect various groups from deportation for an enormously wide variety of reasons. Moreover, in virtually every case, except those clearly linked to temporary conditions abroad, Congress has acted, albeit often years later, to ratify the president's original decision. And wisely so, because reflecting on this history makes another point clear: would we now, with the benefit of 20-20 hindsight, have reversed any of these major executive actions? Would we prefer to have returned Eastern Europeans back behind the Iron Curtain, Cambodians to the killing fields, Ethiopians to a brutal civil war, Iranians to the arms of the ayatollah, or Chinese students to face the tanks in Tiananmen Square? Would

our country be better off without the Cubans and Haitians who revitalized South Florida over the past 30 years? Were we wrong to prevent the separation of 1.5 million people from their family members who were getting right with the law during the implementation of IRCA's legalization program?

Many of these executive actions were controversial when first announced. But the fact that Congress later affirmed virtually all of them—without explicitly reversing any of them—suggests that over time they were widely accepted by the American people. Decades from now, when we look back on President Obama's imminent announcement of broad-scale executive action, they'll see that his actions prevented the separation of families and began the process of fixing a badly broken immigration system. They'll see that wages, housing, and education improved for those granted temporary legal status, thus immeasurably enriching not just the immigrants affected but also the entire country. They'll see that Congress would later ratify and build on his exercise of presidential discretion, as has happened so often before.

And, they'll wonder, what was all the fuss about?

Endnotes

- 1 Charles Kamasaki is Senior Cabinet Adviser at the National Council of La Raza, the largest Hispanic civil rights and advocacy organization in the U.S.
- 2 Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law," *Yale Law Journal* 119 (2009).
- 3 Audrey Singer and Jill Wilson, "From 'There' to 'Here': Refugee Resettlement in Metropolitan America," Migration Policy Institute, March 1, 2007.
- 4 Carl Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* (Princeton, NJ: Princeton University Press, 2008).
- 5 David Haines, *Refugees in America in the 1990s: A Reference Handbook* (Westport, CT: Greenwood Press, 1996); Donald M. Kerwin, *The Faltering U.S. Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers, and Others in Need of Protection* (Washington, DC: Migration Policy Institute, 2011).
- 6 Kate M. Manuel and Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*. Congressional Research Service. Washington, DC, 2013; Ruth Ellen Wasem and Karma Ester, "Temporary Protected Status," Current Immigration Policy and Issues." Congressional Research Service. Washington, DC, January 14, 2014; Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum," July 13, 2012, Congressional Research Service Memorandum, Washington, DC.
- 7 Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."
- 8 Heather Reynolds, "Irreconcilable Regulations: Why the Sun Has Set on the Cuban Adjustment Act in Florida," *Florida Law Review* 63, no. 4 (February 8, 2013).
- 9 T. Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* (Eagan, MN: West Publishing Company, 2012); Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum"; Heather Reynolds, "Irreconcilable Regulations"; and Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law."
- 10 Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."
- 11 Ibid.
- 12 Shikha Dalmia, "On Immigration, Obama may be cynical, but he's not breaking the law," *Washington Examiner*, August 7, 2014.
- 13 Stephen Ohlemacher, "Census Bureau Wants to Halt 2010 Raids," *Washington Post*, August 16, 2007; and John Morton, "Policy Guidelines for ICE Operations During Census 2010," March 3, 2010. The latter indicates that "steps should be taken to avoid adverse effects on census participation," but does not end raids or other enforcement actions during the Census period.
- 14 Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."
- 15 Ibid.
- 16 Adam B. Cox and Cristina Rodriguez, "The President and Immigration Law"; and Andorra Bruno, et. al., Memorandum, "Analysis of June 15, 2012 DHS Memorandum."