Written Testimony of

Jill E. Family
Professor of Law
Director, Law and Government Institute
Widener University School of Law
jefamily@widener.edu
http://ssrn.com/author=511359

Before the

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

March 19, 2015

Mr. Chairman and Honorable members of the subcommittee, thank you for the opportunity to testify before you. My name is Jill Family. I am Professor of Law at Widener University School of Law in Harrisburg, Pennsylvania. At Widener, I teach Administrative Law, Immigration Law, Civil Procedure, and Introduction to Immigration Law Practice. Also, I am the director of Widener's Law and Government Institute. The Institute is dedicated to the study of government law, including study of administrative agencies. Through the Institute, students may earn a certificate in government law along with a law degree. I have been researching immigration law for 10 years, and my focus of study is the dynamic between immigration law and administrative law in general. This includes study of the administrative agencies that implement immigration law, the respective roles of notice and comment rulemaking and agency guidance documents, as well as the role of the federal courts in reviewing the decisions of administrative agencies. I had the privilege of serving as a member of the governing council of the Administrative Law Section of the American Bar Association. I am a Fellow of the American Bar Foundation, and before I became a law professor, I practiced immigration law.

The issues before the committee today are important, and I have thought about them deeply. President Obama announced actions affecting immigration law on November 20, 2014.[1] Among other things, he proposed to expand the already existing Deferred Action for Childhood Arrivals (DACA) policy and to establish the Deferred Action for Parental Accountability (DAPA) policy.[2] DAPA would allow the parents of US citizen children and the parents of lawful permanent resident children

[1] https://www.whitehouse.gov/issues/immigration/immigration-action
[2] http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

to request deferred action. Deferred action is a signal that the individual is a low priority for deportation. Deferred action does not provide a legal immigration status, but it does give revocable permission for an individual to be present in the United States for a certain period of time.[3]

As far as the legal authority for DACA and DAPA, I have signed two letters explaining that these two policies are well within President Obama's legal authority. The first letter, signed by 135 immigration law scholars and teachers, explains the history of and circumstances surrounding the exercise of prosecutorial discretion in immigration law and concludes that DACA and DAPA "are legal exercises of prosecutorial discretion."[4]

The second letter, which I helped draft, shows some of the flaws in US District Judge Andrew Hanen's opinion in Texas v. United States.[5] On February 16, 2015, Judge Hanen preliminarily enjoined the expansion of DACA and the operation of DAPA.[6] Judge Hanen, among other things, concluded that President Obama's policies are subject to judicial review under the Administrative Procedure Act (APA) because the policies are something other than "nonenforcement decisions."[7] Judge Hanen is concerned because, in his view, "DHS has not instructed its officers to merely refrain from [arrest]."[8] To him, this makes deferred action a "program" that provides immigration benefits.[9]

This conclusion allowed Judge Hanen to move on to the question whether the Department of Homeland Security (DHS) appropriately invoked an exception to notice and comment rulemaking under the APA.[10] Judge Hanen concluded that DHS did not properly invoke that exception and preliminarily enjoined the DACA extension and DAPA based on that perceived APA procedural violation.[11] After Judge Hanen refused to rule on the United States' request for a stay of the injunction, on March 12, 2015 the United States filed with the US Court of Appeals for the Fifth Circuit an emergency motion for a stay of Judge Hanen's order pending appeal.[12]

---

[3] Testimony of Stephen H. Legomsky before House Judiciary Committee at 7 (Feb. 25, 2015), available at http://lawprofessors.typepad.com/files/legomsky-testimony.pdf

[4] See https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf .

[5] See https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf

[6] Texas v. United States, Civ. Action B-14-254 (S.D. Tex. Feb. 16, 2015), available at http://crimmigration.com/wp-content/uploads/2015/02/Memorandum-Opinion-Texas-v-United-States.pdf

[7] Id. at 85-86.

[8] Id. at 86.

[9] Id. at 85-86.

[10] Id. at 102-112.

[11] Id. at 123.

[12] See Appellants' Emergency Motion for Stay Pending Appeal, No. 15-40238 (5th Cir. Mar. 12, 2015), available at http://crimmigration.com/wp-content/uploads/2015/03/03-12-2015-stay-mx-5th-cir.pdf

This second letter clears up confusion about immigration law and immigration prosecutorial discretion that is evident in Judge Hanen's opinion. The letter emphasizes that the immigration statutes give DHS the authority to establish immigration enforcement priorities, and that deferred action is a longstanding form of immigration prosecutorial discretion. DACA and DAPA are not something other than prosecutorial discretion, in fact, they are simply a part of a long history of formulating enforcement priorities in immigration law. Contrary to Judge Hanen's characterization, DACA and DAPA do not afford the benefit of any kind of lawful immigration status.[13] On this point, the Secretary of Homeland Security is explicit.[14] In the technical world of immigration law, the difference between lawful status and lawful presence is important. Lawful presence merely means that the individual has the government's consent to be present.[15] It does not grant the individual a legal immigration status, such as a green card, or even a temporary status. Additionally, the letter addresses Judge Hanen's misunderstanding of the role of work authorization, which he categorizes as a part of the "program."[16] DHS did not create work authorization in November 2014 as a part of DACA or DAPA. A longstanding separate statutory provision gives DHS the authority to issue work authorization,[17] and longstanding regulations allow DHS to issue work authorization to those who have received deferred action.[18]

I would like to focus the remainder of my testimony on the administrative law implications of the litigation over President Obama's immigration actions. First, I would like to provide some background about the APA and its exceptions from notice and comment rulemaking. Second, I will highlight some concerns I have about Judge Hanen's approach to the administrative law questions raised in the litigation. Third, I will present some broader thoughts for this committee to consider.

Procedurally speaking, President Obama did not issue any executive orders to announce these immigration policies. The extension of DACA and the institution of DAPA are addressed in a policy memorandum (DAPA Memo).[19] This policy memorandum is from the Secretary of Homeland Security to other agency officials and explains what the Secretary would like to see accomplished. In administrative law, such a memorandum is known as a "guidance document." Other terms often used include "sub-regulatory rule" or "non-legislative rule."[20]

---

[13] Texas v. U.S. at 87.
[14] DAPA Memo at 5, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf
[15] That consent, authorized by INA § 212(a)(9)(B)(ii) (8 U.S.C. § 1182(a)(9)(B)(ii)), means that the person will not be accruing *additional* unlawful presence for purposes of the 3-year and 10-year bars on future admissibility.
[16] Texas v. U.S. at 85-86.
[17] INA § 274A(h)(3) (8 U.S.C. § 1324b(h)(3)).
[18] 8 C.F.R. § 274a.12(c)(14).
[19] http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf
[20] Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565, 572 (2012).

Agency guidance documents are used heavily throughout the executive branch, and have been for decades; they are common to administrative law.[21] In administrative law, the term "rule" is used very broadly to include both legislative and non-legislative rules.[22] Legislative rules are legally binding while non-legislative rules are not. [23] A legislative rule must follow either the formal or informal rulemaking provisions of the APA.[24] Under formal rulemaking, the agency holds a hearing where evidence is received.[25] Formal rulemaking rarely is required, partially due to the Supreme Court's high bar that statutes need to meet to trigger the use of formal rulemaking.[26] Informal rulemaking is more common: the executive branch agency places notice of a proposed rule in the Federal Register, allows for an opportunity for the public to comment and then considers those comments and publishes a final rule.[27]

The APA allows for an exception to the informal rulemaking requirements for guidance documents.[28] The APA grants an exception to the informal rulemaking requirements for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[29] Under the exception for general statements of policy, policy statements are not subject to the notice and comment requirements of the APA, but they are not legally binding on the public.[30] That means that a regulated party may argue that a different rule, other than the one in the policy statement, should apply in any enforcement proceeding.

All types of federal agencies use non-legislative rules. Guidance documents allow an agency to move more quickly, and to communicate more frequently with regulated parties.[31] A policy statement such as the DAPA Memo expresses an agency's enforcement plans. It is important to highlight that guidance documents are not at all unique to immigration law or to the current administration. Guidance documents are a very common type of agency tool, and agencies rely on guidance documents to carry out statutory and regulatory directives.[32]

---

[21] Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and* Not Really *Binding Rules*, 47 U. Mich. J. L. Reform 1, 4 (2013).
[22] 5 U.S.C. § 551(4).
[23] Family, *Administrative Law Through the Lens of Immigration Law*, at 571-72.
[24] Id. at 569-70.
[25] 5 U.S.C. §§ 556-557.
[26] Family, *Administrative Law Through the Lens of Immigration Law*, at 570.
[27] 5 U.S.C. § 553; Family, *Administrative Law Through the Lens of Immigration Law*, at 569-70.
[28] Id. at 569-70.
[29] 5 U.S.C. § 553(b)(a).
[30] Family, *Administrative Law Through the Lens of Immigration Law*, at 570.
[31] Id. at 589; Family, *Easing the Guidance Document Dilemma* at 20-22.
[32] Family, *Easing the Guidance Document Dilemma* at 4, 31-38; Family, *Administrative Law Through the Lens of Immigration Law*, at 588.

It is also common to see challenges to an agency's use of guidance documents.[33] Again, this is something that is not at all unique to immigration law or to the current administration. In these challenges, a regulated party argues that the agency's use of a guidance document violates the APA. The argument is that the guidance document really is a legislative rule in disguise and that the agency should have used notice and comment rulemaking rather than invoking an exception. Distinguishing between appropriate and inappropriate uses of the exceptions to informal rulemaking is notoriously hazy.[34] There is no clear cut test. For example, the US Court of Appeals for the DC Circuit commonly hears challenges to agency use of guidance documents.[35] It is difficult to summarize the DC Circuit's approach to uncovering policy statements that really are improperly formulated legislative rules.[36] The court usually looks to the language of the policy statement and the agency's behavior.[37] If the document does not use binding language and the agency does not treat the rule as binding, the rule may truly be non-legislative.[38]

To reach the question of whether the agency appropriately invoked the exception, a federal court must first determine that it has judicial review over the agency action. Here it becomes important that the DAPA Memo expresses how the agency will exercise its prosecutorial discretion. The APA states that federal court review is not available where "agency action is committed to agency discretion by law."[39] If the agency action is committed to the agency's discretion, then the APA precludes judicial review. It is this APA provision that makes essential to the injunction Judge Hanen's conclusion that the DAPA Memo is not agency action committed to DHS' discretion. If it is, then Judge Hanen was wrong to even reach the question whether DHS should have engaged in notice and comment rulemaking. According to the Supreme Court, "an agency's decision not to take enforcement action should be presumed immune from judicial review" under the APA.[40]

Judge Hanen concluded that the DAPA Memo is not committed to the agency's discretion because it is something other than a non-enforcement decision. Judge Hanen characterized the memorandum as establishing a "program;" that the federal government is granting benefits, rather than exercising prosecutorial discretion. Further, Judge Hanen concluded that the Immigration and Nationality Act (INA) expressly forbids DHS to grant deferred action.[41] He concluded that the INA "circumscribe[s] discretion" because, according to his reading of the statute, the INA

---

[33] Family, *Administrative Law Through the Lens of Immigration Law*, at 571-78.
[34] Id. at 570-71.
[35] *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (acknowledging the role of the US Court of Appeals for the District of Columbia in shaping how courts distinguish between legislative and nonlegislative rules).
[36] Family, *Administrative Law Through the Lens of Immigration Law*, at 575-78.
[37] Id.
[38] Id.; see also *Professionals and Patients for Customized Care,* 56 F.3d at 595-601.
[39] 5 U.S.C. § 701(a)(2).
[40] *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).
[41] Texas v. U.S. at 88-89.

mandates that all applicants for admission must be detained and put into removal proceedings if an immigration inspector does not admit the person.[42] Therefore, according to the opinion, "potential DAPA beneficiaries who entered unlawfully are inadmissible . . . and the law dictates that they should be removed. . . ."[43]

I believe that these conclusions represent a fundamental misunderstanding of the operation of immigration law, and that they uncomfortably stretch administrative law principles to allow for judicial review of this particular agency action. As I mentioned earlier, deferred action is prosecutorial discretion. It does, in fact, represent a non-enforcement decision. The agency is examining its limited resources[44] and is prioritizing individuals for deportation. A grant of deferred action does not confer legal immigration status. A grant of deferred action does not provide "immunity."[45] The government may revoke the deferred action. The availability of work authorization does not stem from the DAPA Memo, but rather from an already existing, separate and legally binding framework. As also explained earlier, the INA expressly grants prosecutorial discretion authority to the agency. At its core, Judge Hanen's argument about non-enforcement reflects his disagreement with how DHS has chosen not to enforce. But the APA contains the applicable exception to judicial review to prevent such judicial interference. [46]

As for Judge Hanen's conclusion that the INA forbids deferred action, Professor David Martin carefully examined a similar interpretation of the INA in 2012 and concluded that it "deeply misunderstands" the purpose of the statute it relies on.[47] If Judge Hanen's interpretation is correct, then any kind of prosecutorial discretion exercised before an applicant for admission is placed into removal proceedings would be unlawful. For example, Professor Martin explained that parole, a type of prosecutorial discretion, is often granted to foreign nationals who come to the United States to help with a natural disaster. [48] If Judge Hanen's reading of the statute stands, then no first responder volunteer would be allowed into the country without first being detained and put into a removal hearing. [49] Judge Hanen erroneously looked at these statutory sections in a vacuum and failed to square his conclusion that the INA forbids deferred action with his own acknowledgement that DHS has the authority to set enforcement priorities. [50]

---

[42] Id.
[43] Id. at 89.
[44] Testimony of Stephen H. Legomsky before House Judiciary Committee at 3 (Feb. 25, 2015), available at http://lawprofessors.typepad.com/files/legomsky-testimony.pdf
[45] Texas v. U.S. at 87.
[46] *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).
[47] David A. Martin, *A Defense of Immigration Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L.J. Online 167, 172 (2012), available at http://www.law.yale.edu/documents/pdf/conference/ILR13_CCDavidMartin.pdf ; see also Testimony of Stephen H. Legomsky before House Judiciary Committee at 18-20 (Feb. 25, 2015), available at http://lawprofessors.typepad.com/files/legomsky-testimony.pdf
[48] Martin, *A Defense of Immigration Enforcement Discretion* at 179-81.
[49] Id. at 181.
[50] Texas v. U.S. at 69.

Also, I am concerned about Judge Hanen's ultimate conclusion that DHS' use of a guidance document, instead of notice and comment rulemaking, violates the APA.[51] I want to emphasize that I believe that Judge Hanen should not have addressed this issue because the DAPA Memo is committed to the agency's discretion. Placing that concern to the side for the moment, I strongly disagree with Judge Hanen's characterization of the DAPA Memo as leaving no room for discretion.[52]

In a leading Fifth Circuit case, the court of appeals determined that the FDA appropriately invoked the policy statement exception to notice and comment rulemaking.[53] In that case, the Fifth Circuit examined the agency's own words and actions in describing and implementing the policy contained in the memorandum. Before the court was a policy statement that listed "nine factors that the FDA 'will consider' in determining whether to initiate an enforcement action."[54] The FDA had explained in the memorandum that those nine factors were not exhaustive and that agency personnel could consider other factors.[55] Despite the "will consider" language, the Fifth Circuit concluded that the document left enough room for individualized determinations because the memorandum allowed for the consideration of other factors other than the nine. [56] Turning to how the agency actually treated the memorandum, the Fifth Circuit concluded that even though the memorandum had signaled how the agency would exercise its enforcement discretion, that in itself did not doom the memorandum. As the court stated, "all statements of policy channel discretion to some degree- indeed, that is their purpose."[57] In reaching this conclusion, the Fifth Circuit looked at how the FDA had implemented the actual memorandum that was before the court.

Similar to the policy memorandum that was before the Fifth Circuit, the DAPA Memo directs adjudicators to exercise discretion and gives them space to consider factors other than those listed in the memorandum. The language used by the agency, therefore, is the language of a policy statement. Also, the only evidence Judge Hanen considered regarding the agency's own behavior was the agency's implementation of a different policy, the original DACA policy.[58] Judge Hanen concluded that he knows how DHS will implement this policy based on his conclusion of how DHS is

---

[51] This conclusion is closely related to the conclusion that the DAPA Memo is final agency action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 452 F.3d 798, 806 (D.C. Cir. 2006). Where a policy memorandum does not create legal consequences, it cannot be final agency action. Id. at 808. Therefore, if the DAPA Memo is truly a policy memorandum, it is not final agency action.
[52] Texas v. U.S. at 108-110.
[53] *Professionals and Patients for Customized Care*, 56 F.3d at 600-601.
[54] Id. at 593-94.
[55] Id. at 597.
[56] Id. at 597, 600.
[57] Id. at 600.
[58] Judge Hanen concluded that DHS is not exercising discretion in the implementation of DACA. Texas v. U.S. at n.96 and n.101. Professor Stephen Legomsky has explained how the record refutes this conclusion. Testimony of Stephen H. Legomsky before House Judiciary Committee at 12 (Feb. 25, 2015), available at http://lawprofessors.typepad.com/files/legomsky-testimony.pdf

implementing another policy. If the test is whether the memorandum is binding on its face or as applied, the memorandum is not binding on its face, and it is too early to know how it will be applied.

In closing, I would like to focus your attention on some broader administrative law issues. Guidance documents do have drawbacks. There are valid concerns that any agency, or any administration, could use a guidance document to bind a regulated party practically without undergoing the rigors of notice and comment rulemaking. The concern is that a regulated party will feel compelled to follow the direction of the guidance document and will not argue that some other rule should apply. Guidance documents do play a necessary role in administrative law, however. The APA contains the exception to notice and comment rulemaking for good reasons. Whether, as a matter of good governance, agencies should use more notice and comment rulemaking is an open question. But policy memoranda like the DAPA Memo will always play a role in administrative law. In evaluating the DAPA Memo, we should test it in the same way a court would test any guidance document, and not subject it to different scrutiny because the substantive subject is immigration law.

Also, we should commend and encourage DHS for its efforts to be transparent about the DACA and DAPA procedures. The listing of criteria, while not determinative, informs the public about the types of things DHS will think about when deciding whether to grant deferred action. This is immensely preferable to a scenario where the agency provides no signals to either the public or its own adjudicators and the guiding principles behind a decision are a mystery. Providing some criteria and explaining how the agency will approach requests for deferred action is undoubtedly fairer, and also makes it easier for the public to hold the agency accountable when it actually adjudicates requests.

Thank you once again for the privilege of testifying before this Committee.