



# KEEPING HOPE ALIVE: PRESIDENT OBAMA CAN USE HIS EXECUTIVE POWER UNTIL CONGRESS PASSES THE DREAM ACT

*Posted on December 19, 2010 by Cyrus Mehta*

**By Gary Endelman and Cyrus D. Mehta**

We are all extremely disappointed that the Senate blocked the DREAM Act on December 18. Even though a majority of the Senate voted for cloture, it was not enough. We need 60 votes for legislation to move forward, even when we have a majority of 55 out of 100. But do we need to wait endlessly for Congress to act? The answer is NO! Faced with unrelenting opposition from a radicalized Republican party that has declared war on immigrants, the Obama Administration is not powerless if it has the vision and the will to act.

We demonstrated in our article Tyranny of Priority Dates, <http://scr.bi/i0Lqkz>, that it is possible for the Executive to legalize the status of non-citizens without Congressional intervention to achieve something close to CIR. Our proposal for administrative solutions has become all the more relevant now that Congress has not passed the DREAM Act. DREAMERS must still lobby the administration for relief, which is has the ability to grant without going to Congress. Yes, the President does indeed have power to grant benefits administratively, such as parole and employment authorization. The Executive, under INA § 212(d)(5), has the authority to grant parole for urgent humanitarian reasons or significant public benefits.

<http://cyrusmehta.blogspot.com/2010/04/comprehensive-immigration-reform.html>. Talented and dedicated DREAMERS who go to college, serve in the military or perform work of national importance under civilian direction are ideal candidates for invoking § 212(d)(5) under "urgent humanitarian reasons or significant public benefits." Similarly, the Executive has the authority to grant employment authorization under INA §274A(h)(3), which defines the term

“unauthorized alien” as one who is not “(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.” Under sub paragraph (B), the USCIS may grant an EAD to DREAM kids who inadvertently fell out of status for no fault of their own and who only know America as their country.

The Executive’s use of parole, sua sponte, in such an expansive and aggressive fashion is hardly unique in post-World War II American history. The rescue of Hungarian refugees after the abortive 1956 uprising or the Vietnamese refugees at various points of that conflict comes readily to mind. While these were dramatic examples of international crises, the immigration situation in America today, though more mundane, is no less of a humanitarian emergency with human costs that are every bit as high and damage to the national interest no less long lasting. DREAM kids need not wait an eternity for Congress to come to the rescue.

The government has always had the ability to institute Deferred Action, which is a discretionary act not to prosecute or to deport a particular alien. Deferred Action is purely discretionary. They are both informal ways to allow continued presence in the United States. The INA never mentions deferred action. Neither does deferred action depends upon regulation. Deferred action is not mentioned in Title 8 of the Code of Federal Regulations but only in the old, and now inapplicable, Operations Instructions. The exercise of prosecutorial discretion to grant deferred action status is an expression of limited enforcement resources in the administration of the immigration law. It makes no sense to deport DREAM kids who have been educated in the US, and who have the potential to enhance the US through their hard work, creativity and determination to succeed. Giving these kids a chance will also help the economy by generating more taxable earnings and will also reduce the budgeted deficit by over \$2.2 billion over a 10 year period, <http://immigrationpolicy.org/just-facts/dream-act-supporting-us-economy-creating-opportunities-immigrant-students>.

Deferred Action has also been applied to battered spouse and children self-petitioners who had approved I-360 petitions under the Violence Against Women Act, so that they could remain in the United States and obtain work authorization. In 2006, Congress, in recognition of this informal practice, codified at INA § 204(a)(1)(k) the grant of employment authorization to VAWA self-petitioners. Deferred Action has also been granted to U visa applicants.

More recently, and prior to the passage of INA § 204(l), the DHS provided interim relief to surviving spouses of deceased American citizens and their children who were married for less than two years at the time of the citizen's death. Mr. Neufeld's memo, issued on June 15, 2009, provides extraordinary relief to spouses whose citizen spouses died regardless of whether the I-130 petitions were approved, pending or even not filed. Such beneficiaries may request deferred action and obtain an EAD. Then, on October 28, 2009, Congress amended the statute, and created § 204(l) to allow, inter alia, a widow who was married less than two years at the time of the citizen's death to apply for permanent residence.

How about parole in place? Unaccompanied minors brought as young children to the United States without inspection deserve such relief. Take a look at Section 235(a)(1) of the INA. Know what it says? It reminds us that these DREAMERS who are physically in this country without formal inspection or legal admission can be deemed to be applicants for admission. That is how "parole in place" works. By indulging in the legal fiction that these DREAMERS are actually knocking at the golden door and asking to be let in, the Obama Administration can make them eligible for adjustment of status to legal permanent resident (if they qualify as immediate relatives, such as a spouse of a US citizen) through expansion of the parole mechanism. The USCIS informally allows spouses of military personnel who would otherwise be unable to adjust under INA § 245(a) if they were neither "inspected and admitted or paroled" to apply for "parole in place." This administrative solution, where a non-citizen is fictitiously paroled, and thus rendered eligible for adjustment as an immediate relative of a US citizen under § 245, allows our troops to concentrate in the battlefield without being distracted about whether their spouses can or cannot remain in the US.

Moreover, as suggested in *The Tyranny of Priority Dates*, there is nothing to prevent the administration from granting similar parole benefits to undocumented non-citizens in the United States, along with employment authorization, who are waiting for their priority dates to become current or who meet certain sympathetic criteria such as DREAM children. The President can achieve something close to the DREAM Act and even Comprehensive Immigration Reform without going through Congress and without violating the Separation of Powers doctrine. While some may argue that there is no express Congressional authorization for the Executive to enact such measures, the

President may act within a “twilight zone” in which he may have concurrent authority with Congress. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

There is no bar in law or logic to a decision by the Department of Homeland Security that it will not seek to deport or remove anyone here without color of law who would qualify for DREAM Act benefits. Only in those instances where relief was available would ICE issue a Notice To Appear. Refraining from seeking removal of DREAMERS in the public interest would be entirely consistent with the reasons why the Administration lobbied the Congress so hard in the first place and hopefully will continue to do so. Be prepared for Steve King, Lamar Smith and their nativist allies in the Senate to react. They can threaten to use the power of the purse to curb these regulatory initiatives. Be strong and of good courage! Mr. President, keep your veto pen close at hand. Until we get a new law, justice will have to be squeezed out of the one we have now. The fact that Congress will not act does not mean that the DREAM is dead; it simply is deferred, while we go about its realization by other means.