

March 13, 2015

We write as scholars and teachers of immigration law who have reviewed the executive actions announced by the President on November 20, 2014; the opinion in *Arpaio v. Obama*¹, Civ. Action # 14-01966 (BAH) (D.D.C. Dec. 23, 2014); and the opinion of Judge Hanen in *Texas v. United States*, Civ. Action B-14-254 (S.D. Tex. Feb. 16, 2015), preliminarily enjoining two of the executive actions: expansion of the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs. We believe that Judge Hanen’s opinion is deeply flawed and that DAPA and the expansion of DACA are well within the legal authority of the federal executive.

Comprehensive analyses of the legal authority for DAPA and expanded DACA can be found in the government’s briefs in the Texas litigation; in Professor Legomsky’s written testimonies before the Senate and House Judiciary Committees² and in numerous articles and other writings.³ This letter does not seek to duplicate those existing analyses. Rather, we write to provide background on prosecutorial discretion and deferred action and to highlight a few key points.

Legal Authority for Immigration Prosecutorial Discretion: Prosecutorial discretion in immigration law refers to the executive branch’s decisions about whether and to what extent to enforce the immigration laws against different persons.⁴ Indeed, Judge Hanen strongly defends the Secretary of Homeland Security’s authority to exercise prosecutorial discretion and set enforcement priorities, and he explicitly affirms related guidance announced by Secretary Johnson on November 20, 2014.⁵

Importantly, 8 U.S.C. § 1103(a) (§ 103(a) of the Immigration and Nationality Act (“INA” or the “Act”)) empowers the Department of Homeland Security (DHS) to make choices about

¹ Dismissing (for lack of both standing and likelihood of success on the merits) a lawsuit challenging the legality of these executive actions.

² Testimony by Stephen H. Legomsky before House Judiciary Committee, (February 25, 2015)

<http://judiciary.house.gov/cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf>.

³ See Letter from Steve Legomsky, Hiroshi Motomura, Shoba Sivaprasad Wadhia et. al re: legality of DAPA and DACA, (November 25, 2014) <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>; Hiroshi Motomura, *The President’s Discretion, Immigration Enforcement, and the Rule of Law* (August 2014), (available at:

http://www.immigrationpolicy.org/sites/default/files/docs/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf); Shoba Sivaprasad Wadhia, *Relics of Deferred Action*, *The Hill* (2014),

<http://thehill.com/blogs/congress-blog/civil-rights/224744-relics-of-deferred-action>; Stephen H. Legomsky, *Legal Authorities for DACA and Similar Programs* (August 2014), (available at: <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/11/17/Editorial-Opinion/Graphics/executive%20action%20legal%20points.pdf>);

Wadhia, Shoba Sivaprasad, *Response, In Defense of DACA, Deferred Action, and the DREAM Act* (January 2, 2013). *Texas Law Review*, Vol. 91:59; Penn State Law Research Paper No. 5-2013. Available at SSRN:<http://ssrn.com/abstract=2195735>.

⁴ See Thomas Aleinikoff, David Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 778-88 (7th ed. 2012); Stephen H. Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* 629-32 (5th ed. 2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341.

⁵ See *State of Texas v. United States of America*, court opinion page 92 (S.D. Tex. Feb. 16, 2015) (“This court finds nothing unlawful about the Secretary’s priorities.”).

immigration enforcement. That section provides: “The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens”⁶ Moreover, 6 U.S.C. § 202(5) charges the Secretary of DHS with “establishing national immigration enforcement policies and priorities,”⁷ and DHS has increasingly carried out enforcement against targeted priorities using the funds appropriated by Congress. Congressional endorsement can also be found in 8 U.S.C. § 1252(g), which recognizes the executive branch’s legal authority to exercise prosecutorial discretion, specifically by barring judicial review of three particular types of prosecutorial discretion decisions: to commence removal proceedings, to adjudicate cases, and to execute removal orders.⁸ Indeed, Congress clearly understood that prosecutorial discretion is unavoidable in immigration enforcement.⁹ Prosecutorial discretion serves as a necessary tool for managing limited resources and, when exercised favorably, would operate to protect certain people from deportation on a temporary basis.¹⁰ Beyond the halls of Congress, the U.S. Supreme Court has also recognized the important role that discretion plays in the immigration system and explicitly noted “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”¹¹ These statutes and Supreme Court declarations are part of the multi-dimensional legal foundation for prosecutorial discretion programs like DAPA.

The specific role of deferred action: In the *Texas* decision, Judge Hanen declares that “The Government must concede that there is no specific law or statute that authorizes DAPA.”¹² However, the government need not concede anything here, because there is strong legal authority for deferred action in general, and for DAPA and DACA in particular as forms of deferred action. To explain why his reasoning is erroneous, it is crucial to understand that deferred action is a longstanding form of prosecutorial discretion.¹³ In its decision in *Reno v. AADC*, the U.S. Supreme

⁶ 8 U.S.C. § 1103(a).

⁷ 6 U.S.C. § 202(5).

⁸ 8 U.S.C. § 1252(g); see also *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (U.S. 1999).

⁹ See also, *Arpaio v. Obama*, Civ. Action # 14-01966, court opinion page 7 (BAH) (D.D.C. Dec. 23, 2014) (available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1966-23) (“Congress has acquiesced to, and even endorsed the use of, deferred action on removal of undocumented immigrants by the executive branch on multiple occasions.”).

¹⁰ In *Arpaio v. Obama*, Judge Howell supports this assertion. She notes “the Secretary of DHS is specifically charged with ‘establishing national immigration enforcement policies and priorities,’ 6 U.S.C. § 202(5), to ensure that DHS’s limited resources are expended in pursuit of its highest priorities in national security, border security, and public safety” (court opinion pages 4-5).

¹¹ See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

¹² *State of Texas v. United States of America*, court opinion page 90. For a specific legal defense of DAPA and DACA, see Letter from Steve Legomsky, Hiroshi Motomura, Shoba Sivaprasad Wadhia et. al re: legality of DAPA and DACA, (November 25, 2014)

<https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>;

Testimony by Stephen H. Legomsky before Senate Judiciary Committee (Jan. 29, 2015), at

<http://www.judiciary.senate.gov/imo/media/doc/01-29-15%20Legomsky%20Testimony.pdf>; Testimony by Stephen H. Legomsky before House Judiciary Committee, (February 25, 2015).

<http://judiciary.house.gov/cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf>).

¹³ See e.g., Wadhia, Shoba Sivaprasad, *The Role of Prosecutorial Discretion in Immigration Law* (September 21, 2009). Connecticut Public Interest Law Journal, Vol. 9 , No. 2, p. 243, 2010; Penn State Legal Studies Research Paper No. 25-2010. Available at SSRN: <http://ssrn.com/abstract=1476341>; Wadhia, Shoba Sivaprasad, *Response, In*

Court explicitly recognized “deferred action” as a form of prosecutorial discretion—namely, a choice to interrupt or abandon efforts of trying to deport someone by offering them temporary protection from deportation.¹⁴ Meanwhile, Judge Hanen suggests that deferred action in general and DAPA in particular fall outside the scope of prosecutorial discretion, because they go beyond “non-enforcement.”¹⁵ His characterization of deferred action cannot be reconciled with either the long-established practices throughout the history of the deferred action program, or with the words of the U.S. Supreme Court.

To place deferred action in context, the immigration system has more than twenty different forms of prosecutorial discretion used by DHS. These forms include decisions to cancel, dismiss, or not bring charges against a noncitizen, as well as more positive acts, such as the decision to grant deferred action, parole, or a stay of removal.¹⁶ Regardless of the label, prosecutorial discretion always involves “non-enforcement.” However, it is limited because it provides no formal legal status or pathway to a permanent status in the United States.

Judge Hanen also confuses deferred action with work authorization, which is based on an independent statute and governing regulations. He goes to great pains to distinguish prosecutorial discretion in immigration law through “nonenforcement” from deferred action because it comes with “other benefits” like work authorization. But the deferred action program has operated for decades in this way, and among other things, has provided qualifying grantees the opportunity to apply for work authorization upon a showing of economic necessity.¹⁷ INA § 274A (h) (3)

Defense of DACA, Deferred Action, and the DREAM Act (January 2, 2013). Texas Law Review, Vol. 91:59; Penn State Law Research Paper No. 5-2013. Available at SSRN: <http://ssrn.com/abstract=2195735>; Wadhia, Shoba Sivaprasad, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE* (January 2, 2013). 27 Geo. Immigr. L.J. 345; Penn State Law Research Paper No. 6-2013. Available at SSRN: <http://ssrn.com/abstract=2195758>; Wadhia, Shoba Sivaprasad, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law* (2011). University of New Hampshire Law Review, Vol. 10, No. 1; The Pennsylvania State University Legal Studies Research Paper No. 21-2011. Available at SSRN: <http://ssrn.com/abstract=1879443>; See also *Arpaio v. Obama*, Civ. Action # 14-01966, opinion pages 7 and 31 (BAH) (D.D.C. Dec. 23, 2014).

¹⁴ *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (U.S. 1999).

¹⁵ See page 87 of the decision (“This Court seriously doubts that the Supreme court, in holding non-enforcement decisions to be presumptively unreviewable, anticipated that such “non-enforcement” decisions would include the affirmative act of bestowing multiple, otherwise obtainable benefits upon the individual.”)

¹⁶ See e.g., Wadhia, Shoba Sivaprasad, *The Role of Prosecutorial Discretion in Immigration Law* (September 21, 2009). Connecticut Public Interest Law Journal, Vol. 9, No. 2, p. 243, 2010; Penn State Legal Studies Research Paper No. 25-2010. Available at SSRN: <http://ssrn.com/abstract=1476341>; Wadhia, Shoba Sivaprasad, *Immigration Remarks for the 10th Annual Wiley A. Branton Symposium* (July 1, 2014). Howard Law Journal, Vol. 57, No. 3, 2014; Penn State Law Research Paper No. 30-2014. Available at SSRN: <http://ssrn.com/abstract=2461361>; Memorandum from John Morton, Director, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (available at: <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>); Memorandum from Jeh Charles Johnson, Secretary, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (November 20, 2014) (available at: http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

¹⁷ See e.g., Wadhia, Shoba Sivaprasad, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012), (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443); Wadhia, Shoba Sivaprasad, *Beyond Deportation – The Role of Prosecutorial Discretion* (2015), chap. 4.

recognizes the executive branch’s authority to authorize employment for noncitizens who do not otherwise receive it automatically by virtue of their particular immigration status.¹⁸ This provision – together with the formal regulations that specifically make deferred action recipients eligible to apply for work permits – provide the necessary legal authority to provide work authorization to beneficiaries of DACA and DAPA.

Finally, Judge Hanen is mistaken to suggest that one cannot obtain the “benefit” of lawful presence or a work permit through programs outside the DACA or DAPA programs. As just a few examples, deferred action generally, parole and orders of supervision are all forms of prosecutorial discretion that provide the possibility of work authorization.¹⁹ Judge Hanen also appears troubled that DAPA “awards” some form of lawful presence, but deferred action promises nothing and can be terminated without cause or notice. Moreover, lawful presence for individuals in deferred action status is an already established concept.²⁰ Congress has specifically provided that a noncitizen is lawfully present during any “period of stay authorized by” [DHS].²¹ DHS in turn has exercised that authority with respect to deferred action recipients, though deferred action does not erase any prior periods of unlawful presence.²² Judge Hanen identifies the decision of DHS to classify DACA recipients as “lawfully present” to be “outside the realm of prosecutorial discretion,”²³ but this is inaccurate. The source of his mistake is overlooking the difference between “lawful presence” and “lawful status.” The lawful presence awarded to deferred action recipients is a modest aspect of deferred action with its own statutory basis. The limited significance of unlawful presence is that it determines whether the person’s presence will trigger future inadmissibility when he or she departs.²⁴ In contrast, lawful status, which neither DAPA nor DACA would grant, is associated with whether a person’s status is secure or liminal. Under governing statutes and regulations, the differences between lawful presence and lawful status are striking. The differences relate to a person’s future vulnerability to apprehension and deportation, ability to obtain certain benefits, and other rights, to name a few. Judge Hanen wrongly conflates the two.²⁵

¹⁸ INA § 274A(h)(3); 8 U.S.C.A. § 1324a(h)(3).

¹⁹ See e.g., 8 C.F.R. §274a.12(c)(14); *See also* Ombudsman Recommendation: Recommendations on USCIS Deferred Action Processing, U.S. DEPARTMENT OF HOMELAND SECURITY (July 11, 2011) (available at: <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf>); *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. Citizenship and Immigration Services (October 23, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>; See also *Arpaio v. Obama*, Civ. Action # 14-01966, opinion page 5 (“Under long-existing regulations, undocumented immigrants granted deferred action may apply for authorization to work in the United States.”); 8 C.F.R. §274a.12(c)(11); 8 C.F.R. §274a.12(c)(18).

²⁰ Memorandum from Donald Neufeld, Acting Associate Director, Lori Scialabba, Associate Director, and Pearl Chang, Acting Chief, on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009) (available at: http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF).

²¹ 8 USC § 1182(a)(9)(B)(ii).

²² *Consideration of Deferred Action for Childhood Arrivals Process: Frequently Asked Questions*, U.S. Citizenship and Immigration Services (October 23, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

²³ *State of Texas v. United States of America*, court opinion page 95. (S.D. Tex. Feb. 16, 2015).

²⁴ See e.g., 8 USC § 1182(a)(9)(B)(i)(I,II).

²⁵ See e.g., page 87 decision, FN 67 (“...The award of legal status and all that it entails is an impermissible *refusal* to follow the law”); page 95 decision, FN 76 (“This response clearly demonstrates that the DHS knew by DACA

Judge Hanen is critical of the procedures the Administration has put into place to operate the DAPA program. Importantly, many instruments to set prosecutorial discretion policy have been recognized as “general statements of policy” subject to the exceptions of the notice and comment requirement even where the criteria were outlined with care and where the related benefits were nearly identical. One of the earliest recitations of deferred action was in the form of a policy called the “Operations Instructions,” which stated in part, “When determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States – effect of expulsion; (5) criminal, immoral or subversive activities or affiliations....”²⁶ Later, then Commissioner Doris Meissner identified deferred action as a viable form of prosecutorial discretion.²⁷ Even after the Immigration and Naturalization Service (INS) was abolished and the Department of Homeland Security (DHS) was created, deferred action served as an instrumental form of prosecutorial discretion.²⁸ The mere existence of guiding criteria has not meant, and does not with DAPA or DACA, mean that applications are “simply rubberstamped.”²⁹

We support the Administration’s decision to create a program for administering prosecutorial discretion that takes transparency seriously. But DACA and DAPA are no less discretionary just because they are transparent. We believe that creating sound procedures like a form, application fee and public information about how a person should go about making a request

(and now by DAPA) that by giving the recipients legal status, it was triggering obligations on the states as well as the federal government”); In *Arpaio v. Obama*, Judge Howell addresses this concern. She states “Deferred action does not confer any immigration or citizenship status or establish any enforceable legal right to remain in the United States and, consequently, may be canceled at any time” (court opinion pages 5-6).

²⁶ (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

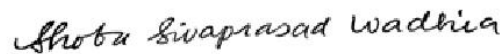
²⁷ Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, 2 (Nov. 17, 2000), (available at: <http://www.scribd.com/doc/22092970/INSGuidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-0>); See also Wadhia, Shoba Sivaprasad, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012), (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443).

²⁸ Memorandum from John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, U.S. Immigration and Customs Enforcement, 3 (June 17, 2011) (available at: <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>); Memorandum from William J. Howard, Principal Legal Advisor, on Prosecutorial Discretion, *footnote 2* (Oct. 24, 2005) (on file with authors); Memorandum from Jeh Charles Johnson, Secretary, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, 2 (November 20, 2014) (available at: http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf). Beyond the scope of this letter, but worth noting, is the broad use of guidance documents by DHS in immigration policy making. See e.g., Memorandum from Donald Neufeld, Acting Associate Director, Lori Scialabba, Associate Director, and Pearl Chang, Acting Chief, on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act (May 6, 2009) (available at: http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF).

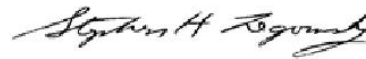
²⁹ For a broader discussion on this topic, see, Testimony by Stephen H. Legomsky before House Judiciary Committee, 10-14, (February 25, 2015) <http://judiciary.house.gov/cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf>).

for DACA and DAPA are crucial, even if they represent general policy statements regarding the exercise of prosecutorial discretion. These features promote sound administrative law values that include consistent decision-making, efficient process, public transparency, and the political accountability of agency personnel in both leadership positions and in the field.³⁰

Sincerely,



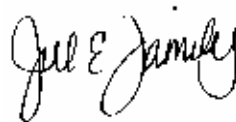
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³⁰ For broader discussions of the administrative law values associated with prosecutorial discretion, see Hiroshi Motomura, *Immigration Outside the Law* 19-55, 185-92 (2014); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012) (also proposing deferred action procedures), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443; Jill Family, *Administrative Law Through the Lens of Immigration Law*, 64 Admin. L. Rev. 565 (2012).

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