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BOOK REVIEW

International Migration, US Immigration Law and Civil Society: From the Pre-Colonial Era to the 113th Congress

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With the passage of immigration reform legislation stalled in the House of Representatives, President Obama announced on June 30, 2014 that he was prepared to exercise executive authority on immigration if Congress had not acted by the end of the August recess. In early September, however the administration indicated that it would not move forward with issuing an immigration directive until after the November midterm elections due to polarization over the issue (Shear 2014). The administration argued that prolonging the time frame to act would allow the President to unveil a bolder and more sustainable policy to provide administrative relief to unauthorized immigrants (ibid.).

A new book, *International Migration, US Immigration Law and Civil Society: From the Pre-Colonial Era to the 113th Congress*, published by the Scalabrini International Migration Network (SIMN) in collaboration with the Center for Migration Studies of New York (CMS), offers an overview of immigration law and policy that contextualizes the present challenges in reaching policy consensus in the immigration debate.

In a chapter on the evolution of US immigration laws, Charles Wheeler, senior attorney at the Catholic Legal Immigration Network (CLINIC), traces the history of immigration law and policy since the colonial era. This history illustrates that immigration legislation has reflected the nation's political climate, diverse values, and contested visions of nationality and membership over time. Wheeler likens immigration policy to a "swinging pendulum of efforts to restrict and liberalize admissions policies," and points out that immigration legislation often results only after years of debate, incubation, negotiation, and compromise (69).

In the US constitutional system, the faithful execution of immigration laws

rests with the executive branch and federal immigration agencies have the authority to exercise discretion in deciding whether or not to enforce the law against individuals.[1] Wheeler writes that the use of "[e]xecutive power to exercise discretion in the enforcement of immigration law dates back to the first federal statutes and to the inherent authority of law enforcement agencies to determine how best to use their limited resources" (70). He sets forth several examples of executive discretion in the immigration arena, some statutory, some implicit in the executive's authority to enforce the law:

> The delegated agencies have been able to apply case-by-case leniency, as reflected in the following powers: humanitarian parole; the setting of bonds; the authority to suspend or cancel deportation or waive grounds for inadmissibility based on evidence of hardship; the exercise of prosecutorial discretion on whether to commence removal proceedings; the granting of "deferred action" status to the sick or elderly; release from detention under "orders of supervision;" and waiving non-immigrant visa requirements for citizens from countries with a history of low visa fraud. (ibid)

At different times in US history, the exercise of prosecutorial discretion has been used to suspend the enforcement of immigration laws toward particular groups of non-citizens. Forms of administrative relief available to the executive branch include deferred action, which grants temporary protection from removal and work authorization. Prosecutorial discretion has also included blanket or categorical relief from deportation through deferred enforced departure (DED) and extended voluntary departure (EVD) for foreign nationals who are unable to or fear return due to conditions in their country of origin.[2] In addition, the secretary of the Department of Homeland Security (DHS) can grant parole-in-place to allow noncitizens to remain lawfully in the United States based on humanitarian concerns.[3] These forms of temporary relief do not make recipients eligible to adjust to lawful permanent resident status (LPR) or provide a pathway to citizenship, which would require an act of Congress.

Formal guidance on the exercise of prosecutorial discretion by federal agencies has developed since the mid-1970s. In 2000, an Immigration and Naturalization Service (INS) memorandum, "Exercising Prosecutorial Discretion," issued by Commissioner Doris Meissner, stated that: "Like all law enforcement agencies, the INS has finite resources, and it is not possible to

1 Memorandum from the Congressional Research Service Prepared for Distribution to Multiple Congressional Requesters, *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, 13 July 2012, 5. http://shusterman.com/pdf/crsdeferredactionmemo.pdf?3856b4.

2 A list of these administrative actions from 1976 to 2012 compiled by the Congressional Research Service is available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fshusterman.com%2Fpdf%2Fcrsdeferredactionmemo.pdf%3F3856b4&ei=BbIZVP73FcP-yQTs8oGwCA&usg=AFQjCNEblzib8hF7lweNWcXNxQaOnVkM2w&bvm=bv.75097201,d.aWw. A May 2012 letter from law professors to President Obama on the authority to grant administrative relief for DREAM Act beneficiaries stated: "Almost every Administration since President Dwight D. Eisenhower has granted DED or the analogous 'Extended Voluntary Departure' to at least one group of noncitizens" (see http://wfc2.wiredforchange.com/dia/track.jsp?v=2&c=ZgsEVTjVEm4YlkPFE0FtDGwurDDPVAhc).

3 In addition, Temporary Protected Status (TPS) may be granted to groups from designated countries. For a more detailed discussion, see Kerwin 2014.

investigate and prosecute all immigration violations." The memorandum instructed agency officials to "exercise discretion in a judicious manner at all stages of the enforcement process." In 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued a memorandum with further guidance on factors that immigration officials should consider in weighing the exercise of discretion based on enforcement priorities. Factors include age, with particular consideration given to minors and the elderly; serious health conditions; strong ties to the community; whether a person represents a national security or public safety concern; length of presence in the United States; the circumstances of the person's arrival to the United States, particularly if he or she came to the United States as a child; and the pursuit of education in the United States.[4] Based on the existing guidelines for prosecutorial discretion, the Deferred Action for Childhood Arrivals (DACA) program gives deferred action to young people brought to the United States as children whom the administration has deemed a low priority group for deportation (see Motomura 2014). The program, which represents the most "recent and ambitious use of executive discretion" (Kerwin 2014), has provided work authorization and temporary protection from removal to approximately 600,000 recipients since it was initiated in 2012 (Batalova, Hooker, and Capps 2014).

President Obama has charged the heads of DHS and the Department of Justice with formulating possible options for executive action that could provide administrative relief to a greater share of the population of more than 11 million unauthorized immigrants. Options under consideration include extending deferred action to a wider pool of youth under the DACA program through adjusting the eligibility requirements related to age, length of residence, and/or educational attainment (Capps, Rosenblum, and Bachmeier 2014). The administration could also grant deferred action to additional populations like the family members of US citizens, LPRs or DACA beneficiaries. According to Migration Policy Institute (MPI) estimates, 3.5 million unauthorized immigrants are parents of US citizens under the age of 18, and up to 3.7 million are parents of children who are either green card holders or DACA recipients (ibid.). MPI estimates also show that the length of residence in the United States would be an important factor defining the scope of possible deferred action. Whereas an estimated 3 million unauthorized immigrants have resided in the country for 15 years or more and 5.7 for at least 10 years, 8.5 million have been present for at least five years (ibid.). In addition to deferred action, the administration has indicated that it is considering the refinement of immigration enforcement priorities that would minimize the deportation of particular groups of individuals if they are apprehended (ibid.).

The President's consideration of executive action has prompted debate over the legal authority to expand immigration relief. In a September 3rd letter to the President, 136 law professors affirmed the administration's legal authority to exercise prosecutorial discretion as means to protect individuals or groups from deportation.[5] The letter

4 Memorandum from John Morton, director of Immigration and Customs Enforcement (ICE), *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities for the Agency for Apprehension, Detention and Removal of Aliens*, 17 June 2011, 4. http://www.ice.gov/doclib/foia/prosecutorial-discretion/pd_cnstnt_w_civil_imm_enforce_ice_priorities.pdf.

5 Letter to President Obama from law professors regarding executive authority to protect individuals

highlighted the longstanding use of prosecutorial discretion in the immigration system, and across all enforcement contexts, as being grounded in the Constitution and recognized by court decisions, immigration statute, regulations, and policy guidance. Notably, in 2012 the Supreme Court emphasized the "broad discretion" of federal officials in its decision on Arizona's S.B. 1070.[6] Through the Immigration and Nationality Act (INA), Congress confers upon DHS the authority to administer and enforce immigration laws. The professors contend that "Congress has also implicitly acknowledged immigration prosecutorial discretion insofar as its appropriations for immigration enforcement have fallen far below the actual number of removable people in the United States."[7] The legal recognition of prosecutorial discretion is further recognized by Congress in the INA's bar on the judicial review of decisions to commence removal proceedings, to adjudicate cases, and to execute removal orders. Legal scholars have also affirmed that the President exercised his executive authority consistent with rule of law principles through the adoption of a formal process by which DACA relief is granted on a case-by-case basis[8] in a uniform, predictable, and non-discriminatory manner (Motomura 2014).

In a lengthy law review article, Zachary Price, a visiting assistant professor at the University of California, Hastings College of Law, takes a very different view, arguing that while the authority for prosecutorial discretion is grounded in the Constitution, this authority is "limited and defeasible" (Price 2014, 674). Price distinguishes between case-by-case discretion and immunizing broad categories of persons from enforcement. He contends that the DACA program falls outside of the proper scope of executive authority in its application of a categorical policy of non-enforcement toward a particular group which has already been deemed a low-enforcement priority. Price argues that DACA goes beyond the "mere prioritization of enforcement resources" (ibid., 761). He cites the use of "executive policymaking through nonenforcement" by George W. Bush and other recent administrations and cautions that "executive nonenforcement authority, if unbounded, could substantially reorder the Constitution's separation of powers framework… [and] provide Presidents with a sort of second veto—an authority to remake the law on the ground without asking Congress to revise the law on the books" (ibid., 674).

The DACA program was a major political victory for the pro-reform movement and it highlights the growing influence of civil society in immigrant communities and the US immigration debate. In a chapter complementing Wheeler's history of US immigration law, Sara Campos, a freelance writer and the former director of the Asylum Program for the Lawyers Committee for Civil Rights in San Francisco, charts the role of civil society in shaping immigration policy from the passage of the Immigration Reform and Control Act of 1986 to the present. Campos reports that when comprehensive immigration reform legislation which would have included the DREAM Act[9] failed to pass in 2007,

or groups from deportation, 3 September 2014 [hereinafter Law professors' letter], https://law.psu.edu/_file/Law-Professor-Letter.pdf.

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

7 Law professors' letter.

8 Even when a deferred action program covers a particular group, each individual must submit an application which is screened on a case-by-case basis. DACA recipients must reapply every two years.

9 The Development, Relief, and Education for Alien Minors Act (DREAM) Act would provide legal status and a pathway to citizenship to eligible

"unauthorized youth re-evaluated their agenda and began to build a movement to influence the broader immigrant rights agenda." This gave rise to the founding of the United We Dream Network in 2008 which encompasses 47 organizations from 24 states (137). In the spring of 2012, the Obama administration announced the DACA program following months of concerted advocacy by unauthorized youth and the United We Dream Network. At the time DACA was announced, advocates hoped that it would be followed by immigration reform legislation that would enact permanent relief. In the interim, the implementation of the program has served as a "test run for a future legalization program" (138).

Other civil society groups have vociferously opposed comprehensive immigration reform. Campos recounts that while the immigration reform bill was under debate in 2007, NumbersUSA, a restrictionist lobbying organization, "orchestrated a stream of more than one million calls and faxes, causing the congressional switchboard to break down" (134). More recently, NumbersUSA has provided substantial support to a lawsuit filed by ICE agents against the Obama administration challenging the directives on prosecutorial discretion issued in the Morton Memorandum and by DHS on DACA,[10] which, they claim, order them to act in violation of federal laws (Manetas 2013).

Campos' account illustrates how the Senate-passed immigration reform bill (S. 744) reflects the intense advocacy of civil society stakeholders on both sides of the debate. She concludes: "What legislation might result and whether Congress in its current polarized, partisan state will be capable of enacting reform in the near-term remains to be seen. What is certain is that civil society is more robust than it has ever been, will remain active in the immigration debate, and will be ready for reform if and when it comes" (161).

International Migration, US Immigration Law and Civil Society: From the Pre-Colonial Era to the 113th Congress also includes an introductory essay by Donald Kerwin, CMS's Executive Director, and a chapter by Joseph Chamie, former director of the Population Division of the United Nations, on migration to the Americas over the last 500 years. The book is the tenth in a series of publications by SIMN on immigration policy and civil society in the Western Hemisphere.

unauthorized youth who were brought to the United States as children.

10 Memorandum from Janet Napolitano, secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, 15 June 2012. http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

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