



2021

Informal Executive Actions and Agency Guidance: Legal and Political Implications for Immigration and Other Policy Areas

Ihsan A. Alkhatib
Murray State University

James C. Clinger
Murray State University

Follow this and additional works at: <https://digitalcommons.murraystate.edu/crps>

Recommended Citation

Alkhatib, Ihsan A. and Clinger, James C. (2021) "Informal Executive Actions and Agency Guidance: Legal and Political Implications for Immigration and Other Policy Areas," *Commonwealth Review of Political Science*: Vol. 5: No. 1, Article 1.

Available at: <https://digitalcommons.murraystate.edu/crps/vol5/iss1/1>

This Article is brought to you for free and open access by Murray State's Digital Commons. It has been accepted for inclusion in Commonwealth Review of Political Science by an authorized editor of Murray State's Digital Commons. For more information, please contact msu.digitalcommons@murraystate.edu.

THE COMMONWEALTH REVIEW OF POLITICAL SCIENCE

The Journal of the Kentucky Political Science Association

Editor-in-chief

James Clinger
Murray State University

Editorial Board

Mike Berheide
Berea College

William Garriott
Centre College

Bruce Hicks
University of the Cumberlands

Jeremy Hall
Rutgers University

James Clinger
Murray State University

John Heyrman
Berea College

Jason Gainous
University of Louisville

Stephen Lange
Morehead State University

Manuscripts should be submitted via
<https://kpsaweb.org/journal-crps/>
The editors will consider all properly formatted
manuscripts but assume no responsibility
regarding submissions.

Please visit <https://kpsaweb.org/> to subscribe



Commonwealth Review of Political Science

“Informal Executive Actions and Agency Guidance: Legal and Political Implications for Immigration and Other Policy Areas

Author(s) Ihsan Alkhatib and James C. Clinger, Murray University

Stable URL: <https://kpsaweb.org/informal-executive-actions-and-agency-guidance-legal-and-political-implications-for-immigration-and-other-policy-areas/>

Abstract

This paper is a study the use of various forms of informal executive actions used by presidents and cabinet officials to guide the policy implementation of federal agencies. Among these are policy manuals, guidance statements, statements of administration policy, and announcements of executive priorities. The recent executive action regarding immigration announced by President Obama is also an example of this kind of behavior. The paper will rely upon the analysis of legal scholars who have examined the causes and consequences of informal executive actions. We will examine the implications that these actions have for public participation, transparency, consistency in decision-making, and inter-branch comity. The analysis will be applied to President Obama’s recent action regarding immigration enforcement.

Introduction

Since the late 1980s, many jurists and legal scholars have identified a significant tendency for many federal agencies to forsake more formal and legally binding forms of decision-making (such as notice and comment rulemaking) in favor of issuing informal, presumably advisory documents such as interpretive rules, guidance documents, administration statements of policy, agency manuals, and the like (see, e.g., Anthony, 1992). The advantage of reliance on such informal documents, from the standpoint of the agency,

is speed, flexibility, and insulation from legal challenge. Formal decision-making is time-consuming and tedious. Another advantage for the agency but a disadvantage from the perspective of those adversely affected by the policy is the difficulty in challenging the decision in court.

In recent months, the Obama Administration has made substantial use of such informal executive actions, under circumstances that illustrate the political strategies and the legal difficulties in using these means of achieving policy objectives. These actions, including most no-

tably the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parental Accountability (DAPA), are considered “prosecutorial discretion” programs administered through the United States Customs and Immigration Service (USCIS). The term “prosecutorial” is a bit of a misnomer, since immigration cases do not generally fall under criminal law. These executive actions are also sometimes called “executive orders,” although that term is not quite correct, either, for reasons that are discussed below.

This paper examines these executive actions in light of the standard critiques of informal administrative decision-making. The paper will then show how that critique was applied by district court judge Andrew Hanen shortly before this paper was written. It is probably necessary to state clearly what this paper is not. It is not a study of immigration policy generally, nor is it an advocacy document that urges a particular position regarding the merits of deporting or offering benefits to undocumented migrants. It is not even a study of whether the recent use of discretion by President Obama or other presidents has exceeded the executive’s constitutional and/or statutory authority. Instead, this paper examines the use of discretion through informal, presumably non-legally binding practices compared to more formal, substantive and legally-binding procedures. Our analysis reveals that the recent use of executive discretion has tried to escape challenge by use of informal decision-making while at the same time claiming the legal authority of official policymaking. The paper will conclude by discussing the political and legal implications that executive actions may have in immigration and other policy areas.

Discussion of Informal Executive Actions

Section 553 of the federal Administrative Procedure Act (APA) establishes a brief set of standards for what is commonly called “notice-and-comment” or “informal” rulemaking. In actuality, this set of procedures is much more formal than some of the alternative forms of decision-making that agencies have used when they refrain from “notice-and-comment” rulemaking. Under Section 553, agencies must post a notice of proposed rulemaking in the Federal Register, state the statutory authority for a proposed rule, invite public comments, usually hold public hearings, and respond to comments offered orally or in writing to the agency before finalizing a rule. Once finalized, these rules become legally binding. Since these rules are binding and are based upon delegated authority given by legislatures, they are often styled “legislative rules.” Alternatives, however, have emerged. These include “interpretive rules” which give the agencies’ interpretation of statutory or regulatory language, and policy statements, which are statements of substantive law or policy, but which is not considered a rule and which is owed much less deference by the courts. While interpretive rules and policy statements may have no legally binding direct effect on the public at-large, these documents may have great influence on decision-making within agencies, which indirectly affects the external public. These and other documents may be categorized as “guidance documents,” which were defined in Executive order #13,422 as “an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue” (3 C.F.R.

191-192 [2007]). These documents would include manuals, circulars, memoranda, and bulletins.

Legally, these guidance documents differ from legislative rules in terms of the procedures required for their issuance, their legal impact outside the agency, and the scope of judicial review (Raso, 2010: 792). Guidance documents require no “notice and comment” process (although the Bush administration did require that they be sent to OMB). Guidance documents have, at times, been deemed non-binding, yet some statutes (e.g., the FDA Modernization Act) require the pertinent agency to observe them. Generally, an agency that departs from a guidance document may have to offer a reasonable explanation for the departure, lest they be deemed by a court to be acting in an arbitrary and capricious manner (Funk, 2004). Finally, if a guidance document is challenged in court, it may not accord the agency the deference normally available under the doctrine established in *Chevron, USA v. Natural Resources Defense Council* (104 S. Ct. 2778 [1984]). According to the *Chevron* doctrine, courts should defer to agencies’ official policies when those agencies are interpreting a vaguely written statute. If the statute is clear, the courts may strike down agency interpretations that are obviously departing from the legislative text, but otherwise should defer to any reasonable interpretation. On the other hand, courts are more likely to resort to the weaker *Skidmore* or *Mead* level of deference when hearing a challenge of a less formal agency decision, such as those made pursuant to a guidance document (see *Skidmore v. Swift & Co.*, 323 U.S. 134 [1944] and *United States v. Mead*, 533 U.S. 218 [2002]). In these decisions, the court ruled that agencies’ more informal, less rigorous, less transparent, and

less fully justified should receive less deference than decisions made through a notice-and-comment rulemaking procedure.

Yet while courts may be less deferential to these informal decisions, they also are less likely to accept a case challenging these decisions or to address these issues in a case that comes before them. To be justiciable, guidance documents would have to meet the “finality” requirement under the APA. Since guidance documents generally leave plenty of room, at least in theory, for discretion and individualized decision-making, they normally won’t be considered the “final” word on agency action. Some challenges to guidance documents will be rejected under the “ripeness” doctrine, particularly since it is hard to determine when a set of decisions shaped by the guidance document constitute a settled policy that can subject to review.

In light of these differences, guidance documents offer some special advantages over legislative rules. They may be overturned by the courts but only if the cases get to a full hearing. If they were overturned, they could be replaced by new guidance documents that differ only marginally from the ones they supplanted. In most cases, of course, the guidance documents would be treated as agency policy, just as much as they would if they were considered legally binding.

Some scholars have argued that agencies substitute informal guidance documents for legislative rules for strategic reasons. Raso’s empirical research (2010) on this question suggests that agencies do not do this on a systematic basis. For example, it does not appear that agencies may more use of guidance documents at times when there is a partisan division of government between the executive and legislative

branches. Nevertheless, even if agencies do not adopt this strategy systematically, there is no reason to believe that they are unable or unwilling to do so under the right circumstances. That appears to be the case in the recent executive actions regarding the Deferred Action for Childhood Arrivals (DACA) and (Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs.

Recent Executive Actions Regarding Immigration

Both President George W. Bush and President Obama, made campaign promises to “fix” America’s “broken” immigration system by working with Congress to pass a comprehensive immigration reform law. President George W. Bush was unable to achieve immigration reform in part due to the national crisis of the 9/11 attacks, the subsequent War on Terror and wars in Afghanistan. President Obama also made campaign promises during his first and second presidential campaigns to fix America’s broken immigration system but was unable to deliver on his promises. One of those promises dealt with a legislative proposal called the DREAM Act, which dealt with educational opportunities for children of undocumented workers. This legislation has been proposed repeatedly in Congress since 2001. Yet this legislation has never been enacted by Congress. In 2010, the DREAM bill did pass through the House of Representatives but could not reach the floor of the Senate because of an unsuccessful cloture vote.

Much more comprehensive immigration reform favored by open borders proponents and most Hispanic-Americans have not come close to passage.

The disappointment of the supporters of immigration reform at the failure of the Obama administration to deliver comprehensive immigration reform was aggravated by the perception that record levels of removals were achieved during the Obama presidency. This engendered a sense of betrayal with immigrant rights and ethnic advocates puzzled by the apparent contradictions between Obama’s campaign promises and actions as President. This enforcement reality is explained by the fact that while Congress was unwilling or unable to pass comprehensive immigration reform, there was bipartisan support to ever increasing the funding for immigration enforcement. With more funding, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two divisions of the Department of Homeland Security (DHS), were able to arrest, detain and remove more undocumented/illegal immigrants.

With President Obama realizing that Congress is unable to pass even the DREAM Act even though it benefits a sympathetic group of undocumented immigrants, children who were illegally brought into the country or illegally stayed. With pressure from Democratic pro-immigrant constituencies, especially Latinos, President Obama decided to use executive discretion to provide temporary relief to potentially millions of unauthorized immigrants. This discretion used many of the criteria of the Dream Act proposal. There are two Obama executive actions on immigration that used prosecutorial discretion to provide temporary relief from deportation/removal to potentially millions of the undocumented immigrants. The first executive action is a memorandum issued by Secretary of the Department of Homeland Security Janet Napolitano on June 15, 2012. This memorandum laid out

President Obama's executive action program Deferred Action for Childhood Arrivals (DACA).

The United States Citizenship and Immigration Services (USCIS) on its website provides this information on DACA:

On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status. NOTE: On November 20, 2014, the President made an announcement extending the period of DACA and work authorization from two years to three years.

Potential DACA applicants could try to register if they:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;

6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety (United States Citizenship and Immigration Services [USCIS], 2012).

The inability of the Congress to pass the DREAM Act, a proposal that garnered some public sympathy, motivated the Obama administration to use executive discretion to grant temporary relief to the young unauthorized immigrants that the DREAM Act intended to provide relief. The DREAM ACT and DACA requirements have many commonalities. The latest version of the DREAM ACT provides:

most students who came to the U.S. at age 15 or younger at least five years before the date of the bill's enactment and who have maintained good moral character since entering the U.S. would qualify for conditional permanent resident status upon acceptance to college, graduation from a U.S. high school, or being awarded a GED in the U.S. Students would not qualify for this relief if they had committed crimes, were a security risk, or were inadmissible or removable on certain other grounds. Under the Senate bill qualifying students must be under age 35, whereas under the House bill they must be under age 32 (National Immigration Law Center, 2011).

One notes the similarities between the requirements of DACA and the latest version of the DREAM Act introduced on May 11, 2011. To be eligible for relief under the DREAM Act, the undocumented immigrant must have arrived before the age of 16 and have five years of continuous presence. The key difference between DACA and the DREAM ACT is that while the DREAM Act puts the beneficiaries on the path to naturalization, DACA provides a temporary legal status that has an expiration date.

Deferred Action for Parents of Americans and Lawful Permanent Residents

In 2014, President Obama's second DHS Secretary, Jeh Johnson, issued a memorandum expanding DACA and initiating DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) to benefit the undocumented immigrant parents, spouses, sons and daughters of American citizens and lawful permanent residents (Green Card holders). On DAPA, the USCIS website provides:

On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include:

Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1,

2010, and extending the period of DACA and work authorization from two years to three years.

Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks |

Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens (USCIS, 2014).

President Obama has initiated DAPA and DACA because the odds of passing a comprehensive immigration reform during his second term did not seem any better than his first term in office. DeSipio and de la Garza (2015) consider immigration reform comprehensive if it achieves the following:

- 1.Redesigning the rules for immigration to permanent residence in order to meet the labor needs of sectors of the economy most dependent on immigration labor.
- 2.Guaranteeing the labor rights of immigrants, including the right to organize
- 3.Regulating more rigorously the flow of unauthorized migration
- 4.Legalizing some (many or most) of the unauthorized immigrants resident in the U.S. at the time of the law's passing

5. Protecting the civil and human rights of immigrants

6. Ensuring that national security needs and global interests are met through US immigration and immigrant policies

7. Restructuring fiscal policy so that costs of immigration are shared equitably by local, state, and federal authorities

8. Developing programs to ensure that immigrants -- particularly immigrants to permanent residence and any newly legalized immigrants -- have the training and encouragement needed to speed their entry and incorporation into US society (30-31).

It is unlikely that comprehensive immigration reform would occur in the near future. In the conclusion of their book, Desipio and de la Garza (2015) offer a diagnosis and a prognosis:

The primary locus of the current stalemate is the House of Representatives. We anticipate that this will remain the case at least until the early 2020s, and potentially beyond. Republicans are likely to remain in the majority until the House is redistricted after the 2020 census. Republicans in the House will retain today's plurality, or perhaps a majority, that for principled and political reasons opposes any immigration reform that includes a path to legal status for unauthorized immigrants. Neither Speaker Boehner nor his successors will be likely to pass an immigration reform bill with mostly democratic votes, and so the Republican House majority ensures that no comprehensive reform bill will become law.

This stalemate may well remain beyond 2022 (the first congressional election after

the 2020 redistricting), even though Democrats will likely do better in state legislative races that largely shape the redistricting that follow in 2020 than they did in 2010. It will also be a presidential election year -- when more Democrats turn out -- and Congress will be unlikely to have passed as controversial a bill as they had before the 2010 election -- the Affordable Care Act, or Obamacare -- which angered and mobilized many Republican voters. However, by itself, more success in redistricting may not be enough for the Democrats to overcome the Republican congressional geographic advantage. Instead, Congress will be won or lost by each party based on its success reaching out to voters, speaking to the issues that drive them, and communicating why their party will be better for the nation. At this writing, it isn't possible to anticipate which party will have won this battle for the nation's hearts and minds in the distant future. We can, however, say with confidence that a careful reading of the political tea leaves suggests that the House membership will not change sufficiently before 2020 to create a likely path to comprehensive immigration reform (221-222).

The Traditional Role of Discretion in Immigration Decision-Making

In his *Immigration Law Sourcebook* (2004), Kurzban states the following on the discretionary immigration benefit of deferred action:

Discretionary. Deferred action is a discretionary act through the recommendation of a DD and approval of the Regional Commissioner not to prosecute or deport a particular alien. It cannot be granted by the IJ. *Johnson v. INS*, 962 F.2d 574, 579 (7th Cir. 1992). It is "an act of administra-

tive choice to give some cases lower priority and in no way an entitlement...” former O.I. 242.1 (a)(22). See also, *Reno v. American-Arab Anti-Discrimination Committee*, 119 S.Ct. 936 (1999) {Court discusses deferred action as a purely discretionary act not subject to review}.

Although the operations instructions for deferred action have been withdrawn, the relief is still be available.

See Standard Operation Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal (Standard Operating Procedures), Part X; Meissner, Comm., Memo, HQOPP 50/4 (Nov. 17, 2000), posted on AILA InfoNet at Doc. No. 00112702 (Nov. 27, 2002) {Regarding prosecutorial discretion}.

Among the factors the DD may consider are:

1. The likelihood of ultimately removing the alien.
2. The presence of sympathetic factors.
3. The likelihood that because of sympathetic factors a large amount of adverse publicity will be generated.
4. Whether the individual is a member of a class of deportable aliens whose removal has been given high enforcement priority (e.g. terrorists, drug traffickers).

Preclusion of Review: Some cases addressing deferred action include: *Pasquini v. Morris*, 700 F.2d 658 (11th Cir. 1983); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). However, the Supreme

Court in *Reno v. American-Arab Anti-Discrimination Committee*, 119 S.Ct. 936 (1999), has interpreted INA 242 (g) as precluding judicial review of any decision concerning deferred action. (p. 802)

Deferred action is a temporary relief that an unauthorized immigrant that is ineligible for legal status under the immigration laws would seek to be able to stay and work in the United States. It is difficult for an unauthorized immigrant to meet the requirements for deferred action and while the Government does not disclose these numbers in its annual reporting on immigration, there is reason to believe that the numbers are not more than a thousand a year. Judge Hanen in his Memorandum Opinion and Order granting the Plaintiffs’ Motion for a preliminary injunction in *Texas v. USA*, 2015 US Dist. Lexis 18551, stated in footnote 46 of the opinion that the Government was not “forthcoming” in providing deferred action statistics to a scholar, Shoba S. Wadhia, who requested this information for her law review article on deferred action. Judge Hanen quoted Wadhia estimating that “between 2003 and 2010 (118 plus 946) yields fewer than 1,100 cases, or less than 130 cases annually. Hanen continued:

The Court is not comfortable with the accuracy of any of these statistics, but it need not and does not rely on them given the admissions made by the President and the DHS Secretary as to how DAPA would work. Nevertheless, from less than a thousand individuals per year to over 1.4 million individuals per year, if accurate, dramatically evidences a factual basis to conclude that the Government has abdicated this area- even in the absence of its own announcements (p. 61).

Michigan attorney Fawzeah Abusalah thinks that most attorneys that practice immigration law are aware of deferred action but do not file for it because they know that the chances of approval are slim (Personal communication, February 27, 2015). The decision of the District Director is final and not subject to judicial review. An attorney who files for deferred action and gets a denial can internally appeal the decision by asking that the director reconsider the decision. But it is highly unlikely that the decision would change.

President Obama's declaration of "I don't make law" reminds one of the authors of this paper of a statement by a former head of the immigration services in Detroit, District Director Carol Jenifer. In a town hall meeting with Arab Americans in 2002 in Dearborn she was asked what her agency would do with individuals who are in the country illegally but are contributing to the country. Director Jenifer stated as to the "good people" who are illegally present she can't "manufacture a legal status" for them. However, she could and did grant deferred action in very few cases. One of the authors of this paper filed and obtained deferred action for a Lebanese from Sierra Leone who had an American-born child with a rare medical disorder. The child was getting treatment in the US that he could not get in Sierra Leone. Before filing for deferred action, favorable media coverage was sought. A local paper was contacted and the paper expressed interest in the story. The paper wrote a very sympathetic story on the child. Letters of support were obtained from a Congressman, a Senator, clergy and leaders of Arab American organizations. The request for deferred action was granted with the father of the child issued a work permit. It is understood that deferred action cannot be obtained simply because removal from

the US would cause hardship. For most unauthorized immigrants' removal, formerly referred to as deportation, would cause hardship. There has to be hardship and a compelling case that warrants the extraordinary temporary relief of deferred action.

Judge Hanen's Opinion

In February of 2015 Judge Andrew Hanen handed down his opinion regarding a temporary injunction to block the Obama administration's executive action. Many of the media reports and public discussion of the decision seemed to imply that the judge's decision was a reaction to the breadth and scope of the action and its alleged absence of explicit statutory authority. Hanen had been a fairly outspoken critic of some of the Obama administration's immigration actions, but his opinion imposing the injunction was largely limited to the procedural issues of executive discretion rather than the substance of its effects. After establishing that Texas and the other plaintiff states had standing to bring suit, Hanen presented a fairly conventional administrative law kind of argument for agency action using Section 553 notice-and-comment rulemaking. Hanen establishes that the DAPA directive constitutes final agency action and that the plaintiffs have a "zone of interest" affected by the action. The court acknowledges that non-enforcement decisions are generally exempted from review, Hanen claims that this directive actually is an "affirmative action:" to confer statuses rather than a discretionary decision not to enforce. Successful applicants under DACA and DAPA are not simply given a stay on a deportation order. They are considered "legally present" in

the United States. Furthermore, several specific benefits are associated with conferral of legal status, including work permits, drivers' licenses. Subsequent to the district court's decision, the congressional testimony indicated that Social Security benefits must be offered to successful applicants under the DACA and DAPA programs (cited in Hanen, 2015, footnote 14, p. 10).

It is noteworthy that Judge Hanen's ruling against the administration's executive action had little mention of the suspension of deportation. Such power is explicitly granted to the Secretary of Homeland Security without limitation. But the granting of legal statuses and accompanying benefits was not something Hanen was willing to permit without a legislative rulemaking process. Work permit approvals by the department are already provided for a federal regulation (8 C.F.R. Section 274a.12), but those approvals are only provided for designated classes of aliens. The authority for those designations can be found in four statutory provisions. One such provision, Section 1101(a)(15) of Title 8 of the USCA, suggests some discretion in the granting of work permits to the attorney general, whose powers in the realm of immigration should have been transferred to the DHS secretary after the creation of Homeland Security as a cabinet level agency. The question of whether that discretion is limited by the specific criteria for conferring benefits in the statute is critical. Under the canon of *expressio unius* ("inclusion of one thing implies the exclusion of the other"), the specific criteria for granting benefits should constrain the secretary's discretion. Supporters of the DACA and DAPA programs would

contend that the secretary's discretion is unlimited.

The Department of Homeland Security has published fairly explicit conditions, listed above in this paper, that can be used as a basis to offer benefits to applicants. Therefore, the court viewed the directive as establishing new policy so that the presumption of nonreviewability in *Heckler v. Chaney* (470 U.S. 821 [1985]) is rebutted. Furthermore, the court found that specific provisions within the immigration law (i.e., Section 1225(a)(1)) compel particular procedures for alien applicants for legal status. The statute also authorizes the Secretary of the Department of Homeland Security to establish regulations that form the criteria for legal entry into the United States. Such regulations would be matters of general policy and have binding effect. Judge Hanen deemed such a regulation to be a legislative rule, rather than an interpretive rule or guidance document. Hence, the notice-and-comment requirements must, in Judge Hanen's judgment, come into play.

After the district court ruling, the federal government filed an Emergency Expedited Motion to stay Judge Hanen's order. The government also filed an appeal with the Fifth Circuit Court of Appeals. The state of Texas and other plaintiffs filed a motion of discovery to obtain documents within DHS regarding the implementation of the contested programs. Judge Hanen ruled on the motion to stay his order in April of 2015. In his ruling, denying the government's motion, Judge Hanen contended that evidence brought to his attention indicated that the government had been less than candid in its statements in

his courtroom. He furthermore reiterated that recent statements from the president (Remarks by the President in Immigration Town Hall, available at <https://www.whitehouse.gov/the-press-office/2015/02/25/remarks-president-immigration-town-hall-miami-fl>) had vividly demonstrated that the administration's executive action was binding on immigration enforcement personnel. According to Hanen, this removed any doubt that the executive action was effectively a substantive rule that established a binding norm, a substantive change in existing policy, and a granting of new benefits not conferred by existing law (Hanen, 2015, pp. 7-10). In Judge Hanen's view, these circumstances indicate that DHS must propose its program through a legislative rulemaking process, which clearly the administration does not wish to use.

Implications for the Future

Judge Hanen's injunction will be challenged soon in federal appellate courts. Exactly what the disposition of his decision will remain to be seen. His ruling, however, follows a fairly traditional position regarding the need to constrain executive discretion, procedurally if in no other way. Hanen's opinion suggests that the substance of DACA and DAPA is not particularly problematic. If such programs were established by a normally legislative rulemaking process, there would be no particular legal difficulty. Perhaps in other litigation, claims that the actions were ultra vires might be sustained, but that argument did not come up in the judge's opinion.

Such a legislative rulemaking process would be more time-consuming

than simply handing down directives from the DHS secretary. It would also open up the policy to criticism from tens of thousands of commenters on the proposed role. It would require responses from DHS regarding those comments. The final result might be the same, but the time and political capital consumed by the administration to accomplish its immigration goals would be substantial.

References

- American Immigration Council, 2014. A Guide to the Immigration Accountability Executive Action. Special report. November
- Anthony, Robert A. 1992. "Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?" *Duke Law Journal* 41:2 (June): 1311-1384.
- DeSipio, Louis and Rodolfo O. de la Garza. 2015. *US Immigration in the Twenty First century: Making Americans, Remaking America*. Boulder, CO: Westview Press.
- Eastman, John C. 2014. "Did congress Really Give the Secretary of Homeland Security Unfettered Discretion Back in 1986 to Confer Legal Immigrant Status on Whomever He Wishes?" *Engage* 15:3 (October): 27-30.
- Eskridge, William N., Jr. and Lauren E. Baer. 2008. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*," *Georgetown Law Journal* 96:4 (January): 1083-1226.
- Franklin, David L. 2010 "Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut," *Yale Law Journal* 120:2 (November): 276-326.
- Funk, 2004. "Legislating for Non-Legislative Rules." *Administrative Law Review*
- Gerson, Jacob E. 2007. "Legislative Rules Revisited," *University of Chicago Law Review* 74: 1705-1722.
- Gilhooley, Margaret. 1991. "Executive Oversight of Administrative Rulemaking: Disclosing the Impact," *Indiana Law Review*. 25: 299-350.
- Goldsmith, Jack, and Manning, John F. 2006. "The President's Completion Power," *Yale Law Journal* 115: 2280-2312.

- Hanen , Andrew. 2015. Memorandum Opinion and Order, *State of Texas, et al., v. United States of America, et al.* Civil No. B-14-254.
- Kagan, Elena. 2001. "Presidential administration". *Harvard Law Review*. 114 (8): 2245-2385.
- Kurzban, Ira J. 2006. *Kurzban's Immigration Law Sourcebook*. Washington, DC: American Immigration Law Foundation.
- Mendelson, Nina. 2010. "Disclosing 'Political' Oversight of Agency Decision Making," *Michigan Law Review* 108: 1127-1178.
- Napolitano, 2012 <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>
- National Immigration Law Center, 2015. <https://nilc.org/dreamsummary.html>. Accessed on February 28, 2015.
- Pedersen, William. 1975. "Formal Records and Informal Rulemaking," *Yale Law Journal* 85:1 (November): 38-88.
- Raso, Connor N. 2010. "Strategic or Sincere? Analyzing Agency Use of Guidance Documents," *Yale Law Journal* 119:4 (January): 782-824.
- Sofaer, Abraham D. 1972 "The Change-of-Status Adjudication: A Case Study of the Informal Agency Process," *Journal of Legal Studies* 1:2 (June): 349-421.
- Stack, Kevin M. 2006. "The President's Statutory Powers to Administer the Laws," *Columbia Law Review* 10: (March): 263-323.
- State of Texas, et al v. United States of America, et al*, 2015 U.S. Dist. Lexis 18551.
- Zatz, Marjorie S., and Nancy Rodriguez. 2014. "The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement," *Law & Social Inquiry* 39:3 (Summer): 666-689.

