

President Donald J. Trump  
The White House  
1600 Pennsylvania Avenue NW  
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August 14, 2017

Dear President Trump:

As immigration law teachers and scholars, we write to express our position that the executive branch has legal authority to implement Deferred Action for Childhood Arrivals (DACA 2012). This letter provides legal analysis about DACA 2012. In our view, there is no question that DACA 2012 is a lawful exercise of prosecutorial discretion. Our conclusions are based on years of experience in the field and a close study of the U.S. Constitution, administrative law, immigration statutes, federal regulations and case law. As the administration determines the future of DACA 2012, understanding its legal foundation and history is critical.

DACA 2012 was announced by the President, and implemented in a memorandum by the Secretary of Homeland Security, on June 15, 2012.<sup>1</sup> It enables qualifying individuals to request a temporary reprieve from removal known as “deferred action.” Deferred action is one form of prosecutorial discretion in immigration law and has been used for decades by the Department of Homeland Security (DHS) (and formerly the Immigration and Naturalization Service (INS)) and over several administrations.<sup>2</sup>

Whether a requesting individual receives deferred action under DACA 2012 is at the discretion of DHS. Qualifying individuals may request DACA 2012 if they came to the United States before the age of sixteen; are currently in school or have graduated; have continuously resided in the United States since June 15, 2007; have not been convicted of a felony, “significant misdemeanor,” or three or more non-significant misdemeanors; do not otherwise pose a threat to public safety or national security; and otherwise warrant protection as a matter of discretion.<sup>3</sup>

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<sup>1</sup> See Barack Obama, President, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>; Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>2</sup> See Shoba Sivaprasad Wadhia, *Beyond Deportation The Role of Prosecutorial Discretion in Immigration Cases* 14-32 (2015) (“Wadhia, *Beyond Deportation*”); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 Am. U. L. Rev. 1285, 1296-97 (2015) (“Wadhia, *History of Prosecutorial Discretion*”); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 Wm. & Mary Bill of Rts. J. 463, 475–92 (2012); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1, 21-22 (2012) (“Wadhia, *Sharing Secrets*”).

<sup>3</sup> DHS requires that DACA applicants: “1. Were under the age of 31 as of June 15, 2012; 2. Came to the United States before reaching your 16<sup>th</sup> birthday; 3. Have continuously resided in the United States since June 15, 2007, up to the present time; 4. Were physically present in the United States on June 15, 2012, and at the time of making your

Individuals who are granted DACA 2012 receive a two-year period in deferred action and also gain eligibility to apply for employment authorization.

The legal authority for DACA 2012 originates from the U.S. Constitution. Article II, Section Three (the Take Care Clause) states in part that the President “shall take Care that the Laws be faithfully executed.”<sup>4</sup> Inherent in the function of the “Take Care Clause” is the ability of the President to target some immigration cases for removal and to use prosecutorial discretion favorably in others. As described by the U.S. Supreme Court:

[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>5</sup>

As early as 1976, former INS General Counsel Sam Bernsen executed a legal opinion that identified the Take Care Clause as the primary source for prosecutorial discretion in immigration matters. He wrote: “The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President. Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President ‘shall take care that the laws be faithfully executed.’”<sup>6</sup>

The U.S. Supreme Court has also recognized the role of prosecutorial discretion in the immigration system. In *Arizona v United States*, the Court noted 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 . . . .”<sup>7</sup>

Congress created the Immigration and Nationality Act (the Act or INA) in 1952 and it remains the primary statutory authority for immigration law today.<sup>8</sup> Importantly, Congress has delegated most discretionary immigration functions to DHS. Section 103 of the Act provides that

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request for consideration of deferred action with USCIS; 5. Had no lawful status on June 15, 2012; 6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and 7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.” *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last updated Dec. 22, 2016).

<sup>4</sup> U.S. Const. art. II, § 3.

<sup>5</sup> Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. See Also 59, 63 (2013) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

<sup>6</sup> Memorandum from Sam Bernsen, Gen. Counsel, Immigration & Naturalization Serv., to Comm’r, Immigration & Naturalization Serv. 2 (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

<sup>7</sup> 567 U.S. 387, 396.

<sup>8</sup> See Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *Immigration and Nationality Act*, U.S. Citizenship & Immigr. Servs., <https://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 10, 2013).

“[t]he 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 . . . .”<sup>9</sup>

Congress has repeatedly acknowledged that the Executive has power to grant “deferred action” for certain categories of people such as victims of crimes and human trafficking.<sup>10</sup> Additionally, previous administrations have announced deferred action programs to protect qualifying individuals. For example, under the George W. Bush administration, U.S. Citizenship and Immigration Services (part of DHS) announced a deferred action program for students affected by Hurricane Katrina<sup>11</sup> and later developed a program for the widows of U.S. citizens.<sup>12</sup> Moreover, Congress also recognized legal authority for immigration prosecutorial discretion in INA § 242(g), which bars judicial review of three specific prosecutorial discretion decisions by the agency: to commence removal proceedings, to adjudicate cases, and to execute removal orders.<sup>13</sup>

Another important legal source for deferred action is Title 8 of the Code of Federal Regulations. Section 274a.12(c)(14) dates to 1981 and is the product of notice and comment rulemaking.<sup>14</sup> This regulation specifically identifies deferred action by name and allows individuals granted deferred action to apply for work authorization upon a showing of “economic necessity.”<sup>15</sup> Over the last two decades, thousands of individuals have applied for and received work authorization based on a deferred action grant.<sup>16</sup>

There are also agency guidance documents related to deferred action issued by DHS (and formerly INS) over the last four-plus decades. The 1976 legal opinion by former INS General Counsel Sam Bernsen cites to the Take Care Clause of the U.S. Constitution, as well as statutory and case law from as early as 1825 to affirm the exercise of prosecutorial discretion in immigration.<sup>17</sup> It was around this time when INS published its first guidance on deferred action in the form of an “Operations Instruction.” This “Operations Instruction” stated “(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.”<sup>18</sup> Since 1975, deferred action has been identified in several subsequent

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<sup>9</sup> 8 U.S.C. § 1103(a)(1) (2012).

<sup>10</sup> See 8 U.S.C. § 1227(d)(4) (2012), INA § 237(d)(4).

<sup>11</sup> See Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), [https://www.uscis.gov/sites/default/files/files/pressrelease/FIStudent\\_11\\_25\\_05\\_PR.pdf](https://www.uscis.gov/sites/default/files/files/pressrelease/FIStudent_11_25_05_PR.pdf); see also 70 Fed. Reg. 70,992 (Nov. 25, 2005).

<sup>12</sup> See DHS Establishes Interim Relief for Widows of U.S. Citizens, U.S. Department of Homeland Security (June 9, 2009), <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>. See generally Wadhia, *Beyond Deportation*, *supra*, ch.4.

<sup>13</sup> 8 U.S.C. § 1252(g) (2012).

<sup>14</sup> See 8 C.F.R. § 274a.12(c)(14); *Unconstitutionality of Obama’s Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Stephen H. Legomsky); *Reining in Amnesty: Texas v. U.S. and Its Implications: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts, S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Jill E. Family); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 Colum. J. Race & L. 1 (2016) (“Wadhia, *Demystifying Employment Authorization*”).

<sup>15</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>16</sup> See Wadhia, *Demystifying Employment Authorization*, *supra*, at 25.

<sup>17</sup> Memorandum from Sam Bernsen, *supra*, at 2.

<sup>18</sup> (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975); see also

guidance documents.<sup>19</sup> Guidance documents are common in administrative law and are a recognized form of agency action under the Administrative Procedure Act.<sup>20</sup>

At tension with the aforementioned body of law is a letter sent by ten state Attorneys General to the administration requesting that DACA 2012 be rescinded.<sup>21</sup> This letter refers to DACA 2012 as “unlawful” and does so without citing to the foundational legal authorities behind deferred action. Furthermore, the letter conflates deferred action, “lawful presence” and work authorization in ways that are legally unsound and unclear. Finally, the letter itself shoehorns arguments into *Texas v. United States*, a lawsuit that never included the core of DACA 2012, and instead involved policies that are at this point in time moot.<sup>22</sup> Moreover, a previous lawsuit challenging DACA 2012 failed on jurisdictional grounds and would inevitably inform any future challenge.<sup>23</sup>

While the scope of this letter is to describe the legal foundation for DACA 2012, it is important to highlight the history and inevitability of prosecutorial discretion in immigration enforcement. Prosecutorial discretion exists because the government has limited resources and lacks the ability to enforce the law against the entire undocumented population. Recognizing this resource limitation, Congress has charged the Secretary of DHS with “establishing national immigration enforcement policies and priorities.”<sup>24</sup> Prosecutorial discretion and policies like DACA 2012 also have a humanitarian dimension, and such factors have long driven deferred action decisions. Finally, DACA 2012 has been an unqualified policy success, allowing over three-quarters of a million recipients to continue their education, receive professional licensing, find employment, and pay taxes into Social Security and other tax coffers.<sup>25</sup>

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Wadhia, *Beyond Deportation*, *supra* at ch. 2; Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 247-52 (2010); Shoba Sivaprasad Wadhia, *Sharing Secrets*, *supra*, at 9-11 (2012); Leon Wildes, *John Lennon v. The U.S.A.: The Inside Story of the Most Bitterly Contested and Influential Deportation Case in United States History* (2016).

<sup>19</sup> Wadhia, *History of Prosecutorial Discretion*, *supra*; Shoba Sivaprasad Wadhia, *The Aftermath of United States v. Texas: Rediscovering Deferred Action*, Yale J. on Reg.: Notice & Comment Blog (Aug. 8, 2017, 12:19 PM), <http://yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia>.

<sup>20</sup> *Reining in Amnesty: Texas v. U.S. and Its Implications: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts, S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Jill E. Family)

<sup>21</sup> Letter from Ken Paxton, Att’y Gen. of Texas et al., to Jefferson B. Sessions, Att’y Gen. of the United States (June 29, 2017) [https://www.texasattorneygeneral.gov/files/epress/DACA\\_letter\\_6\\_29\\_2017.pdf?cachebuster:5](https://www.texasattorneygeneral.gov/files/epress/DACA_letter_6_29_2017.pdf?cachebuster:5).

<sup>22</sup> *Texas v. United States* involves challenges to two deferred action policies announced two years after the original DACA policy was announced. The two later policies, popularly known as “DACA +” and “DAPA,” were enjoined by a federal district court in Brownsville, Texas, and later by the Fifth Circuit Court of Appeals. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). Although the Supreme Court reviewed the case, the Court was equally divided. *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). A majority of the Supreme Court never ruled on the case, and the litigation never reached beyond the preliminary injunction stage. On June 15, 2016, DHS issued a memorandum rescinding DAPA. Memorandum from John F. Kelly, Dep’t of Homeland Security Sec’y, to Kevin K. McAleenan, Acting Comm’r U.S. Customs and Border Prot., et al., (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>.

<sup>23</sup> *Crane v. Johnson*, 783 F.3d 244, 252 (5th Cir. 2015).

<sup>24</sup> 6 U.S.C. § 202(5) (2016).

<sup>25</sup> See, e.g., Tom K. Wong et al., *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes*, Center for American Progress (Oct. 18, 2016),

<https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes>.

This letter outlines the legal foundation for DACA 2012 and confirms that maintaining such a policy falls squarely within the Executive's discretion. The legal authority for the Executive Branch to operate DACA 2012 is crystal clear. As such, choices about its future would constitute a policy and political decision, not a legal one. As the administration decides how best to address DACA 2012, we hope that the legal foundation and history for this policy is addressed wisely and that decisions on the future of DACA 2012 are made humanely.

Thank you for your attention.

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