

THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

SHOBA SIVAPRASAD WADHIA*

This Article describes the historical role of prosecutorial discretion in immigration law and connects this history to select executive actions announced by President Obama on November 20, 2014. “Prosecutorial discretion” in immigration law refers to the decision the Department of Homeland Security (DHS)¹ makes about whether to enforce the immigration law against a person or a group of

* Samuel Weiss Faculty Scholar and Clinical Professor of Law at *Penn State Law*. I thank Raquel Aldana, Alina Das, and Jennifer Chacon for their vision, and Gabriela Baca and the editors at the *American University Law Review* for their editorial leadership. I send my appreciation to Doyinsola Aribio ('14) for her research assistance and to *Penn State Law* for supporting my scholarship.

1. The Department of Homeland Security is a cabinet level agency comprised of several subcomponents. The three main immigration subcomponents, Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and United States Citizenship and Immigration Services (USCIS) all have authority to exercise prosecutorial discretion. *See, e.g.*, Shoba S. Wadhia, *Immigration Remarks for the 10th Annual Wiley A. Branton Symposium*, 57 *How. L.J.* 931, 935 (2014). This authority is typically exercised on an individualized basis pursuant to policy by the head of a subcomponent or the Secretary of Homeland Security. *See, e.g.*, Memorandum from William J. Howard, Principal Legal Advisor, U.S. Dep't of Homeland Sec., to Chief Counsels 1 (Oct. 6, 2005), *available at* <http://www.aila.org/File/DownloadEmbeddedFile/47984>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 1 (June 17, 2011) [hereinafter June 2011 Morton Memo], *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Custom & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., Immigration & Customs Enforcement 1-2 (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

persons.² When an immigration officer from DHS chooses not to bring legally valid charges against a person because of the person's family ties in the United States or other equities, prosecutorial discretion is being exercised favorably.³

But prosecutorial discretion is not just limited to whether and what kinds of charges DHS can bring against the noncitizen. Other forms of prosecutorial discretion, like a decision by DHS to grant deferred action to a young person who is thriving as a college student, reflect a positive act by the agency.⁴ In some special cases, DHS may allow this person to receive a work authorization and may recognize the person as "lawfully present" in the United States.⁵ Whether prosecutorial discretion is carried out invisibly through non-enforcement or overtly through affirmative acts, the discretion itself is tenuous. It leads only to an "immigration purgatory" in which the noncitizen is able to reside in the United States without the fear of deportation.

On November 20, 2014, President Obama announced a series of executive actions on immigration that highlight the role of

2. Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel 2 (Nov. 17, 2000) [hereinafter Meissner Memo].

3. *Id.*

4. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec'y for Policy 2 (Nov. 20, 2014) [hereinafter November 2014 Priorities Memo], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (asserting that prosecutorial discretion applies to enforcement beyond just the treatment of Notices to Appear, extending to decisions as to "whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and, whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case").

5. See Immigration and Nationality Act (INA) of 1952, 8 U.S.C. § 1227(d)(4) (2012) ("Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection."); 8 C.F.R. § 274a.12(c)(14) (2014) (allowing persons subject to prosecutorial discretion the ability to apply for work authorization); Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 66 (2013) (noting that the INA's implementing regulations explicitly provide that those granted "deferred action" may be eligible for work authorization); Letter from Shoba Sivaprasad Wadhia, Clinical Professor of Law, Pa. State Univ., et al., to The President 1 (Sept. 3, 2014) [hereinafter Letter from Law Professors], *available at* https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf.

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 103

prosecutorial discretion in immigration law, four of which are described in this Article.⁶ The first policy change—one that has received great attention—is the establishment of a new Deferred Action for Parents of American and Lawful Permanent Residents (DAPA) program. This program will enable undocumented parents to request deferred action (a form of prosecutorial discretion) and work authorization if they can show (1) continuous residence in the United States since January 1, 2010; (2) a relationship as the parent to a U.S. citizen or lawful permanent resident (LPR) child born on or before November 20, 2014; (3) unlawful status on November 20, 2014 and on the date of application; (4) that they are not an enforcement priority for removal; and (5) that they pose no other factor that in the exercise of discretion would deem DAPA inappropriate.⁷ If a person is unable to satisfy one or more of these requirements, she is barred from requesting DAPA.⁸ In this way, the DAPA requirements are likely to operate as bright-line requirements, a conclusion that can be confirmed only after more information becomes available about the application process and requirements.

A second policy change will expand the Deferred Action for Childhood Arrivals (DACA) program. Established in 2012, DACA enables young people who came to the United States before the age

6. See *Fixing The System: President Obama Is Taking Action on Immigration*, WHITE HOUSE, <http://www.whitehouse.gov/issues/immigration/immigration-action> (last visited Apr. 16, 2015) (describing the President's announcement and explaining the policies behind the executive actions). Some other initiatives include: (1) "[e]xpanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents [LPRs] and the sons and daughters of U.S. citizens"; (2) "[m]odernizing, improving and clarifying immigrant and nonimmigrant visa programs to grow [the U.S.] economy and create jobs"; and (3) "[p]romoting citizenship education and public awareness for [LPRs] and providing an option for naturalization applicants to use credit cards to pay the application fee." See, e.g., *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Apr. 1, 2015).

7. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. 4 (Nov. 20, 2014) [hereinafter November 2014 DAPA Memo], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; see also *Executive Actions on Immigration*, *supra* note 6; *You May Be Able to Request DAPA. Want to Learn More?*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf.

8. See *Executive Actions on Immigration*, *supra* note 6 (allowing parents to make the request only if they meet the criteria).

of 16 to apply for deferred action if they have resided in the United States since June 15, 2007.⁹ USCIS created internal policies and public information about how it would interpret certain terms, such as “continuous residence” and “no lawful status.”¹⁰ Under the original program, DACA recipients were eligible to apply for work authorization and were protected from removal for a period of two years.¹¹ The changes made to the DACA program on November 20, 2014 are seemingly simple but significant to people who may have been ineligible for the original DACA program. Specifically, the changes announced on November 20, 2014 would extend the period a person would receive DACA from two years to three years and would manicure the age and residency requirements by removing the age cap and adjusting the residency clock to 2010.¹² These changes make more people eligible to apply.

A third change made by the President’s executive actions pertains to DHS’s enforcement priorities. Specifically, the President announced a new priorities memorandum, entitled “Policies for Apprehension, Detention and Removal of Undocumented Immigrants” (“November 2014 Priorities Memo”), which sets forth refined priorities for immigration enforcement.¹³ The memo

9. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited Feb. 17, 2015). When the DACA program was established in 2012, it required those requesting DACA to show that they (1) were under the age of thirty-one as of June 15, 2012; (2) came to the United States before reaching the age of sixteen; (3) had continuously resided in the United States since June 15, 2007; (4) were physically present in the United States on both June 15, 2012, and at the time of making a request for DACA; (5) had no lawful status on June 15, 2012; (6) were currently in school, had graduated, or had obtained a certificate of completion from high school or general education development (GED) certificate, or were an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and (7) had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and did not otherwise pose a threat to national security or public safety. *Id.*

10. *See, e.g., id.* (providing guidance about the types of international travel would impact the “continuous residence” requirement); Shoba Sivaprasad Wadhia, *Standard Operating Procedure: Deferred Action for Childhood Arrivals (DACA)*, BEPRESS.COM, http://works.bepress.com/shoba_wadhia/19 (last visited Apr. 16, 2015) (reporting that a Freedom of Information Act (FOIA) request to DHS returned over 400 pages of internal memoranda and guidance related to DACA).

11. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 9.

12. November 2014 DAPA Memo, *supra* note 7, at 3–5. The expanded DACA program adjusts the date of entry requirement from June 15, 2007 to January 1, 2010 and removes the requirement that the applicant be born after June 15, 1981. *Id.*

13. November 2014 Priorities Memo, *supra* note 4, at 1.

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 105

commences with a discussion of the Administration's priorities for enforcement, which, in descending order, are: (1) individuals who pose "threats to national security, border security, and public safety," including many individuals with felony convictions and aggravated felony convictions; (2) misdemeanants and new immigration violators, including recent entrants and those convicted of a "significant misdemeanor";¹⁴ and (3) individuals with "other" immigration violations including those who have received a final order of removal on or after January 1, 2014.¹⁵ Based on a plain reading of the new DAPA policy, any person who falls within one of these priorities is automatically barred from DAPA.

The November 2014 Priorities Memo does more than simply identify the three classes of "enforcement priorities"; it goes on to discuss more deeply the role of prosecutorial discretion in immigration matters. For example, the November 2014 Priorities Memo notes that, as a general matter, DHS should not detain noncitizens "who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest."¹⁶ Moreover, the November 2014 Priorities Memo creates a formula in which lesser priorities are to receive greater consideration for prosecutorial discretion when these positive equities are present. For example, Priority 3 individuals may qualify for favorable prosecutorial discretion if they are eligible for relief under the law, are "not a threat to the integrity of the immigration system," or have other factors that suggest they should not be priorities.¹⁷ By contrast, Priority 1 individuals may qualify for favorable prosecutorial discretion if they are eligible for relief or there are "compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority."¹⁸

14. *See id.* at 4 (defining "significant misdemeanor" as "an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence)" (internal footnote omitted)).

15. *Id.* at 3-4.

16. *Id.* at 5.

17. *Id.* at 5-6.

18. *Id.* at 5.

The agency's willingness to grapple with the more complicated cases that may involve a person who both is a potential priority and has strong equities is a unique and welcome feature because it permits the agency to go beyond a "one-size-fits-all" approach when applying its policy on prosecutorial discretion.¹⁹ Consider, for example, Marta, a woman without lawful status who has resided in Washington, D.C., for the last decade and has served as the primary breadwinner for her two U.S.-citizen children. Marta fits within Priority 2 because of a shoplifting conviction in Virginia from years ago, but she may still qualify for a type of prosecutorial discretion because of her equities. Importantly, the devil lies in how these policies are implemented. In one high-profile case, DHS was criticized for deporting Iowa Mennonite Pastor Max Villatoro, a 41-year-old husband and father who was a priority based on a DUI conviction from 1998.²⁰ His attorney, David Leopold remarked: "I can't imagine anybody who's more deserving of discretion and falls within the exception to the enforcement priorities."²¹ Stories like that of Pastor Villatoro have yielded criticism by immigration attorneys and advocates about whether DHS is properly applying its own prosecutorial discretion guidelines.

As a final and perhaps obvious point, there are noncitizens who will neither be eligible for DAPA nor fall within one of the new so-called priorities. For example, Juan may be a father of two U.S.-citizen children, have resided in the United States since January 2012, and have no indiscretion beyond one traffic offense from 2013. In this case, Juan does not qualify for DAPA, but he may have the opportunity to request another form of prosecutorial discretion depending on his circumstances. Some of the factors identified in the November 2014 Priorities Memo to be considered for

19. For a broader explanation, see Shoba Sivaprasad Wadhia, *Felons, Families and Prosecutorial Discretion*, JURIST (Jan. 2, 2015, 9:30 AM), <http://jurist.org/forum/2015/01/shoba-wadhia-prosecutorial-discretion.php> (contrasting the flexibility of the new executive actions to accommodate exceptions against the historical practice of DHS deferred action decisions, in which single (negative) reasons have driven denials of deferred action, even in the face of competing positive reasons).

20. Dara Lind, *The Government Can't Enforce Every Law. Who Gets to Decide Which Ones It Does?*, VOX.COM (Mar. 31, 2015), <http://www.vox.com/2015/3/31/8306311/prosecutorial-discretion>.

21. Elise Foley, *Iowa Pastor Max Villatoro Deported After Community Rallies to Keep Him in U.S.*, HUFFINGTON POST (Mar. 30, 2015, 5:59 PM), http://www.huffingtonpost.com/2015/03/20/max-villatoro-deported-_n_6911610.html.

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 107

prosecutorial discretion include military service, family or community ties to the United States, victim status, and other humanitarian factors.²²

Finally, President Obama announced that DHS and the Department of Defense would collaborate to determine how to expand parole to dependents of certain individuals enlisting or enlisted in the U.S. armed forces.²³ Parole is another form prosecutorial discretion that can temporarily benefit a person by providing protection from removal and the opportunity to apply for work authorization.²⁴ A grant of parole also has long-term benefits for someone who wishes to remain in the United States permanently (and is legally eligible for a green card) but would otherwise be unable to do so because of her immigration history.²⁵

I. UNDERSTANDING THEORIES OF PROSECUTORIAL DISCRETION

There are at least three theories behind the use of prosecutorial discretion in the immigration context. The first theory is economic and recognizes that the government has resources to deport approximately 400,000 individuals annually—less than four percent of the deportable population.²⁶ The second theory for immigration prosecutorial discretion is humanitarian and acknowledges that there are people residing in the United States who have compelling equities like a high school diploma or a serious medical condition, and thus should be protected from removal.²⁷ A less theorized but

22. November 2014 Priorities Memo, *supra* note 4, at 5–6.

23. See Policy Memorandum from U.S. Citizenship & Immigration Servs. (Nov. 15, 2013) [hereinafter Parole in Place Memorandum], *available at* http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf; *Executive Actions on Immigration*, *supra* note 6.

24. Parole in Place Memorandum, *supra* note 23, at 2.

25. See *generally id.* at 1–2 (clarifying the use of parole as a means to adjust the status of the immigrant spouses, children, and parents of those who have served in the armed forces); Shoba Sivaprasad Wadhia, *Immigration Law's Catch 22: The Case for Removing the Three- and Ten-Year Bars*, 19 BENDER'S IMMIGR. BULL. 1267, 1270 (2014) (arguing for the use of parole as a viable alternative to enable individuals otherwise subject to the three- or ten-year bars to adjust to lawful status without having to leave the United States).

26. See June 2011 Morton Memo, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees 1 (Mar. 2, 2011), *available at* <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>, *superseded by* November 2014 Priorities Memo, *supra* note 4.

27. See November 2014 Priorities Memo, *supra* note 4, at 5–6 (stating DHS personnel should consider factors such as: “extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length

highly politicized third factor is the relationship between congressional inaction and public demands for an administrative solution. In the last several years, immigration advocates have demanded an extension of administrative remedies to special classes.²⁸ DACA reflects one such solution. President Obama relied on all of these theories when announcing his actions on November 20, 2014. As to the economics, he declared: “But even as we focus on deporting criminals, the fact is, millions of immigrants in every state, of every race and nationality still live here illegally. And let’s be honest—tracking down, rounding up, and deporting millions of people isn’t realistic.”²⁹ When discussing the humanitarian reasons for creating programs like DAPA, the President remarked:

Over the past few years, I have seen the determination of immigrant fathers who worked two or three jobs without taking a dime from the government, and at risk any moment of losing it all, just to build a better life for their kids. I’ve seen the heartbreak and anxiety of children whose mothers might be taken away from them just because they didn’t have the right papers. I’ve seen the courage of students who, except for the circumstances of their birth, are as American as Malia or Sasha; students who bravely come out as undocumented in hopes they could make a difference in the country they love.

These people—our neighbors, our classmates, our friends—they did not come here in search of a free ride or an easy life. They came to work, and study, and serve in our military, and above all, contribute to America’s success.³⁰

of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative”); *see also* Meissner Memo, *supra* note 2, at 7–8 (citing relevant factors for consideration); June 2011 Morton Memo, *supra* note 1, at 5; *see also* Shoba Sivaprasad Wadhia, *Immigration Remarks for the 10th Annual Wiley A. Branton Symposium*, 57 HOW. L.J. 931, 934 (2014) (discussing the Meissner Memo).

28. *See Administrative Relief Priorities*, NAT’L IMMIGR. L. CENTER (June 2014), available at <http://www.nilc.org/adminreliefpriorities.html> (urging the government to enact broad, administrative relief—including work permits and permanent status—for noncitizens who have resided in the United States for long periods).

29. Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

30. *Id.*

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 109

Finally, President Obama discussed how inactivity in Congress influenced his announcement.³¹ He expressed that he was compelled to create DAPA and expand DACA because the House Republicans refused to vote on the immigration reform bill that passed in the Senate in June of 2013.³² He even suggested to Congress that his executive actions would no longer be necessary if a bill were passed:

And to those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill.

I want to work with both parties to pass a more permanent legislative solution. And the day I sign that bill into law, the actions I take will no longer be necessary.³³

Importantly, President Obama's choice to base his prosecutorial discretion policy on humanitarian factors like family relationships resembles how prosecutorial discretion, and deferred action in particular, has been applied historically. One of the earliest documents used by the immigration agency (then called Immigration and Naturalization Service) was an Operations Instruction that allowed for "deferred action" (then called "non-priority status") for noncitizens who could show one or more of the following factors: advanced or tender age; presence in the United States for many years; need for treatment in the United States for a physical or mental condition; and adverse effect on family members in the United States as a result of deportation.³⁴

II. DEFERRED ACTION PROFILES

Since 2009, I have studied DHS data and internal guidelines on deferred action obtained through the Freedom of Information Act (FOIA).³⁵ The following information, gathered from FOIA requests,

31. *Id.*

32. *Id.*; see also Elise Foley et al., *White House Turns to Aggressive Defense of Immigration Actions*, HUFFINGTON POST (Dec. 4, 2014, 11:59 PM), http://www.huffingtonpost.com/2014/12/04/white-house-immigration-actions_n_6272192.html.

33. Remarks by President Obama in Address to the Nation on Immigration, *supra* note 29.

34. See Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 100–01 (1979) (describing the criteria used to determine whether an individual would receive deferred action, known then as non-priority status).

35. Most of the material I have examined was obtained through FOIA requests because the agency has largely operated deferred action as a secret program. Some

illustrates the types of cases that DHS has considered for deferred action in recent years. In reviewing a sample of 578 deferred action cases provided by USCIS in 2013, deferred action was granted to noncitizens for largely humanitarian reasons.³⁶ In one case handled by the Western region, deferred action was granted to a Mexican national awaiting a heart transplant that required intensive follow-up and care after surgery.³⁷ In one case out of the Central region, deferred action was granted to a Brazilian national with Down syndrome and autism.³⁸ In another case out of the Northeast region, deferred action was granted to a Romanian couple who are parents of a U.S.-citizen child being treated for cancer.³⁹ Of 118 identifiable deferred action cases processed in 2011, USCIS granted deferred action to the twenty-two-year-old daughter with Down syndrome of an LPR and to a father of an eight-year-old U.S.-citizen child receiving extensive neurological treatment.⁴⁰ In this data set, the reasons for deferred action were largely humanitarian and involved one or more of the following factors: (1) serious medical condition; (2) residence in the United States for five years or more; (3) advanced or tender age; and (4) family members with U.S. citizenship.⁴¹

USCIS is not the only agency with a history of processing deferred action requests. According to data collected between October 1, 2011 and June 30, 2012, ICE processed 3,837 requests for deferred action and stays of removals, of which 698 were deferred action cases.⁴² Within this sample, DHS granted deferred action to noncitizens with U.S.-citizen dependents, present in the United States since childhood; primary caregivers to individuals with serious

of the data I have received over the years is also illegible because the agency has not historically tracked deferred action and other forms of prosecutorial discretion.

36. See, e.g., Letter from Shoba Sivaprasad Wadhia, Professor & Dir. Ctr. for Immigrants' Rights, Pa. State Univ. Dickinson Sch. of Law, to U.S. Citizenship & Immigration Servs. Nat'l Records Ctr. (May 24, 2013), available at http://works.bepress.com/shoba_wadhia/25.

37. Response to Letter from Shoba Sivaprasad Wadhia, Professor & Dir. Ctr. for Immigrants' Rights, Pa. State Univ. Dickinson Sch. of Law, to U.S. Citizenship & Immigration Servs. Nat'l Records Ctr. 47 (Sept. 3, 2013) (on file with author).

38. *Id.* at 43.

39. *Id.* at 22.

40. Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 42–43 (2012) [hereinafter Wadhia, *Sharing Secrets*].

41. See *id.* at 42–44 (providing a statistical breakdown of the types of cases in which USCIS granted deferred action over a given time period).

42. Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345, 350, 356 (2013).

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 111

medical conditions; those with long-term presence in the United States; and those with a serious mental or medical care condition.

While much of my own research has focused on DHS's historical use of deferred action for individuals, the agency has also applied deferred action and other forms of prosecutorial discretion to groups (still requiring a case-by-case determination by the government) for similar reasons.⁴³ For example, several administrations have used prosecutorial discretion as an instrument for protecting victims of crime, domestic abuse, and sexual assault.⁴⁴ Similarly, DHS also extended deferred action to certain students adversely affected by Hurricane Katrina.⁴⁵ Finally, DHS created a deferred action program for the widows and widowers of U.S. citizens.⁴⁶

43. Letter from Law Professors, *supra* note 5, at 3; *see also* Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law*, PERSPECTIVES, Aug. 2014, at 1, 6, available at http://www.immigrationpolicy.org/sites/default/files/docs/the_presidents_discretion_on_immigration_enforcement_and_the_rule_of_law_final_1.pdf.

44. *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (forthcoming 2015); *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/battered-spouse-children-parents> (last visited Apr. 16, 2015) (setting out guidelines as to how battered spouses, children, or parents may file for immigrant visa petitions); *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status> (last visited Apr. 16, 2015) (stating that DHS may grant waitlisted U visa petitioners deferred action or parole, and the opportunity to receive a work authorization).

45. Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted By Hurricane Katrina (Nov. 25, 2005), available at http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_P_R.pdf (noting that F-2 visa holders impacted by Katrina, who were not otherwise covered by relief provided to F-1 visa holders, could request deferred action and apply for work authorization).

46. Press Release, Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), available at <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens> ("Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved." (internal quotation marks omitted)).

III. LEGAL AUTHORITY FOR ACTION IN IMMIGRATION

A natural but settled question is whether President Obama or any administration has the legal authority to implement the executive actions he announced on November 20, 2014. The legal foundation for prosecutorial discretion can be found in the Constitution, the immigration statutes created by Congress, binding precedent from the U.S. Supreme Court, and regulations and policy documents from DHS. Moreover, as recently as three years ago, the Supreme Court recognized that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”⁴⁷

The Supreme Court has also analyzed Article 2 section 3 of the Constitution, commonly known as the “Take Care Clause”⁴⁸—a section critics of the President’s policy incorrectly invoke to argue that he has no discretionary authority over immigration enforcement—to explain how prosecutorial discretion decisions are, in fact, essential to the faithful execution of the laws of the United States.⁴⁹ To offer one example, the Supreme Court in *United State v. Armstrong*⁵⁰ held that “[t]he Attorney General and United States Attorneys retain ‘[b]road discretion’ to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”⁵¹

A review of the immigration statute, sometimes called the Immigration and Nationality Act (“the Act”), also confirms that Congress has sanctioned DHS to use prosecutorial discretion. One clear example of this is section 103 of the Act, which boldly delegates

47. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

48. U.S. CONST. art. II, § 3. The Constitution delegates to the President the power to “take Care that the Laws be faithfully executed.” *Id.*

49. *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

50. 517 U.S. 456 (1996).

51. *Id.* at 464 (citations omitted). While *Armstrong* dealt with a selective prosecution claim made in the criminal context, the case itself has been cited in numerous decisions and policy memoranda about immigration. *E.g.*, *United States v. Alameh*, 341 F.3d 167, 172–74 & nn.2, 4–5 (2d Cir. 2003); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068–71 (9th Cir. 2003); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071 (1997). Beyond the scope of this article is yet another interesting topic—the relationship between prosecutorial discretion in criminal law and the use of such discretion in immigration law.

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 113

the administration and enforcement of immigration laws to DHS.⁵² Similarly, section 242 of the Act prohibits judicial review for three specific prosecutorial discretion decisions (commencement of proceedings, adjudication of cases, and execution of removal orders), only reaffirming the delegation of prosecutorial discretion powers to DHS.⁵³

Beyond the statute there rests a library of authority for prosecutorial discretion in the regulations. Regulations in immigration law are precious fuel for interpreting what the Act actually means and are binding on the agency. The regulation at 8 C.F.R. § 274a.12(c)(14), published more than twenty years ago, explicitly identifies “deferred action” as one basis for work authorization.⁵⁴ Even before DHS existed, attorneys who knew about deferred action utilized this regulation to obtain work authorization for clients following a grant of deferred action.⁵⁵

52. Immigration and Nationality Act of 1952, 8 U.S.C. § 1103(a)(1) (2012).

53. *Id.* § 1252(g).

54. 8 C.F.R. § 274a.12(c)(14) (2014); 8 C.F.R. § 274a.12(c)(14) (1988). Some lawyers have identified INA § 274a(h)(3) as the statutory basis for DHS to issue work permits to people residing in the United States without authorization. *See, e.g.*, Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. and the Counsel to the President 21 (Nov. 19, 2014), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (“DHS’s power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an ‘unauthorized alien’ not entitled to work in the United States as an alien who is neither an LPR nor ‘authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security].’” (alterations in original) (quoting 8 U.S.C. § 1324a(h)(3))).

55. On the heels of President Obama’s executive actions, Professors Hiroshi Motomura, Stephen H. Legomsky, and I authored a letter signed by more than 130 law professors outlining the multiple legal authorities for immigration prosecutorial discretion. Letter from Law Professors, *supra* note 5. This letter was updated on November 25, 2014 and March 13, 2015 to affirm the deferred action programs announced by the President. Open Letter from Hiroshi Motomura, Professor of Law, UCLA Sch. of Law, et al. (Nov. 25, 2014) [hereinafter Motomura Letter], *available at* <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>; Open Letter from Shoba Sivaprasad Wadhia, Clinical Professor of Law, Pa. State Univ., et al. (Mar. 13, 2015) [hereinafter Immigration Professors’ Letter], *available at* https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf; *see also* Associated Press, *Legal Scholars: Obama’s Immigration Actions Lawful*, N.Y. TIMES (Nov. 25, 2014, 8:07 AM), <http://www.nytimes.com/aponline/2014/11/25/us/politics/ap-us-immigration-scholars.html>. *See generally* Stephen H. Legomsky, *Written Testimony of*

The actions that followed the November 20, 2014 announcement were similar to those that followed the creation of DACA. Immediately after the announcement, Sheriff Arpaio of Maricopa County, Arizona, filed a lawsuit challenging the legality of the President's executive actions.⁵⁶ This lawsuit was later dismissed by Judge Beryl Howell who, in her opinion, remarked: "The role of the Judiciary is to resolve cases and controversies properly brought by parties with a concrete and particularized injury—not to engage in policymaking better left to the political branches."⁵⁷ Twenty-six states filed a lawsuit alleging that the President's November 20, 2014 actions violate the Constitution and the Administrative Procedure Act (APA).⁵⁸ As a counterbalance to the lawsuits challenging the constitutionality of the November 20, 2014 executive actions, a flurry of amicus briefs were filed by select states' Attorneys General; Brownsville, Texas's own mayor; and several others to defend the actions as a matter of law and policy.⁵⁹ On February 16, 2015, U.S. District Court for the Southern District of Texas Judge Andrew Hanen issued a preliminary injunction on the extended DACA and DAPA programs, ruling that the plaintiffs had standing to bring this

Stephen H. Legomsky Before the United States House of Representatives Committee on the Judiciary, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIARY (Feb. 25, 2015), http://judiciary.house.gov/_cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf; Stephen H. Legomsky, *Written Testimony of Stephen H. Legomsky Before the S. Comm. On the Judiciary: Confirmation Hearing on the Nomination of Loretta Lynch as Attorney General of the United States*, SENATE COMMITTEE ON JUDICIARY (Jan. 28–29, 2015), <http://www.judiciary.senate.gov/imo/media/doc/01-29-15%20Legomsky%20Testimony.pdf>; Wadhia, *Sharing Secrets*, *supra* note 40, at 48–60 (arguing for increased transparency in the use of prosecutorial discretion).

56. Brent Kendall, *Judge Skeptical of Sheriff Arpaio's Obama Immigration Suit*, WALL ST. J. (Dec. 22, 2014, 5:29 PM), <http://blogs.wsj.com/washwire/2014/12/22/judge-skeptical-of-sheriff-arpaio-obama-immigration-suit>.

57. Arpaio v. Obama, 27 F. Supp. 3d 185, 191 (2014), *appeal filed*, No. 14-5325 (D.C. Cir. Dec. 29, 2014).

58. Complaint for Declaratory and Injunctive Relief ¶¶ 1, 3, 6, *Texas v. United States*, No. 14-cv-00254 (S.D. Tex. Dec. 3, 2014); Elise Foley, *Over Half the States Are Suing Obama for Immigration Actions*, HUFFINGTON POST (Jan. 27, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration_n_6550840.html.

59. *See, e.g.*, Press Release, Congressman Filemon Vela, Brownsville Mayor Files Amicus Brief on Behalf of Congressman Vela Defending Executive Action on Immigration Policies (Jan. 7, 2015), *available at* <http://vela.house.gov/index.php/2013-07-18-16-34-07/press-releases/313-press-release-brownsville-mayor-files-amicus-brief-on-behalf-of-congressman-vela-defending-executive-action-on-immigration-policies>.

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 115

lawsuit and concluding that both programs violate the APA because they should have gone through a specialized rulemaking process.⁶⁰ Notably, 104 law professors issued a letter critiquing the accuracy of Judge Hanen's decision and the immigration law applied in his decision.⁶¹ Perhaps even more striking than the outcome in the Texas case is Judge Hanen's confusion regarding the role of prosecutorial discretion in immigration law and the specific sources of authority for deferred action in particular.⁶² It is difficult to know when the litigation will come to an end, but one thing is clear—the President's legal authority to create programs like DACA and DAPA is on solid ground.

Beyond the courtroom, the President's executive actions have been the subject of congressional hearings and emotion. Within a month of President Obama's announcement and, interestingly, before the application period for DAPA and expanded DACA (the two more controversial programs) even began, the House Judiciary Committee held a hearing on December 2, 2014 challenging the legality of these programs.⁶³ On December 3, 2014, the House of Representatives held a vote on a bill, known as the Yoho bill, that would make the President's November 20, 2014 actions null and void.⁶⁴ The politics of this vote is well captured by this exchange in a *Politico* story the day following the vote: "Even the bill's biggest supporters admit the vote is more about symbolism than substance. When asked by a reporter whether Republicans were taking the Yoho bill seriously, Rep. Matt Salmon (R-Ariz.) replied: 'I don't even know if Ted [Yoho] is.'"⁶⁵ The House continued to attack the President's executive actions by holding a vote on a spending bill that would have defunded the executive action programs.⁶⁶ On January 14, 2015, the House voted

60. *Texas v. United States*, No. Civ. B-14-254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015), *appeal filed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

61. See Immigration Professors' Letter, *supra* note 55.

62. See *id.* at 2–5.

63. *President Obama's Executive Overreach on Immigration: Hearing Before the House Comm. on the Judiciary*, 113th Cong. 1 (2014) (statement by Rep. Goodlatte) ("We welcome everyone to this morning's hearing on President Obama's executive overreach on immigration.").

64. Seung Min Kim, *House Sends Obama Message with Immigration Vote*, POLITICO (Dec. 4, 2014, 11:42 PM), <http://www.politico.com/story/2014/12/house-immigration-vote-obama-113327.html>.

65. *Id.* (alteration in original).

66. See, e.g., H.R. 240, 114th Cong. (2015).

236 to 191 to block the President's immigration actions.⁶⁷ Interestingly, the vote exposed more than one layer within the Republican Party, as ten Republicans voted against the bill⁶⁸ and 26 Republicans voted against an amendment to end the DACA program created in 2012.⁶⁹ On the heels of this vote, Representative Luis Gutiérrez remarked: “Wow. Time flies when you're playing politics with people's lives What are the headlines today? Behold the Republican immigration strategy, mass deportation.”⁷⁰

The politics that emerged after President Obama announced his executive actions on immigration resemble the politics that followed the creation of DACA. For example, a lawsuit was brought in the United States District Court for the Northern District of Texas alleging that DACA was unconstitutional.⁷¹ Similarly, select members of the House of Representatives introduced a piece of legislation and held a hearing on a bill titled “Hinder the Administration's Legalization Temptation Act” (HALT), which, among other things, would have nullified a variety of discretionary remedies in the immigration statute and the President's authority to grant select forms of prosecutorial discretion.⁷²

As I reflect on the political statements and plays that have debuted since the President's executive actions, there is a feeling that, intellectually, people unfamiliar with immigration law or the history of prosecutorial discretion in immigration systems should refrain from speaking authoritatively about the subject, and also, practically,

67. Ed O'Keefe, *House Votes to Block Obama's Immigration Actions—But Exposes New GOP Divisions*, WASH. POST (Jan. 14, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/14/house-votes-to-block-obamas-immigration-actions-but-exposes-new-gop-divisions>.

68. The ten Republicans who voted against the bill include Reps. Justin Amash (Mich.), Mike Coffman (Colo.), Carlos Curbelo (Fla.), Jeff Denham (Calif.), Mario Díaz-Balart (Fla.), Robert Dold (Ill.), Renee Ellmers (N.C.), Thomas Massie (Ky.), Ileana Ros-Lehtinen (Fla.), and David Valadao (Calif.). See Rebecca Shabad & Cristina Marcos, *House Passes Bill to Defund Obama's Immigration Orders*, HILL (Jan 14, 2015, 12:06 PM), <http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders>.

69. See H.R. 240; O'Keefe, *supra* note 67; Shabad & Marcos, *supra* note 68.

70. Shabad & Marcos, *supra* note 68.

71. *Crane v. Napolitano*, No. 3:12-cv-03247, 2013 WL 8211660, at *1 (N.D. Tex. July 31, 2013).

72. See H.R. 2497, 112th Cong. (2011) (suspending discretionary remedies including parole, cancellation of removal, and adjustment of status for certain nonpermanent residents; temporary protected stats, deferred action, and extended voluntary departure).

2015] THE HISTORY OF PROSECUTORIAL DISCRETION 117

that questionable lawsuits and symbolic legislative activities dampen the pockets of the taxpayer.

The political impetus to challenge the legality of the President's executive actions stems in part from the number of people who may qualify for these actions—especially from the creation of the DAPA program. Estimates from the White House suggest that more than 4 million people will benefit from the President's executive actions.⁷³ Notably, although the scale of President Obama's executive actions is significant, they do not reflect something new as a legal matter nor do they confirm that the actual number of eligible people who will apply or may receive DAPA will even come close to 4 million. In the case of DACA, for example, just fifty-five percent of the estimated 1.2 million eligible individuals applied for the program after it had been in place for two years.⁷⁴ Some of the reasons an eligible person may choose not to apply for a program include the inability to pay the application fee, fear of deportation for oneself or a family member(s), inability to obtain the documents necessary to prove eligibility, or lack of access to an immigration attorney or non-profit group because of a cultural, language, and/or geographic barrier.⁷⁵ Possibly, the new deferred action programs will undergo an even larger drop in applications because of the confusion and fear surrounding the temporary injunction issued by Judge Hanen and the ongoing removals of noncitizens identified as enforcement priorities.⁷⁶

73. *More Than 4 Million Undocumented Immigrants Will Now Be Able to Play by the Rules*, WHITE HOUSE (Nov. 1, 2014), <http://www.whitehouse.gov/share/more-4-million-undocumented-immigrants-will-now-be-able-play-rules>.

74. JEANNE BATALOVA ET AL., MIGRATION POLICY INST., *DACA AT THE TWO-YEAR MARK: A NATIONAL AND STATE PROFILE OF YOUTH ELIGIBLE AND APPLYING FOR DEFERRED ACTION 4-5* (2014), available at <http://www.migrationpolicy.org/research/daca-two-year-mark-national-and-state-profile-youth-eligible-and-applying-deferred-action>.

75. See *id.* at 4 (reporting that applicants must be able to pay the application fee, meet the eligibility criteria, and have the knowledge to navigate the application process); ROBERT G. GONZALEZ & ANGIE M. BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, *TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA 6* (2014), available at <http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca> (highlighting the barriers that the application fee, distrust of the system, lack of paperwork, and not meeting the eligibility criteria impose on potential applicants).

76. See, e.g., Mark Noferi, *ICE Sweeps Up Minor Offenders with Families, Using Heavy-Handed Approach*, AM. IMMIGR. COUNCIL (Mar. 13, 2015), <http://immigrationimpact.com/2015/03/13/ice-sweeps-up-minor-offenders-with-families-using-heavy-handed-approach>.

Beyond the legality and politics of the President's executive actions is a real tension about whether programs like DACA and DAPA reflect good policy. Some of the sources for this strain stem partially from a fear about the potential size of the class to whom administrative relief would be provided and also from the negative image produced by a hostile Congress. Another source of tension relates to work permits. For some critics, the challenge to President Obama's prosecutorial discretion programs lies with the ability it creates for beneficiaries of these programs to apply for work permits.⁷⁷ The reality, however, is that DHS and its predecessors have a long history of considering work authorization based on prosecutorial discretion. One sample size obtained through FOIA reveals that between June 2011 and June 2013, 17,040 work authorization applications for noncitizens from more than 150 countries were based on a grant of traditional deferred action.⁷⁸ Of the 17,040 applications, DHS granted 13,135 or seventy-seven percent.⁷⁹ Indeed, questions about how many people should qualify for prosecutorial discretion, the kind of criteria that should be used to determine eligibility for such protection, and whether the protection itself should be a form of deferred action that is accompanied by work authorization are all policy questions that predictably trigger great emotion—ranging from fear to compassion.

Fear has often been a feature in the creation of and reaction to immigration policy. Perhaps compassion is a better source for policy than fear. The above-described history provides a good indication that programs like President Obama's prosecutorial discretion programs are not new ideas. By combining traditional humanitarian criteria, such as a close family relationship, long-term residence in the United States, or presence in the United States since childhood with sound procedures, a bold prosecutorial discretion policy like the one announced by the President is a prudent response that will lead to a sensible but temporary solution.

77. See Josh Blackman, *Obama: Giving Immigrants Work Permits Is Vital for National Security*, NAT'L REV. (Mar. 24, 2015, 4:00 AM), <http://www.nationalreview.com/article/415845/obama-giving-immigrants-work-permits-vital-national-security-josh-blackman> (echoing the criticism of Judge Hanen that the President's plan to provide work authorizations is gratuitous because a reprieve from deportation should suffice).

78. Letter from Jill A. Egelston, Dir., FOIA Operations, to author (July 22, 2013) (on file with author).

79. *Id.*