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GOING BEYOND THE POLITICS OF DISCRETION IN THE AMERICAN IMMIGRATION SYSTEM

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The ability of whether the President can use discretion in the immigration arena has become the flavor of the month. The announcement by the DHS on August 18, 2001 under which 300,000 individuals who are low priority can hope to have their cases closed and obtain work authorization was welcomed. The details about how this policy will play out are nicely explained in a Legal Action Center advisory. Although many were pleasantly surprised by this policy, within days of the announcement even advocates for immigration reform have become skeptical about whether this policy will have a dramatic and far reaching impact. Obama supporters have even gone so far to accuse the Obama administration for mere window dressing in order to keep certain voters on his side in the next elections. Commentators such as Dan Kowalski also justifiably feel that ICE personnel will continue to ignore this policy, and choose not to exercise their discretion favorably.

While the President has his critics within the pro-immigration camp regarding his new announcement on discretion, the attempt by immigration restrictionists in Congress to blunt the June 17, 2011 Morton Memo on prosecutorial discretion when viewed in a larger context repeats an old pattern. For instance, Congressmen Lamar Smith (R-TX) and Senator Vitter have proposed a most unusual piece of legislation suitably called the HALT Act (Hinder the Administration's Legalization Temptation Act) that will suspend all of the Administration's discretionary relief until January 21, 2013, which is the day after the next Presidential inauguration.

Those who think the exercise of discretion will reduce enforcement or promote immigration support the concept of discretion. This is the case with the Morton

Memo. The same thing happened with respect to the leaked memo to USICS Director Mayorkas - it was written to allow for remediation through executive fiat without the need for Congress to act and it was leaked to prevent this from happening. However, when the policy question appears to reinforce narrow interpretation and make strict enforcement more likely, then the antagonists switch sides and the pro-immigration camp seeks to curb discretion. Skeptics who fear ICE over-reaching often counsel clients to avoid signing up for the IMAGE program precisely because the exercise of discretion by ICE will, in reality, prove both invasive and punitive.

What is lost in all this is an open and honest discussion of the place that discretion has in the American immigration system separate and apart from the substantive issues or ideological positions at stake. In an increasingly complex, hyper-technical system, the need for discretion as a way to make intelligent choices seems more open and obvious than ever. In light of the possibility of more than a decade long backlog in the Employment-based Second and Third Preferences, for persons born in India and China, we provided in The Tyranny of Priority Dates, a dispassionate approach for the exercise of discretion to ameliorate the plight of those caught in the backlogs. The entrenched positions and mutual recriminations that characterize relations between all major interest groups makes such a disinterested dialogue virtually impossible. Consequently, the system becomes increasingly rigid and ever more incapable of responding in a meaningful and effective way to new challenges and emerging opportunities.

The Doris Meissner Memo on Prosecutorial Discretion and Letter from Assistant Attorney General Robert Raben to Congressman Barney Frank (available on AILA Infonet at Document # 00020771, Feb. 7,2000) both dealt with concerns by immigration advocates that the Illegal Immigration Reform and Responsibility Act of 1996 had deprived the legacy INS of the fundamental authority to grant discretionary relief; in each case, it was not the presence or absence of discretion that was of primary concern to critics who sought clarification and reassurance but rather the ability to obtain the substantive relief that Congress had seemed to put out of reach.

Both critics and defenders of discretion often convey the subliminal but powerful message that discretion is the polar opposite of enforcement. Restrictionists oppose discretion because they oppose the substantive relief that discretion makes possible. Advocates promote discretion not because they

accept the need for more intelligent or targeted enforcement, but because they hope that its vigorous exercise will make any enforcement less likely.

The point is that whether discretion is good or bad depends upon whether one supports or opposes the short-term end result to which discretion is presumed to lead. A detached, disinterested examination of how discretion will affect the larger national interest or the fundamental heath and rationality of the system itself is, sad to say, conspicuously absent.

The Immigration Policy Center has published a report on the historical role of the Administration in exercising discretion. This paper provides the example of the implementation of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), which provided relief, but unequal treatment, to Nicaraguans, Cubans, Salvadorians and Guatemalans. Nicaraguans and Cubans were allowed to adjust their status without preconditions, while Salvadorians and Guatemalans were thrown the gauntlet to demonstrate extreme hardship if removed from the US. While advocates demanded the same standard to apply for Salvadorians and Guatemalans as NACARA sought to apply for Nicaraguans and Cubans, which the then Clinton Administration correctly stated it could not do under the legislation, the Administration compromised through subsequent regulation, and through use of judicious discretion, by softening "extreme hardship" for Salvadorians and Guatemalans through the creation of a rebuttal presumption standard.

The exercise of discretion by the Clinton Administration after the passage of NACARA is a good example of how this exercise was used judiciously to achieve a compromise between competing interests. Moreover, the use of discretionary administrative action is no stranger to immigration policy, and previous efforts to administratively correct hardships or imbalances were implemented without a whisper. Deferred Action has 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. A USCIS memo, issued on June 15, 2009, provided extraordinary relief to spouses whose citizen spouses died regardless of whether the I-130 petitions were approved, pending or even not filed. Such beneficiaries could 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 (er) who was married less than two years at the time of the citizen's death to apply for permanent residence. The USCIS has also implemented "parole in place" for spouses for military personnel who would otherwise not be eligible for adjustment of status if they were unable to demonstrate that they were admitted or paroled into the US.

It is widely acknowledged that we have a broken immigration system, which has contributed to the buildup in the undocumented population. In the absence of Congressional intervention to fix the system, the Administration can exercise discretion, devoid of ideology, to remedy the imbalance. In the context of the recent August 18 policy announcement about closing the cases of low priority respondents in removal, people on all sides of the political spectrum acknowledge that it would take about 30 years if the government could hypothetically deport all the 12 million + undocumented persons in the US given its current resources. If it expended more money and resources, it would be counter-productive, in addition to creating a Gestapo-like state tearing families apart, as these precious resources could be efficiently spent elsewhere. Rather, it would be wiser for the Administration to use its executive power to tap into the resources, energies and dreams of people who can ultimately benefit the United States. In providing some legal basis for them to remain in the US under the August 18 policy, even if it does not go all the way, they are more likely to add to tax revenues, spur consumer confidence, buy homes and ultimately build businesses that may result in jobs for Americans.