

March 20, 2023

The President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

RE: Deferred Enforced Departure for DACA-Eligible Individuals

Dear Mr. President:

As immigration law scholars and teachers, we write to address the scope of your legal authority to grant Deferred Enforced Departure (DED) to noncitizens or groups of noncitizens. Specifically, we comment on the history and legal foundation of DED as a reprieve for recipients or those potentially eligible for Deferred Action for Childhood Arrivals (DACA).¹

First, the President has the legal authority to use DED to defer the removal of certain individuals for foreign policy reasons.² Second, this authority reflects over a century of practice within the executive branch, spurring congressional acquiescence and eventual ratification.³ Third, this law and practice confirm that DED need not be country specific. Fourth, extending DED to those eligible or potentially eligible for DACA is consistent with advancing equity and racial justice.

Ending DACA implicates United States foreign policy interests.⁴ Withdrawing protections from DACA-eligible individuals would jeopardize the health of bilateral relationships necessary for the success of your Administration's strategy to address the root causes of Central American migration.⁵ The prospect of returning an additional population of hundreds of thousands of former DACA-recipients to countries with whom the United States is already engaged in sensitive negotiations regarding the return of nationals and foreign nationals in much lower numbers does not augur well. For example, the recently announced parole programs demonstrate the reciprocal burden-sharing of Mexico and regional partners required to advance U.S. foreign policy interests in managing migration in the hemisphere.⁶ The Cuban, Haitian,

¹ Deferred Action for Childhood Arrivals ("DACA") is a policy announced in 2012 by President Obama that allowed for qualifying individuals who entered the United States before the age of sixteen and were in school or graduated to request a form of prosecutorial discretion known as "deferred action" and apply for work authorization. In the last decade, the future of DACA has been uncertain due to attempts by the former administration to end the policy altogether and litigation challenging its legality. Mem. for David Aguilar, Acting Comm'r, CBP, et al., from Janet Napolitano, Sec'y, DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; Nat'l Immigration Forum, *The Current State of DACA: Challenges Await in Litigation and Rulemaking* (Apr. 15, 2022), <https://immigrationforum.org/article/the-current-state-of-daca-challenges-await-in-litigation-and-rulemaking/>.

² USCIS, ADJUDICATOR'S FIELD MANUAL § 38.2, <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm38-external.pdf>.

³ See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (noting second category of presidential power); e.g., National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 7611 (2019) [hereinafter *Liberian Refugee Immigration Fairness*] (providing for adjustment of status for Liberians who received DED).

⁴ Brief of Amici Curiae Former Nat'l Sec. Officials in Support of Respondents at 8-13, *Dep't of Homeland Sec. v. Regents*, 591 U.S. ____ (2020), https://www.supremecourt.gov/DocketPDF/18/18-587/118082/20191004112536399_18-587%2018-58818-589bsacFormerNationalSecurityOfficials.pdf.

⁵ Nat'l Sec. Council, U.S. Strategy for Addressing the Root Causes of Migration in Central America (July 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Root-Causes-Strategy.pdf>.

⁶ See The White House, FACT SHEET: Biden-Harris Administration Announces New Border Enforcement Actions (Jan. 5, 2023),

Nicaraguan, and Venezuelan processes are, “fully aligned with larger and important foreign policy objectives of this Administration and fit[] within a web of carefully negotiated actions by multiple governments (for instance in the [Los Angeles] Declaration [on Migration and Protection]).”⁷

Even were DACA recipients not removed, the termination of their employment authorization would significantly curtail remittances to other countries and thus adversely affect U.S. foreign policy. Remittances make up a substantial portion of the GDPs of the top four countries of origin of DACA-recipients—Mexico, El Salvador, Honduras, and Guatemala.⁸ A significant reduction in those remittances would disrupt each state's economy.

Ending DACA would also harm efforts to attract and maintain international students, one of our nation’s “unique strategic advantages.”⁹ International students have reported feeling less welcome in the United States as one reason for seeking opportunities in other countries. Failure to protect DACA students will likely accelerate the trend of international students investing their time and talents elsewhere.¹⁰

I. The President Can Defer Enforced Departure for Foreign Policy Reasons

While DED has sometimes entailed interstitial authority to promote the effectiveness of legislative remedies,¹¹ it has also stemmed from a range of foreign policy rationales. For example, Presidents have cited the risk of straining a relationship with a regional partner by returning nationals without sufficient preparation.¹² Other rationales include a country’s inability to “accommodate the repatriation” of nationals,¹³ the effect of the return of refugees from other regional neighbors on a country’s stabilization efforts,¹⁴ and “offering safe haven” to those “deprived [of] guaranteed freedoms.”¹⁵

<https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/05/fact-sheet-biden-harris-administration-announces-new-border-enforcement-actions/>.

⁷ This language is identical in the Federal Register notices for the Cuban, Haiti, and Nicaraguan processes and the original Federal Register notice for the Venezuelan process. Implementation of a Parole Process for Cubans, 88 Fed. Reg. 1,266, 1,277 (Jan. 9, 2023), <https://www.federalregister.gov/d/2023-00252>; Implementation of a Parole Process for Haitians, 88 Fed. Reg. 1,243, 1,253 (Jan 9, 2023), <https://www.federalregister.gov/d/2023-00255>; Implementation of a Parole Process for Nicaraguans, 88 Fed. Reg. 1,255, 1,266 (Jan. 9, 2023), <https://www.federalregister.gov/d/2023-00254>; Implementation of a Parole Process for Venezuelans, 87 Fed. Reg. 63,507, 63, 516 (Oct. 19, 2022), <https://www.federalregister.gov/d/2022-22739>.

⁸ See Personal Remittances, Received (% of GDP), The World Bank (last visited March 20, 2023), <https://data.worldbank.org/indicator/BX.TRE.PWKR.DT.GD.ZS>.

⁹ See The White House, National Security Strategy 15 (Oct. 2022),

<https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>; see also Dep’t of State & Educ., Joint Statement of Principles in Support of International Education 3 (July 27, 2021), https://educationusa.state.gov/sites/default/files/intl_ed_joint_statement.pdf.

¹⁰ NAFSA: Assoc. of Int’l Educators, *Losing Talent 2020: An Economic and Foreign Policy Risk America Can’t Ignore* 1, 6 (Mar. 2022), <https://www.nafsa.org/sites/default/files/media/document/nafsa-losing-talent.pdf>; see also Karin Fischer & Sasha Aslanian, *Fading Beacon: The U.S. May Never Regain its Dominance as a Destination for International Students. Here’s Why That Matters*, Am. Pub. Media (Aug. 3, 2021), <https://www.apmreports.org/episode/2021/08/03/fading-beacon-why-america-is-losing-international-students>.

¹¹ See Implementation of Employment Authorization for Individuals Covered by Deferred Enforced Departure for Liberians, 87 Fed. Reg. 54,515, 54,516 (Sept. 6, 2022) (extending DED for Liberians to provide time for applications for adjustment of status under Liberian Refugee Immigration Fairness), <https://www.federalregister.gov/d/2022-19207>.

¹² Extension of Deferred Enforced Departure for Liberians, 84 Fed. Reg. 12,867 (Apr. 2, 2019), <https://www.federalregister.gov/d/2019-06556>.

¹³ Deferral of Enforced Departure for Salvadorans, 57 Fed. Reg. 28,700 (June 26, 1992), <https://www.govinfo.gov/app/details/FR-1992-06-26>.

¹⁴ Memorandum on Measures Regarding Certain Liberians in the United States, 2 Pub. Papers 1,193 (Sept. 12, 2007), <https://www.govinfo.gov/app/details/PPP-2007-book2>.

¹⁵ Deferred Enforced Departure for Certain Hong Kong Residents, 86 Fed. Reg. 43,587 (Aug. 10, 2021), <https://www.federalregister.gov/d/2021-17122>.

Youngstown Sheet & Tube Co. v. Sawyer is instructive in understanding the viability of these executive actions.¹⁶ In *Youngstown*, the Supreme Court held that President Truman’s seizure of steel mills during a Korean War labor dispute exceeded his authority.¹⁷ The Court held that Congress had denied the President this power when it enacted comprehensive labor-management legislation. Justice Jackson’s concurrence “provides the accepted framework for evaluating executive action.”¹⁸ His concurrence described three categories of presidential action: 1) action with Congress’ consent, express or implied, 2) action taken against the backdrop of congressional silence or acquiescence, and, 3) action opposing Congress, based on the President’s exclusive constitutional authority.¹⁹ Relevant here is the second category, which includes cases in which executive action is widely heralded and elicits no legislative response. The President’s use of his constitutional foreign relations authority to defer the enforced departure of certain foreign nationals, whether known as Deferred Enforced Departure or as a component authority of its predecessor, Extended Voluntary Departure, fits comfortably in this second category.²⁰

II. The President’s DED Authority Reflects Over a Century of Executive Branch Practice

For over a century, Presidents have taken executive action to protect foreign nationals in the United States and elsewhere whose return to their countries of origin would place them at risk and be adverse to United States foreign policy interests. These efforts also eased entry into the United States for those at risk due to genocide, repression, and natural disasters. Beginning in 1853, President Franklin Pierce authorized naval action to rescue a Hungarian national and freedom fighter, Martin Koszta, who had spent time in the United States, from kidnapping in Turkey by Austrian officials.²¹ Over eighty years later, in the lead-up to World War II, President Franklin D. Roosevelt and Secretary of Labor Frances Perkins assisted Jewish and other refugees from Nazi persecution in two crucial ways: 1) a delegation of authority to private refugee-aid groups to decide whether a noncitizen was “likely . . . to become a public charge,” and, 2) the indefinite extension of the time that visitors from Germany and Austria could remain in the country when those persons faced persecution upon their return.²² President Truman took similar steps to assist refugees in the postwar period.²³

¹⁶ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 698-99 (2008) (discussing *Youngstown*); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 Va. L. Rev. 1, 17-31 (2020) (discussing role of gloss—an understanding based on past practice—from the Founding Era to the present); Brett M. Kavanaugh, *Congress and the President in Wartime* (reviewing David Barron, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* (2016)), Lawfare (Nov. 29, 2017), <https://www.lawfareblog.com/congress-and-president-wartime> (addressing the significance of historical practice).

¹⁷ *Youngstown*, 343 U.S. at 586-87.

¹⁸ *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

¹⁹ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

²⁰ DED also may fit into the first category of Presidential power if the President were to identify an express or implied source of statutory authorization. *E.g.*, Brief for Petitioners at 32, *Trump v. Hawaii*, 585 U.S. ____ (2018) (“Section 1185(a)(1) additionally makes it ‘unlawful’ for an alien to ‘depart from or enter’ * * * the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.’ 8 U.S.C. 1185(a)(1). . . . [I]t does not require a determination of detriment to the national interest; and, second, it allows the President to regulate both entry and departure.”).

²¹ *In re Neagle*, 135 U.S. 1, 64 (1890) (noting wide approval of President Pierce’s action).

²² See Stephen R. Porter, *BENEVOLENT EMPIRE: U.S. POWER, HUMANITARIANISM, AND THE WORLD’S DISPOSSESSED* 63-64 (2017); Bat-Ami Zucker, *Frances Perkins and the German-Jewish Refugees*, 89 Am. Jewish Hist. 35, 43-46 (2001) (describing Perkins’ role). Congress knew of Perkins’s efforts and did not seek to pass legislation halting the Secretary’s initiatives. See Alan M. Kraut, Richard Breitman & Thomas W. Imhoof, *The State Department, the Labor Department, and German Jewish Immigration, 1930-1940*, 3 J. Am. Ethnic Hist. 5, 13 (1984); see also *id.* at 21-22 (discussing President Roosevelt’s November 1938 extension of the stay of German and Austrian refugees in the United States).

²³ Anita Casavantes Bradford, *SUFFER THE LITTLE CHILDREN: CHILD MIGRATION AND THE GEOPOLITICS OF COMPASSION IN THE UNITED STATES* 74-77 (2022).

From 1960 to 1989, the Attorney General, at the time the official below the President responsible for immigration, granted Extended Voluntary Departure (EVD) to noncitizens from countries facing severe armed conflict, civil strife, government persecution, and natural disasters such as earthquakes, volcanos, and famine. In the 1970s, use of EVD addressed the plight of refugees from the Indochina conflict.²⁴ Before the passage of the Refugee Act in 1980, the admission of refugees and the determination of their length of stay within the United States were often the subject of *ad hoc* procedures within the executive branch. Because the cap on refugee admissions was set at 10,200 in the 1965 Immigration Amendments, the executive branch used statutory parole authority to admit additional refugees to meet the need.²⁵ The Attorney General then used EVD to review refugees' stay in the United States on an annual basis.²⁶ Grants of EVD were premised on the Executive's "inherent authority in the areas of both foreign and prosecutorial policy."²⁷

The widespread use of EVD ceased when Congress codified Temporary Protected Status (TPS) in the 1990 Immigration Act.²⁸ Congress asserted that TPS was the "exclusive" way for the executive branch to permit further prolonged stays based on the "particular nationality or region" of noncitizens who had been paroled into the country or were removable.²⁹ But from the signing of the 1990 statute to the present, Presidents of both parties interpreted the INA to permit supplemental authority in addressing risks abroad through the use of their foreign relations authority. The legislative history of the 1990 Immigration Act indicates that Congress viewed at least some uses of presidential power outside the statute to be consistent with Congress's plan.³⁰ Congress's mention of this residue of presidential power is consistent with the second category in Justice Jackson's *Youngstown* framework.

Every President since George H.W. Bush has used DED to defer the enforced departure of certain populations.³¹ Since its first use in 1990, DED has been granted to certain individuals from El Salvador, the People's Republic of China, Kuwait, Haiti, Liberia, Venezuela, and Hong Kong.³² It is currently in effect for Liberia and Hong Kong.³³ Congress recently ratified and expanded on DED for Liberians by authorizing the adjustment of status for Liberians who have been in the United States since 2014.³⁴

Under DED, the President exercises his authority to defer the enforced departure of individuals by issuing a memorandum to the Secretaries of State and Homeland Security that specifies eligibility criteria and the duration of the deferment.³⁵ That memorandum is published in the Federal Register along with any notice the memorandum instructs the Secretary of Homeland Security to publish with implementation

²⁴ Rebecca Hamlin & Philip E. Wolgin, *Symbolic Politics and Policy Feedback: The United Nations Protocol Relating to the Status of Refugees and American Refugee Policy in the Cold War*, 46 Int'l Migration Rev. 586, 607 (2012).

²⁵ *Id.* at 601.

²⁶ *Id.* at 607.

²⁷ Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 Mich. L. Rev. 1, 163-64 (1986) (quoting *Hotel & Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502, 505 (D.D.C.1984)).

²⁸ 8 U.S.C. § 1254a.

²⁹ 8 U.S.C. §1254a(g).

³⁰ See H.R. Rep. No. 101-955, at 37 (1990) (Conf. Rep.) (discussing TPS provisions and noting that President George H.W. Bush's separate relief for Chinese nationals in the United States at risk due to repression after Tiananmen Square protests would "remain in effect" for a period indicated by the President).

³¹ Jill H. Wilson, Cong. Research Serv., RS20844, *Temporary Protected Status and Deferred Enforced Departure* 4-5 (Apr. 19, 2022), <https://sgp.fas.org/crs/homesecc/RS20844.pdf>.

³² *Id.*

³³ Deferred Enforced Departure, U.S. Customs and Immigration Servs., <https://www.uscis.gov/humanitarian/deferred-enforced-departure> (last visited March 20, 2023).

³⁴ See Liberian Refugee Immigration Fairness Act, *supra* note 3.

³⁵ *E.g.*, Deferred Enforced Departure for Certain Hong Kong Residents, *supra* note 15.

procedures.³⁶ Recipients do not need to apply for deferment.³⁷ Under existing, separate regulations, recipients may apply for employment authorization.³⁸

III. Grants of Deferred Enforced Departure Do Not Need to be Country-Specific

Though DED has been used in response to disturbed conditions in specific countries, there is no requirement that a grant of DED be country-specific. Historically, eligibility requirements for grants of DED have been broad enough to include evacuees from Kuwait of any nationality with U.S. citizen children or who had protected U.S. citizens during the First Gulf War.³⁹ The Department of Homeland Security itself does not appear to recognize a country-specific limitation on the President's ability to grant DED. In announcing procedures for employment authorization for residents of Hong Kong granted DED by President Biden, DHS stated:

DED has been authorized in situations where foreign nationals or *other groups of noncitizens* may face danger if required to return to countries or any part of such foreign countries experiencing political instability, conflict, or other unsafe conditions, or when there are other foreign policy reasons for *allowing a designated group of noncitizens* to remain in the United States.⁴⁰

Moreover, although particular EVD grants were expressly directed at specific nationalities, the logic and practice of the EVD grants was multinational and regional in character. Viewed in combination, EVD grants often took in entire regions where risks were high and the United States had a special role because of proximity, geopolitical factors, or history. Those regions included the Caribbean, Central America, Eastern Europe, and areas of Africa. For example, the government granted EVD to noncitizens from Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Laos, Vietnam, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan, and Poland.⁴¹ The United States granted Cubans EVD from November 29, 1960 to November 2, 1966, when Congress passed the Cuban Adjustment Act that provided more permanent relief. Officials granted Czechs EVD in one-year iterations from 1968 to 1977, to protect Czechs in the United States from the repression that followed the Soviet Union's armed intervention in Czechoslovakia in 1968.⁴² Due to continued conflict in Indochina, U.S. officials authorized EVD for Vietnamese, Cambodian, and Laotian nationals from 1975-1977, until Congress provided for their adjustment to LPR status.⁴³ Officials made such decisions on a case-by-case basis, focusing on conditions "on the ground."⁴⁴

³⁶ *E.g.*, Implementation of Employment Authorization for Individuals Covered by Deferred Enforced Departure for Hong Kong, 86 Fed. Reg. 58,296 (Oct. 21, 2021), <https://www.federalregister.gov/d/2021-23012>.

³⁷ *E.g., id.* ("[T]here is no DED application form required to obtain DED coverage.")

³⁸ 8 C.F.R. § 274a.12(c)(14).

³⁹ For the Relief of Certain Persian Gulf Evacuees, H.R. Rep. No. 106-580, at 2 (2000) (referencing President George H.W. Bush's November 14, 1991 memorandum, Measures Regarding Certain Persian Gulf Evacuees), <https://www.govinfo.gov/content/pkg/CRPT-106hrpt580/pdf/CRPT-106hrpt580.pdf>.

⁴⁰ Implementation of Employment Authorization for Individuals Covered by Deferred Enforced Departure for Hong Kong, *supra* note 36 (emphasis added).

⁴¹ See H.R. Rep. No. 100-627, at 6-7 (1989); Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 Nw. J. L. & Soc. Pol'y 1, 5 (2019).

⁴² H.R. Rep. No. 100-627, at 6.

⁴³ *Id.*

⁴⁴ *Id.*

IV. Granting DED to DACA Eligible Individuals Furthers United States Efforts to Advance Equity and Racial Justice

Extending DED to DACA eligible individuals aligns with the President’s commitment to advance racial equity and “to redress inequities in . . . policies and programs that serve as barriers to equal opportunity.”⁴⁵ Granting DED to DACA recipients or those who may qualify improves equity by protecting from discrimination a diverse group of foreign nationals who have resided in and contributed to the United States. In practice, DACA has allowed individuals from largely Mexico and Central American countries to acquire, among other things, social security numbers, driver’s licenses, and employment authorization.⁴⁶ Importantly, DACA recipients have also been inclusive of nationals from South America, Africa, and Asia.⁴⁷ More than 825,000 young people have received its protections since 2012.⁴⁸ As of September 30, 2022, there are 589,660 DACA-recipients.⁴⁹ Under more favorable circumstances, many more would benefit from DACA’s protections, as the registration cut-off, age requirement, and other restrictions made individuals ineligible who in many respects are similarly situated to current recipients.⁵⁰

We hope Congress acts to secure permanent relief for DACA-recipients and DACA-eligible individuals. But with DACA threatened by litigation and future administrations, we urge you to provide independent grounds of protection for this population by granting them Deferred Enforced Departure.

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⁴⁵ Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021), <https://www.federalregister.gov/d/2021-01753>.

⁴⁶ See Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,205 (Aug. 30, 2022), <https://www.federalregister.gov/documents/2022/08/30/2022-18401/deferred-action-for-childhood-arrivals>.

⁴⁷ USCIS, Count of Active DACA Recipients By Month of Current DACA Expiration As of June 30, 2022, at 2 (July 2022), https://www.uscis.gov/sites/default/files/document/data/Active_DACA_Recipients_June_30_2022.pdf.

⁴⁸ Deferred Action for Childhood Arrivals, *supra* note 46, at 53,153.

⁴⁹ USCIS, *supra* note 47, at 1.

⁵⁰ Presidents’ Alliance on Higher Educ. and Immigration, et al., Comment on DHS Docket No 2021-0006, Deferred Action for Childhood Arrivals 6-8 (Nov. 29, 2021), <https://www.presidentsalliance.org/wp-content/uploads/2021/11/2021-11-29-PA-Joint-DACA-Comment.pdf>.

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