



2016

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## Recommended Citation

Shoba S. Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority - Response to Hiroshi Motomura*, 55 *Washburn L.J.* 189 (2016).

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## The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority—Response to Hiroshi Motomura

Shoba Sivaprasad Wadhia\*

### I. INTRODUCTION

It is my honor to provide this response to Washburn University School of Law’s Foulston Siefkin Lecture, 2015 titled “The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority,” delivered by Professor Hiroshi Motomura in March of 2015. Part II of this Essay provides a summary of Professor Motomura’s remarks from my vantage point. Part III of this Essay analyzes and supports Professor Motomura’s conclusion that deferred action is “different” from prosecutorial discretion and elaborates on how deferred action goes one step “further” than prosecutorial discretion.

### II. SUMMARY OF PROFESSOR MOTOMURA’S REMARKS

Professor Motomura opened his remarks with a description of the deferred action program announced in 2012— known as Deferred Action for Childhood Arrivals (“DACA”); and programs announced in 2014— an expansion to the DACA program and a newly established deferred action program for undocumented parents of Americans and legal residents.<sup>1</sup> “Deferred action” is a form of prosecutorial discretion

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\* Samuel Weiss Faculty Scholar and Founding Director of the Center for Immigrants’ Rights Clinic, Penn State Law- University Park; author of *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases* (NYU Press 2015); The author thanks Jill Family and Hiroshi Motomura for reviewing a draft of this Essay as well as Vienna Vasquez (2016) and the editorial team at the *Washburn Law Journal* for their research assistance.

1. Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<http://perma.cc/2K3L-CMML>] [hereinafter DAPA Memorandum]. In order to qualify for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”), the applicant must: (1) have, as of November 20, 2014, a son or daughter who is a U.S. citizen or lawful permanent resident, (2) have resided in the United States since before January 1, 2010, (3) be physically present in the United States on November 20, 2014, and at the time of filing the application; (4) not have a lawful immigration status on November 20, 2014, (5) not be an enforcement priority, and, (6) have no other factors that make the grant of deferred action inappropriate. *Id.* In order to qualify for the

that has been part of the immigration system for decades.<sup>2</sup> Prosecutorial discretion comes in many shapes and forms, but is common as it pertains to a decision made by the Department of Homeland Security (“DHS”) about the degree to which or whether to bring enforcement actions against a foreign national.<sup>3</sup> Professor Motomura is careful to identify the parameters of these deferred action programs, namely that they are renewable and also revocable, meaning that the DHS may revoke deferred action at any time.<sup>4</sup> Likewise, deferred action provides no independent path to a green card or legal status.<sup>5</sup> These limitations are similar to any form of prosecutorial discretion.

Professor Motomura moved next to the political events leading to the President’s announcement of deferred action in 2012. The demise of comprehensive immigration reform in 2013 marked an end to a decade long effort to fix the immigration system legislatively, and ended with an unsuccessful vote in the Senate to move the latest bill forward.<sup>6</sup> This congressional stalemate sparked new pressure on the Administration to

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expanded Deferred Action for Childhood Arrivals (“DACA”) program, the applicant must: (1) have entered the United States before the age of sixteen, (2) have lived in the United States since January 1, 2010, (3) either be in school or have graduated from high school, (4) have not been convicted of certain crimes. *Id.*; see also *The Obama Administration’s DAPA and Expanded DACA Programs*, NAT’L IMMIGR. L. CTR. (Jan. 23, 2015), <http://www.nilc.org/dapa&daca.html> [<http://perma.cc/2ZLF-3TAE>].

2. Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004); Shoba Sivaprasad Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, 9 CONN. PUB. INT. L.J. 243 (2010); 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 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [[perma.cc/8M53-3NJB](http://perma.cc/8M53-3NJB)] [hereinafter Thompson Memorandum Opinion].

3. DAPA Memorandum, *supra* note 1, at 2; Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, *supra* note 2.

4. Open Letter from Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar Clinical Professor of Law, Pa. State Univ. Dickinson School of Law, Stephen H. Legomsky, The John S. Lehmann University Professor, Wash. Univ. School of Law, Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, Jill E. Family, Professor of Law, Dir., Law & Gov. Inst., Widener School of Law, et al. (Mar. 13, 2015), [https://pennstatelaw.psu.edu/\\_file/LAWPROFLTRHANENFINAL.pdf](https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf) [<https://perma.cc/3UQF-KEZX>] [hereinafter Law Professors’ March 13th Letter].

5. Interoffice Memorandum from Donald Neufeld, Acting Associate Dir., Domestic Operations Directorate, Lori Scialabba, Associate Dir., Refugee, Asylum and Int’l Operations Directorate, and Pearl Chang, Acting Chief, Office of Policy and Strategy, 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) [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files/Memoranda/2009/revisi\\_on\\_redesign\\_AFM.PDF](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/2009/revisi_on_redesign_AFM.PDF) [<http://perma.cc/6MQ2-Y7XH>] [hereinafter Neufeld, Consolidation of Guidance]; Law Professors’ March 13th Letter, *supra* note 4.

6. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (1st Sess. 2013); Muzaffar Chishty & Faye Hipsman, *U.S. Immigration Reform Didn’t Happen in 2013; Will 2014 Be the Year?*, MIGRATION POL’Y INST. (Jan. 9, 2014), <http://www.migrationpolicy.org/article/us-immigration-reform-didnt-happen-2013-will-2014-be-year> [<http://perma.cc/DQS4-BSV4>].

exercise prosecutorial discretion and led to a flurry of policy guidance published by the DHS setting standards on prosecutorial discretion.<sup>7</sup> Professor Motomura rewinds the tape even further to chronicle how the immigration system itself was created with discretion in mind. Congress created an immigration system first, with restrictions drawn by ethnic and national identity and later by numerical caps on the number of people who may enter.<sup>8</sup> In a system where visas are limited, and eleven million or so people live in the United States without documents, discretion is inevitable.

Professor Motomura aptly describes how the debate around the legality of prosecutorial discretion and the 2012 and 2014 deferred action programs in particular has merged into the political debate. In other words, if critics want these programs to disappear, their best argument is to label them as unlawful. Whether or not these programs are good policy, the law is sound. Like Professor Motomura, I have been on record defending the legality of these programs.<sup>9</sup>

### III. DEFERRED ACTION: A DISTINCTION WITH A DIFFERENCE?

During his speech, Professor Motomura remarked that defenders of the President's executive action should see that "there is a lot more going on here than just the exercise of prosecutorial discretion."<sup>10</sup> In making this point, Professor Motomura explains how the President publicized the guidelines for his program and announced a deferred action program with potential work authorization for qualifying individuals. These additions, says Motomura, makes deferred action

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7. Memorandum from John Morton, Dir., U.S. Customs & Immigration Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens, (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<http://perma.cc/5T8Z-RER9>] [hereinafter Morton, Exercising Prosecutorial Discretion]; *Immigration Reform: Advocates Putting Pressure on Obama to Act Now*, ABC 7 (Sept. 13, 2013), <http://www.wjla.com/articles/2013/09/immigration-reform-advocates-putting-pressure-on-obama-to-act-now-94017.html> [<http://perma.cc/PF7T-TFD8>]; *ICYMI: Pressure Grows for Administration to Reform Deportation Policies*, AMERICA'S VOICE (Apr. 9, 2014), <http://americasvoice.org/blog/icymi-pressure-grows-for-administration-to-reform-deportation-policies/> [<http://perma.cc/RXG2-6Q5J>].

8. Hiroshi Motomura, *The President and Deportation: DACA, DAPA, and the Source and Limits of Executive Authority*, YOUTUBE, (March 26, 2015), <https://www.youtube.com/watch?v=3zR5k1jzGkk> [<http://perma.cc/U5DL-V52L>] (excerpt from Hiroshi Motomura's speech before Washburn University School of Law).

9. Open Letter from Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA School of Law, Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar Clinical Professor of Law, Pa. State Univ. Dickinson School of Law, Stephen H. Legomsky, The John S. Lehmann University Professor, Wash. Univ. School of Law, et. al., (Nov. 25, 2014), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf> [<https://perma.cc/FR32-9TL3?type=source>] [hereinafter Law Professors' November 24th Letter]; Law Professors' March 13th Letter, *supra* note 4.

10. Hiroshi Motomura, *The President and Deportation: DACA, DAPA, and the Source and Limits of Executive Authority*, YouTube, 25:15-25:25 (March 26, 2015), <https://www.youtube.com/watch?v=3zR5k1jzGkk> [<http://perma.cc/U5DL-V52L>]

different.<sup>11</sup> This section analyzes what makes deferred action “different” and considers why these differences matter.

Importantly, deferred action is only one form of prosecutorial discretion in immigration law—the immigration agency or DHS has the authority to exercise prosecutorial discretion in many different ways. DHS discretion includes, but is not limited to, refraining from serving, filing, or issuing a charging document known as the Notice to Appear,<sup>12</sup> choosing not to appeal a decision by an immigration judge that favors a noncitizen;<sup>13</sup> and choosing to grant a stay of removal or parole.<sup>14</sup> Deferred action is more visible in the discourse around immigration prosecutorial discretion because it is specifically named in the “Immigration and Nationality Act.”<sup>15</sup> Deferred action has also been explicitly discussed by the United States Supreme Court and other federal courts,<sup>16</sup> and is featured regularly in agency policy documents.<sup>17</sup> Additionally, the fifty-plus year application of deferred action for individual noncitizens by the agency means that a body of case profiles have developed an identifiable set of criteria— including advanced or tender age, many years’ presence in the United States, and a serious medical condition.<sup>18</sup> Deferred action has also been applied to groups, like widowers of U.S. citizens and victims of crimes and sexual assault while still being processed on an individualized basis by the agency.<sup>19</sup> As just one example, a victim of crime who applies and is approved for a U visa during a year when the statutory cap (which is set at 10,000 annually) is reached, is placed in “deferred action” until a visa becomes available.<sup>20</sup> This history provides a platform for developing programs

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11. *Id.*

12. Immigration and Nationality Act § 239(a), 8 U.S.C. § 1229a(a) (2012); DAPA Memorandum, *supra* note 2.

13. 8 U.S.C. 1228(c)(3); DAPA Memorandum, *supra* note 2; Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion at 2 (Nov. 17, 2000), <http://www.scribd.com/doc/22092970/INSGuidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-0> [<http://perma.cc/7YQZ-B6JR>] [hereinafter Meissner Memorandum]; Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 2.

14. See *e.g.*, 8 U.S.C. § 1227(d)(4); 8 U.S.C. § 1182(d); 8 C.F.R. § 241.6 (2015).

15. See *e.g.*, 8 U.S.C. § 1227(d)(2); 8 C.F.R. § 274a.12(c)(14).

16. See *e.g.*, *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979); *David v. INS*, 548 F.2d 219 (8th Cir. 1977); *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755 (8th Cir. 1976); *Lennon v. INS*, 527 F.2d 187, 191 n.5 (2d Cir. 1975).

17. Morton, Exercising Prosecutorial Discretion, *supra* note 7; DAPA Memorandum, *supra* note 1; Meissner Memorandum, *supra* note 13.

18. See generally, Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1 (2011); see also, Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law* 64 AM. U. L. REV. 101 (2015).

19. Thompson Memorandum Opinion, *supra* note 2; Letter from Shoba Sivaprasad Wadhia Samuel Weiss Faculty Scholar, Clinical Professor of Law Pa. State Univ. Dickinson School of Law, et al. to President Barack Obama, (Sept. 3, 2014), [https://pennstatelaw.psu.edu/\\_file/Law-Professor-Letter.pdf](https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf) [<http://perma.cc/52UL-8WWA>]; SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 54–88 (NYU Press 2015).

20. See *e.g.*, *Victims of Criminal Activity: U Nonimmigrant Status*, USCIS, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity->

like DAPA and DACA and supports the legal authority and history for deferred action. Deferred action is valuable to those who qualify because it confers “lawful presence” to the noncitizen for the period in which she is in deferred action status.<sup>21</sup> It also represents the possibility of work if the noncitizen is granted deferred action and can prove “economic necessity.”<sup>22</sup>

Deferred action is not the only form of prosecutorial discretion that confers “lawful presence” to noncitizens. For example, a noncitizen that receives prosecutorial discretion in the form of a stay of removal is treated as lawfully present.<sup>23</sup> Moreover, orders of supervision and parole are two regular forms of prosecutorial discretion that come with the possibility of work authorization.<sup>24</sup> Some forms of prosecutorial discretion like parole and stays of removal have enjoyed a long history for which data could be captured and coded in a meaningful way.<sup>25</sup> Still, there remain many other kinds of prosecutorial discretion that yield none of these benefits; among them, a motion to close, dismiss, or terminate a case; a choice to not file charges with the immigration court; and a choice not to detain a person. Under this backdrop, it may be legitimate to conclude that deferred action is the most precious form of prosecutorial discretion.<sup>26</sup> Reasonable minds can debate whether the common thread of a precarious legal status that is revocable at any time (featured in every single form of prosecutorial discretion) is what really matters as a legal question, and that other features like common humanitarian-based criterion, lawful presence, and the possibility of work authorization are ancillary. For the noncitizen, however, the advantage of deferred action over any other form of prosecutorial discretion can be life-changing and give the individual the opportunity

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u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status [http://perma.cc/8WRV-ZA2L] (“If the cap is reached before all U nonimmigrant petitions have been adjudicated, USCIS will create a waiting list for any eligible principal or derivative petitioners that are awaiting a final decision and a U visa. Petitioners placed on the waiting list will be granted deferred action or parole and are eligible to apply for work authorization while waiting for additional U visas to become available.”); see also WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* *supra* note 19, at 54–88.

21. Neufeld, Consolidation of Guidance, *supra* note 5.

22. See e.g., Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, *supra* note 18; WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES*, *supra* note 19.

23. Neufeld, Consolidation of Guidance, *supra* note 5.

24. 8 C.F.R. § 274a.12(c)(11) (2015); 8 C.F.R. § 274a.12(c)(18) (2015).

25. David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 *YALE L.J. ONLINE* 167 (2012), <http://yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade> [http://perma.cc/3UVQ-SBLV]; Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discovers of Deferred Action Cases at ICE*, 27 *GEO. IMMIGR. L.J.* 345 (2013).

26. WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES*, *supra* note 19, at 54–88.

to make a living, attend school, apply for a state driver's license and/or live without the fear of deportation.<sup>27</sup>

Notably, the Department of Justice (DOJ) and Professor Motomura himself argues that programs like DACA and DAPA qualify as an exception to "notice and comment" rulemaking under the Administrative Procedure Act (APA).<sup>28</sup> The APA identifies four clusters of documents that may be exempt from rulemaking, one of which includes interpretative rules, policy statements, and organizational and procedural rules.<sup>29</sup> The government has maintained that programs like DACA and DAPA fall within this exception. There is a historical precedent for excepting DACA and DAPA from the rulemaking requirements; nearly every guidance document on prosecutorial discretion issued by the immigration agency has been treated as a policy statement.<sup>30</sup>

Taking a different position from the DOJ, the state of Texas and twenty-five other states argue that the government's failure to promulgate these programs as a regulation violates the law.<sup>31</sup> Importantly, Professor Motomura expresses how the current policy-document-design of the DACA and DAPA programs align with the values that would accompany a rule: transparency, consistency, and efficiency. I agree with Professor Motomura that the values behind the design and procedure developed by President Obama, in crafting the DACA and DAPA policies, are similar to what might emerge were these programs, or the broader deferred action program, to be put through notice-and-comment rulemaking. Before DACA and DAPA were announced, I found deferred action to be a special form of prosecutorial discretion worthy of notice-and-comment rulemaking.<sup>32</sup> I even support the policy choice to transform the entire deferred action program into a regulation centralized in one unit of the DHS.<sup>33</sup>

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27. NAT'L IMMIGR. L. CTR., *The Obama Administration's DAPA and Expanded DACA Programs*, *supra* note 1.

28. The Administrative Procedure Act provides the following exceptions to the "notice-and-comment" rulemaking requirement:

- a) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or b) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553 (2009).

29. 5 U.S.C. § 553.

30. Law Professors' March 13th Letter, *supra* note 4; WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* *supra* note 19, at 54–88; Brief for the Appellants, No. 15-40238 (5th Cir. March 30, 2015).

31. *Texas v. United States*, 86 F. Supp. 3d 591, 647 (S.D. Tex. 2015).

32. Wadhia, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, *supra* note 2.

33. WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES*, *supra* note 19, at 146–156.

However, the politics of deferred action and rulemaking are volatile.

Critics of the President's executive action, including Judge Andrew Hanen author of the 123-page opinion issued for the U.S. District Court for Southern District of Texas, have argued that programs like DAPA must be subject to notice-and-comment rulemaking because the program leaves no room for discretion and is in effect a binding and new law.<sup>34</sup> However, the fact of the matter is that programs like DAPA include discretion as a main criterion of the program (the program explicitly requires the applicant to "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate").<sup>35</sup> Moreover, the DAPA program has not yet even been implemented in order for anyone to even make a conclusion about whether the program itself is being "rubberstamped" without discretion or handled on a case-by-case basis.<sup>36</sup> These facts diminish the foundation of the argument of the State of Texas and the twenty-five others: that rulemaking is mandatory. Meanwhile, the discretionary denials associated from the DACA program have continued to flow.<sup>37</sup> One amicus brief filed by the American Immigration Council contains case profiles of several individuals denied DACA. These profiles illustrate that in practical terms, DACA has been denied to qualifying individuals in the exercise of discretion.<sup>38</sup>

[Jose's Profile]. In October 2014, [U.S. Citizenship and Immigration Services] issued a discretionary DACA denial to Jose, a Texas high school graduate with substantial family ties in the United States. Jose met all the guidelines, had no criminal convictions, is married to a U.S. citizen, is the father of a U.S. citizen; and helps his lawful permanent resident mother take care of his three siblings, two of whom are U.S. citizens and one of whom has DACA. Jose came to the United States from Mexico when he

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34. *Texas*, 86 F. Supp. 3d 677–78. For a longer description of the lawsuit and related politics, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. 58 (2015).

35. DAPA Memorandum, *supra* note 1, at 4.

36. See e.g., Stephen H. Legomsky, Written Testimony of Stephen H. Legomsky The John S. Lehmann University Professor, Wash. Univ. School of Law: Hearing Before the H. Comm. on the Judiciary, 114th Cong. (2015), <http://lawprofessors.typepad.com/files/legomsky-testimony.pdf> [<http://perma.cc/8J9C-N8AZ>] ("Finally, even if the record had demonstrated that USCIS officers have been systematically disobeying Secretary Napolitano's explicit 2012 instructions to exercise discretion when deciding DACA requests— and as the above discussion shows, it does not— there is no basis for enjoining the future operation of DAPA. To do so requires further speculation that, in the future, officers will systematically disobey the instructions that Secretary Johnson issued in his November 20, 2015 memoranda.").

37. *Number of 1-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Bipmetrics and Case Status: 2012–2015*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 30, 2015), [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d\\_performance\\_data\\_fy2015\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performance_data_fy2015_qtr3.pdf) [<http://perma.cc/37KU-RHXY>]. Nearly 50,000 people have been denied DACA. *Id.*

38. Amici Curiae Brief of Am. Immigration Council, Nat'l Immigration Law Ctr., Servs. Emps. Int'l Union, and Others in Support of Appellant United States Seeking Reversal of Preliminary Injunction, 787 F.3d 733(5th Cir. 2015) (No. 15-40238).



was four years old. . . . He dreamed of one day being able to complete his education. The only blemish on Jose's record is a criminal charge that did not result in conviction . . . Jose demonstrated that he met all the DACA guidelines. . . . Nevertheless, USCIS denied Jose's application solely because, according to the agency, Jose did not warrant a favorable exercise of discretion.<sup>39</sup>

Deferred action has operated for more than fifty years without the benefits of a sound procedure or transparency and may very well benefit from rulemaking.<sup>40</sup> Rulemaking promotes many values like consistency and predictably and also increases the likelihood that cases involving similarly relevant facts will be treated fairly.<sup>41</sup> Outside the DACA program, the deferred action program lacks transparency or basic information for attorneys and applicants about how to apply and guiding criterion. Notably, the Administrative Conference of the United States has long advocated for "voluntary" rulemaking by agencies even if the policy or guidance being issued by the agency qualified as an "exception" to the rulemaking process.<sup>42</sup>

#### IV. CONCLUSION

Despite the values that may flow from putting deferred action through voluntary notice-and-comment rulemaking, it is difficult to have a meaningful conversation about this option now because of the politics. The political landscape includes a lawsuit by states who argue that the President is required to issue regulations for the most recent deferred action programs because these programs leave no room for discretion by the agency. Consequently, any step taken by the Administration will leave the (mis)impression that the rationale by the plaintiffs is sound. Also, important to note is the distinction between "voluntary" rulemaking for deferred action and the argument by the State of Texas and twenty-five states that notice-and-comment rulemaking is "required" under the law. If this were in fact the case, then the historical application of deferred action cases in previous administrations could be deemed unlawful. When the political dust settles, I look forward to a reasoned discussion about improving the DHS's deferred action program.

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39. *Id.*

40. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES, *supra* note 19, at 134–156 (discussing the importance of transparency in prosecutorial discretion cases and the degree to which rulemaking promotes transparency).

41. *Id.* at 146–156 (discussing the benefits of codifying deferred action as a regulation).

42. See e.g., Bremer, Emily S., *A Long History of Encouraging Voluntary Agency Efforts to Expand Public Engagement in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. (June 10, 2013 5:21 PM), <https://www.acus.gov/newsroom/administrative-fix-blog/long-history-encouraging-voluntary-agency-efforts-expand-public> [https://perma.cc/8T9S-UK9L].