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REMARKS ON EXECUTIVE ACTION AND IMMIGRATION REFORM

*Shoba Sivaprasad Wadhia**

This essay places the President's executive actions on immigration last November into a larger context by providing a brief history of prosecutorial discretion in immigration cases. This essay also describes how law students at Penn State Law School used the President's announcement of executive actions as a platform for local change in the State College community.

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First, I would like to thank Professor Avidan Cover for inviting me to speak on this panel and to the law students, faculty, and staff who organized this conference. It is an honor to be on such a distinguished panel and also to be in Ohio (more on that later). I will use my time to place the President's executive actions on immigration last November into a larger context by providing a brief history of prosecutorial discretion in immigration cases. I will also describe how law students at Penn State Law School used the President's announcement of executive actions as a platform for local change in our community.

Last November, President Obama announced a line of executive actions on immigration,¹ the most controversial of which include an update to the Deferred Action for Childhood Arrivals (DACA) program (a program originated in 2012) and a new program for qualifying parents of children in a permanent legal status known as Deferred Action for Parents of Americans and Legal Residents

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1. U.S. Citizenship and Immigration Services, *Executive Actions on Immigration* (last visited July 28, 2015), <http://www.uscis.gov/immigrationaction> [<http://perma.cc/CH4R-BPAG>].

(DAPA).² These programs are controversial because they aim to protect a potentially large class of individuals from deportation using executive authority. These programs were also rolled out with great doses of transparency, enabling even the best of policy, or intentions, to be seized by politics.

The precise tool the Obama Administration identified for protecting this class was “prosecutorial discretion,” which in immigration law refers to the choice by the agency or Department of Homeland Security about whether to enforce the laws against a person or group of persons.³ There are multiple flavors or forms of prosecutorial discretion. They include the choice by a line officer to stop, interrogate or arrest a noncitizen; the decision by an Immigration and Customs Enforcement (ICE) attorney to cancel, serve or file legally valid immigration charges against a noncitizen; the determination by Customs and Border Protection (CBP) to permit the entry of an inadmissible noncitizen through parole; and as we have seen with this Administration, the choice by United States Citizenship and Immigration Services (USCIS) to grant deferred action.⁴ This kind of discretion has operated in the immigration system for many years and is premised on three principles. First, the agency has the resources to deport only a fraction of the unauthorized population, so the idea of targeting limited resources towards enforcement priorities as opposed to parents, children, and workers is deemed reasonable. Second, many unauthorized individuals have lived in the U.S. for many years, live in mixed families where at least one family member is a United States citizen or green card holder and contributes to the U.S. economy in meaningful ways. This compassion is a recurring theme in how prosecutorial discretion decisions have been made by the agency for many years. The third and final principle is more political, and goes to the response by the public and advocates in the wake of congressional action or inaction. One illustration of this can be found in the legislative history and advocacy that led to DACA. Once the Development Relief and Education for Alien Minors (DREAM) Act failed in the Senate in

2. *Id.*

3. *See e.g.*, Memorandum from Jeh Charles Johnson, Sec’y, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (November 20, 2014) (“As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities.”), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_proseutorial_discretion.pdf [<http://perma.cc/ZGK7-7EYC>].

4. Development Relief and Education for Alien Minors Act, S. 3992, 111th Cong (2010).

2010,⁴ affected young people and advocates for the DREAM Act placed more pressure on the Administration to use prosecutorial discretion as a way to protect them from deportation and enable them to go to school and apply for work authorization.

The history of prosecutorial discretion in immigration law does not merely rest on principles, as it has been applied to thousands of people over many presidential administrations.⁵ Many of the cases I have studied were obtained through the Freedom of Information Act (FOIA) and focus on individual deferred action cases. These cases reveal that thousands of people over decades have received deferred action for humanitarian reasons that include but are not limited to: those of advanced or tender age; people with serious medical conditions; individuals who serve as a primary caretakers; victims of crime or domestic violence; and/or those in a close family relationship to someone in legal status.⁶ Unlike the publicity and formality USCIS has applied to the DACA program, the original “deferred action” program remains a mostly secret program without a single form, fee, or instruction about how to apply.⁷

Finally, but of importance to the debate, is the President’s legal authority to create programs like DACA and DAPA. The Immigration and Nationality Act (INA), the immigration statute which every student taking immigration law in this room should have tabbed and by now call the “The Act,” was created by Congress and makes plain the authority for the Department of Homeland Security to make decisions about immigration and set priorities for enforcement.⁸ This authority has been echoed by judges in federal courts including the United States Supreme Court.⁹ Similarly, the regulations and library of guidance documents provide crucial policy on prosecutorial discretion for line officers and employees required to exercise this discretion on a daily basis. Nearly every document issued by the former Immigration and Naturalization Service, and now Department of Homeland Security, on the topic of prosecutorial

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5. Letter from Shoba Sivaprasad Wadhia et al, to President Barack Obama (Sept. 3, 2014) (on file with the Pennsylvania School of Law), *available at* https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf [<https://perma.cc/7TUX-QZZH>]; Memorandum from Office of Legal Counsel on DHS Authority to Prioritize Removal of Certain Aliens (Nov. 19, 2014) [hereinafter OLC Memo], *available at* <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/CZU4-NJL4>].
 6. See Shoba Sivaprasad Wadhia, *BEYOND DEPORTATION*, Chapter 4 (2015).
 7. *Id.*
 8. Immigration and Nationality Act (INA) of 1952, 8 U.S.C. §1103 (2013).
 9. See, OLC Memo, *supra* note 6, at 5; *Arizona v. United States*, 132 S. Ct. 2492, 2999 (2012).

discretion was issued as a policy document as opposed to a regulation under notice and comment rulemaking.¹⁰ The memorandum issued by DHS for DACA 2.0 and DAPA was also issued as a policy document, an agency choice that is being challenged in current litigation.¹¹

I now want to transition to how the changes by the President played out locally in my community. In 2008, I moved from Washington D.C. to State College, home of Penn State, surrounded by mountains, in the middle of mecca, but as some might say “in the middle of nowhere.” One hat I wear at Penn State is to direct the Center for Immigrants’ Rights at Penn State Law, which began as a policy clinic where law students worked on policy papers and practice pointers on behalf of organizational clients, and has since evolved and expanded to include education and legal work in our community. Before federal district court judge Andrew Hanen issued an injunction on February 16, 2015, clinic students screened and consulted with individuals for DAPA eligibility and created a screening instrument for our clinic. They also reached out to our Mayor, Elizabeth Goreham. My students versed themselves on the various terms, stayed abreast of the litigation enjoining the most recent deferred action programs, and learned to boil down complicated information into plain English. One outcome of their collaboration with our Mayor was to lay the groundwork that led to her signature on the now famous Mayors’ amicus brief to the Fifth Circuit Court of Appeals on the Hanen Injunction.¹² Law students in our clinic also testified before the Borough of State College regarding the importance of the President’s executive actions, delivered a CLE to our local bar of largely non-immigration attorneys about the technicalities of DACA, DAPA and the Enforcement Priorities Memo, spoke to our Mennonite Church about the impact of immigration enforcement on families and communities, and created a two-pager on the litigation for community members.¹³ These tasks were not simple in central Pennsylvania but

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10. See e.g., Letter from Steve Legomsky et al., (March 13, 2015), *available at* <http://www.pennstatelaw.psu.edu/lawprofftrlawsuit> [<https://perma.cc/DA35-9F6W>] (arguing that DAPA and the expansion of DACA are within the legal authority of the federal executive).
 11. *Texas v. United States*, 2015 U.S. Dist. LEXIS 18551, at 205-210 (S.D. Tex. Feb. 16, 2015).
 12. Brief for Amici Curia The Mayors of New York and Los Angeles, Seventy-One Additional Mayors, Cities, County Officials, Counties, Villages, and Boroughs, The United States Conference of Mayors, and the National League of Cities In Support of Appellants, *State of Texas et al. v. United States of America*, U.S. Dist. LEXIS 18551 (S.D. Tex. Feb. 16, 2015) (No. 15-40238).
 13. See e.g., Center For Immigrants’ Rights Penn State Law, *DACA and DAPA: What you Need to Know* (April 13, 2015), https://pennstatelaw.psu.edu/sites/default/files/CLEmaterials_daca%26dapa.pdf [<https://perma.cc/YU5-5HGC>]; State College Borough Council,

they were crucial moments during a time great of uncertainty and also extremely rewarding for the law students and for me. Our clinic played a small role in helping our community and I encourage law students in the audience to do the same. There are enormous ways to use the law school experience to discover how law can be used tool for social change on issues like immigration reform. Groundbreaking work is already being done in Cleveland by individuals such as Lynn Tramonte of America's Voice, David Leopold, and others. So, there is enormous opportunity to make connections with these leaders and make an impact before you graduate from law school.¹⁴

Let me close with a personal note – I was born in Dayton, Ohio and lived here for nearly ten years. My father worked as a doctor for the Veterans Affairs hospital (For immigration law students in the room, this was not a ticket he obtained to avoid the two-year home country requirement, despite entering the United States as a J-1 doctor). My mother, upon becoming the spouse of a green card holder, entered the United States in two months, a sharp contrast to the backlogs many spouses and families experience today because of outdated statutory ceilings and quotas. She pursued a second Masters' degree at Wright State University and during a time unknown for her generation worked as an engineer for NCR Corporation or the National Cash Register Company. My personal story could set the next conversation for comprehensive immigration reform – perhaps a topic for the next symposium. Thank you for your time and allowing me to share this day with you.

Borough of State College Meeting, (April 20, 2015), <http://cnet1.org/video/ShowByMember/14/?start=12> [<http://perma.cc/MKK6-YNQN>]; The Daily Collegian, *State College borough joins 70 other municipalities on Obama's immigration stance* (April 29, 2015), available at http://www.collegian.psu.edu/news/borough/article_1474536c-ee10-11e4-90aa-5346367fbb7.html?mode=story [<http://perma.cc/M9DU-P8XV>]; Penn State Law, *Penn State Law Immigration Clinic Educates Community About Immigration*, (May 11, 2015), <http://pennstatelaw.psu.edu/news/penn-state-law-immigration-clinic-educates-community-about-immigration> [<http://perma.cc/SBG3-PWCV>]; Center for Immigrants' Rights Penn State Law, *What You Should Know About the Texas Decision on Immigration*, (updated May 29, 2015), <https://pennstatelaw.psu.edu/sites/default/files/injunction%20flier%2029%20May.pdf> [<https://perma.cc/VW4H-BNMR>].

14. See e.g., America's Voice Online, EXECUTIVE ACTION RESOURCES (2015), <http://americasvoice.org/tag/executive-action/> [<http://perma.cc/VH9Y-5YZP>].