

U.S. immigration: Increasing impact of policy shifts - Part 1

By [Elizabeth M. Klarin](#)

February 20, 2020 | **IMMIGRATION**

Systemic immigration reform has long been an American dream, with the last several administrations (covering both sides of the political aisle) attempting to overhaul key provisions or the country's current system entirely. But over the last 20 years, little has been achieved in changing the actual laws underpinning U.S. immigration - leaving it up to policymakers to inject change where possible based on policy interpretations of existing laws.

The most recent major immigration reforms enacted in the U.S. include the *Immigration Reform and Control Act* of 1986 (under President Ronald Reagan), the *Immigration Act* of 1990 (under President George H.W. Bush) and the *Illegal Immigration Reform and Immigration Responsibility Act* (IIRIRA, under President Bill Clinton). Since then, President George W. Bush's administration (2001-2009) saw both the "Comprehensive Immigration Reform Act" of 2006 and the "Comprehensive Immigration Reform Act" of 2007 proposed, neither of which were passed into law. President Barack Obama (serving from 2009-2017) took a second crack at major immigration reform, with the failed "Border Security, Economic Opportunity, and Immigration Modernization Act" of 2013.

To combat legislative inaction on immigration reform, Obama began a practice of enacting immigration change based on "executive action," which has continued under the current U.S. presidential administration (President Donald Trump). Executive power is granted to U.S. presidents via the U.S. Constitution and allows them to make unilateral moves to circumvent the legislative process (where possible) by declaring government policy. The result has been wild swings in the interpretation of existing U.S. immigration laws, generally to suit the preferences and meet campaign promises of the political party that holds power in the U.S. executive branch.

Policy as new 'law of the land'

Although not law, an executive order is legally binding. Executive orders cannot reverse a law passed by Congress, but a future president can undo a prior president's executive order with a sweep of the pen. Likewise, states can challenge executive actions, potentially delaying or derailing executive actions on certain grounds, through the judiciary (court system). Other types of executive actions - such as directives and memorandums, both used to inform federal agencies of administrative policy - carry varying legal weight.

For example, Obama established the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program in 2014 by executive action (a memorandum), which allowed qualifying illegal immigrants the temporary legal ability to work and to avoid deportation from the U.S., as well as provided a path to legal residency. However, the action was placed on hold by preliminary injunction after 26 states challenged the action in court. While the court case was pending and after the U.S. Supreme Court failed to reach consensus on the issue, the policy was placed on hold, until Trump announced the rescission of the DAPA order in 2017. Game over - for now.

However, a future president could reinstate the program or a similar one by executive action.

Despite judicial challenges, if a president is determined to implement a policy through executive action, it can be hard to derail that train. This truth has been on full display with the executive actions in recent years restricting U.S. entries by individuals from certain countries, based on national security concerns - which have been announced, challenged, rewritten, revoked and replaced by Trump multiple times.

The president signed related executive orders in January 2017, March 2017 and September 2017. Each of these orders was challenged in the country's court system, with the first two being struck down, appealed and replaced by revised orders. The final (September 2017) version made its way to the U.S. Supreme Court, which upheld the order in June 2018. In January 2020, Trump expanded the scope of the restrictions under this order, by issuing a proclamation placing visa and entry restrictions on travelers from six additional countries not named in the original executive order.

Understandably, laws - which have to pass both U.S. houses of Congress and be signed by the president - hold up better over time. Critics of the current practice of implementing major U.S. policy changes based on executive action say that major legal changes should be subject to the scrutiny and agreement of *both* the legislative and executive branches of the U.S. government. But supporters of executive actions say they are unavoidable and largely a result of the failure of the legislative branch of the government to successfully agree on systemic reforms. Executive action is seen as the only effective way to achieve change in some instances - considering the current hotbed of political animosity that has infected both lawmakers and voters on both sides of the political aisle.

This is the first of a two-part series.

Elizabeth M. Klarin, partner with Lippes Mathias Wexler Friedman LLP, has more than 15 years of immigration experience assisting clients with the full spectrum of U.S. immigration matters. She represents clients from around the globe across virtually every industry, as well as individuals seeking strategic immigration options and solutions.

This article was originally published by The Lawyer's Daily (www.thelawyersdaily.ca), part of LexisNexis Canada Inc.

Related Team



Elizabeth M. Klarin
Partner



Elizabeth M. Klarin
Partner

Disclaimer: *The information in this post is provided for general informational purposes only, and may not reflect the current law in your jurisdiction. No information contained in this post should be construed as legal advice from our firm or the individual author, nor is it intended to be a substitute for legal counsel on any subject matter. No reader of this post should act or refrain from acting on the basis of any information included in, or accessible through, this post without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from a lawyer licensed in the recipient's state, country or other appropriate licensing jurisdiction.*