2016

Beyond Deportation: Understanding Immigration Prosecutorial Discretion and *United States V. Texas*

Shoba S. Wadhia
Penn State Dickinson School of Law

36 IMMGR. & NAT'LITY L. REV. 94 (2015).

Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas

Shoba Sivaprasad Wadhia*****

TABLE OF CONTENTS

The human impact of U.S. immigration law cannot be overstated. Each person who faces deportation has a story. She might be an undocumented mother who is a primary caregiver for a young U.S. citizen daughter who suffers from a life-threatening disease. He may be a teenager who aspires to work as a doctor and who was brought to the United States as a baby without any knowledge about his immigration status. He may be a middle-aged man who has faced hardship in his birthplace and a jail sentence in the US but whose dream is to provide for his family and teach his own children about the value of hard work.

Deportation can hand these people cruel and unusual fates, which can also damage the souls of those who are left behind. Prosecutorial discretion is a powerful sword because it empowers the government to decide this fate for thousands of people and their families.[1] The visibility of prosecutorial discretion during President Obama's Administration might leave the impression that policies like DACA and DAPA are something new or perhaps an undiscovered tool in the toolbox, but history tells a different story. As detailed in my book, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*, prosecutorial discretion, and deferred action in particular, has been used for decades to protect thousands of individuals and families based on

---

* Samuel Weiss Faculty Scholar and Clinical Professor of Law at Penn State Law-University Park. This article is based on a talk delivered on November 9, 2015, at the University of Cincinnati School of Law, http://www.law.uc.edu/journals/inlr. Portions of this article are drawn from my book, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES published by NYU Press in 2015; my article, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U.L. REV. 1285 (2015), and various blogs written about the case of *United States v. Texas*. I would like to thank Ming Hsu Chen, and Amanda Frost for their feedback on this Article. I also thank Lauren Holzer ('16), Meaghan McGinnis ('17) and the Immigration and Nationality Law Review for their research and editorial assistance.

[1] SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES, 146-147. (New York University Press 2015).

primarily on humanitarian reasons.

In this article, I place the Supreme Court case of *United States v. Texas* into a broader context by describing the history and legal authority for prosecutorial discretion in immigration law and highlighting the contents and recommendations in my book, *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*. Part I of this article offers a primer on the role of prosecutorial discretion in immigration law and also describes two related programs announced by President Obama on November 20, 2014 and the subject of litigation for nearly two years as of this writing. Part II provides a history and analysis of *United States v. Texas*, a lawsuit originally brought by the state of Texas and twenty-five other states and decided on June 23, 2016.[2] This section offers highlights from the oral arguments held at the U.S. Supreme Court and my position on the sounder arguments. Part III raises normative questions about the implementation, legitimacy, and continued enforcement of immigration law against "priorities" identified by the government. Part IV discusses my book *Beyond Deportation*, which includes a history about discretion, my efforts to obtain data about the individuals who receive discretion and recommendations moving forward.

I. Overview of Prosecutorial Discretion in Immigration Law

"Prosecutorial discretion" in immigration law refers to the decision the Department of Homeland Security (DHS) makes about whether to enforce the immigration law against a person or a group of persons.[3] When prosecutorial discretion is exercised favorably

[2] United States v. Texas, 579 U.S. _ (2016) (per curiam).

[3] Jeh Charles Johnson, Sec'y U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter *Johnson Memo re: Policies*]; John Morton, Dir. U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion

towards a person, the government abstains from bringing a legally valid immigration charge against a person or group of persons. There are three theories behind the use of prosecutorial discretion in the immigration context. The first theory is economic and recognizes that the government only has the resources to deport less than 400,000 people a year, or less than four percent of the deportable population.[4] The second theory is humanitarian in nature and recognizes that there are people residing in the United States who have compelling equities like a high school diploma or a serious medical condition who should be protected from removal.[5] A political third factor is the relationship between congressional inaction and public demands for an administrative solution.[6] Congress has failed to pass a comprehensive immigration reform bill in more than twenty years, despite the fact that several bipartisan bills have been debated during this time period.[7]

Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [hereinafter *Morton 7/11 Memo*].

[4] *See* The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (2014), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [hereinafter *DHS Authorization of Priority Removal*]; *see also* John Morton, Dir. U.S. Dep't of Homeland Sec., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), https://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf [hereinafter *Morton 3/11 Memo*].

[5] Shoba Sivaprasad Wadia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 U. CONN. PUB. INT. L.J. 243, 244-45 (2010).

[6] Wadhia, *supra* note 1, at 8.

[7] *See, e.g.*, Rachel Weiner, *How immigration reform failed, over and over*, WASH. POST (Jan. 30, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/; RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS 2-5 (2013); ANDORRA BRUNO ET AL., CONG. RESEARCH SERV., R44230, IMMIGRATION LEGISLATION

Embracing all three theories of prosecutorial discretion was the announcement by President Obama on November 20, 2014 to use prosecutorial discretion to protect young people and families from deportation. The two most controversial of these actions pertain to two deferred action programs.

One program announced by the President was an expansion to the Deferred Action for Childhood Arrivals (DACA) program, a program established in 2012 that enables young people to apply for deferred action if they are in school, came to the United States before the age of sixteen, and meet other program requirements.[8] Those granted DACA are eligible to apply for work authorization and, if granted DACA, are protected from removal for a period of two

AND ISSUES IN THE 114TH CONGRESS 2-26 (2016); *see generally* Shoba Sivaprasad Wadhia, *Immigration: Mind over Matter*, 5 U. MD, L.J. RACE RELIG. GENDER & CLASS 243 (2005).

[8] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last updated Jan. 4, 2016). The specific requirements of the 2012 DACA program, are as follows:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th 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 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. *Id.*

years.[9] The changes announced on November 20, 2014 to DACA (referred to in this article as "DACA Plus" or "expanded DACA") would adjust the entry date from June 15, 2007 to January 1, 2010 and would also remove the age limit in the original 2012 program.[10] These changes would allow qualifying individuals to apply for DACA regardless of their age if they show continuous residence since January 1, 2010. Cris is one individual who could qualify for DACA Plus if it were not held up in litigation:

> *Cris*: Cris was born in the Philippines and arrived in the United States at the age of 6, but missed the original cut-off for DACA by one year. Cris is the founder of an award-winning start-up company, GrantAnswers, which helps low-income and first generation students secure academic and career opportunities. Cris founded this company after helping students earn more than one million dollars in grants and scholarships for college. He is also developing a career readiness mobile application called KeyJargon. He holds a Bachelor's degree in Psychology and a Master's degree in Criminal Justice from the City University of New York, and has nearly completed his PhD. Despite his professional successes, Cris remains undocumented. The implementation of expanded DACA would alleviate his and his family's concerns that he may be deported. Through expanded DACA, Cris would be

[9] Janet Napolitano, Sec'y U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[10] Jeh Charles Johnson, Sec'y U.S. Dep't of Homeland Sec., 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), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter *Johnson Memo re: Prosecutorial Discretion*].

> able to continue his doctoral studies, the funding for which was revoked due to his immigration status, and pursue additional career opportunities in public service helping youth and marginalized groups.[11]

The second program establishes a new Deferred Action for Parents of American and Legal Residents program (DAPA). DAPA would enable undocumented parents to request deferred action and work authorization if they can show 1) continuous residence since January 1, 2010; 2) a relationship as the parent to a U.S. citizen or lawful permanent resident child born on or before November 20, 2014; 3) unlawful status on November 20, 2014 and on the date of application; 4) they are not an enforcement priority for removal; and 5) they warrant protection as a matter of discretion.[12] It is estimated that sixty-nine percent of persons eligible for DAPA have resided in the United States for ten years or more.[13] The human impact of

---

[11] Brief for American Immigration Council et al. as Amici Curiae Supporting Petitioners, United States v. State of Texas, No. 15-674 (Mar. 8, 2016), 2016 U.S. S. Ct. Briefs LEXIS 1154. Significantly, the 2012 DACA program has transformed the lives of more than half a million people as data from DHS confirms that more than 700,000 initial requests for DACA have been approved. *Deferred Action for Childhood Arrivals Process (Through Fiscal Year 2016, 2nd Qtr)*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2016_qtr2.pdf (last visited June 11, 2016). To illustrate the impact and diversity of those who have benefited from DACA 2012, consider the story of Ji In (Kit) Lee a college student in Los Angeles, California who came to the United States with her mother from Korea when she was 5-years-old. *See Community Stories: Deferred Action for Childhood Arrivals (DACA)*, WHITE HOUSE INITIATIVE ON ASIAN AM. & PAC. ISLANDERS, http://sites.ed.gov/aapi/community-stories/#DeferredActionforChildhoodArrivals (last visited June 11, 2016). Says Kit, "*DACA has opened up so many opportunities for me—school, scholarships, and work. But it's also brought my family a sense of certainty, which has had real effects on our daily lives. The fact that my mom doesn't have to worry about me being deported. We breathe a little easier today because of DACA." Id.*

[12] Johnson Memo re: Prosecutorial Discretion, *supra* note 10.

[13] Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, MIGRATION

DAPA is compelling, as it would protect individuals with significant roots in the United States from deportation and make them eligible to apply for employment authorization. Alina is one example of a person who would qualify for DAPA if the program were operational:

> *Dr. Alina Kipchumba:*. Dr. Alina Kipchumba, a citizen of Kenya, came to the United States in 1995 to begin a Ph.D. program. In 2002, she obtained a Ph.D. in Biological Sciences from the University of Illinois in Chicago. For six years she had work authorization, and she was employed at the University of South Florida and then at the Sarasota Christian School. Dr. Kipchumba's 11-year-old son, a U.S. citizen, was born with a serious heart condition and has undergone multiple open-heart surgeries. Her son's pediatric cardiologist warned her that it would be impossible for her son to receive the medical treatment he requires in Kenya and that returning to Kenya would be "a death sentence" for him. DAPA would enable Dr. Kipchumba to once again have work authorization, resume working as a teacher, and support her U.S. citizen child.[14]

Also on November 20, 2014, President Obama published a new priorities memorandum setting forth refined priorities for immigration enforcement. The new priorities for enforcement are in descending order: 1) threats to national security, border security and public safety, including many felony convictions and those convicted of an aggravated felony; 2) misdemeanants and new immigration violators, including recent entrants and those convicted

---

POL'Y INST. (Feb. 2016), http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families.

[14] Brief for American Immigration Council et al. as Amici Curiae Supporting Petitioners, *supra* note 11.

of a "significant misdemeanor"; and 3) "other" immigration violations including people who received a final order of removal on or after January 1, 2014.[15] Any person who fits within these priorities is disqualified from DAPA.[16] The breadth of the priorities memorandum illustrates that adults and children without a criminal history can fall within a priority category. This memo also provides a revised policy on prosecutorial discretion for DHS and lists more than one dozen types of prosecutorial discretion in immigration law such as the issuance and cancellation of a Notice to Appear (the DHS charging document against a noncitizen alleged to be in violation of the immigration laws); a choice by DHS to refrain from arrest or interrogation of an individual; a choice by DHS not to file an appeal where an Immigration Judge has granted relief to the noncitizen and choices to grant deferred action, parole or a stay of removal, among others.[17] Finally, the memo grapples with the more complicated cases that may involve a person who appears to be a priority but whose equities may instead warrant a favorable exercise of prosecutorial discretion.[18] For example, a person who recently entered the United States unlawfully and therefore is potentially eligible for "Priority 2" may also be a mother to children born in the United States for whom she is the primary caregiver and breadwinner. Arguably, this person should not be treated as an enforcement priority in light of the equities present in her case.

II. *United States v. Texas*: The Litigation

a. Procedural History

[15] Johnson Memo re: Policies, *supra* note 3.
[16] Johnson Memo re: Prosecutorial Discretion, *supra* note 10.
[17] Johnson Memo re: Policies, *supra* note 3.
[18] *Id.*

United States v. Texas originates from a lawsuit brought by the state of Texas and twenty-five other states challenging the legality of DAPA and DACA Plus.[19] On February 16, 2015, Judge Andrew S. Hanen of the Federal District Court in Brownsville, TX halted the new deferred action programs through a tool called preliminary injunction, after concluding that the plaintiffs had standing and should have placed the deferred action programs through "notice and comment rulemaking" under the Administrative Procedure Act.[20] The 123-page opinion contained misrepresentations about immigration law and policy, some of which were memorialized in another letter signed by 104 law professors.[21] As one example, the letter criticizes Judge Hanen's characterization of deferred action as lacking statutory authority and beyond the scope of prosecutorial discretion.[22] Contrary to this characterization and as described below, the Administration has ample authority to operate a deferred action program.

The Administration (represented by attorneys in the Department of Justice) appealed Judge Hanen's decision to the Fifth Circuit Court of Appeals. Oral arguments were heard on July 10, 2015 and heard by a three-judge panel.[23] The hearing displayed

[19] Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015).
[20] Administrative Procedure Act, 5 U.S.C. § 553 (2012).
[21] Texas v. United States, 86 F. Supp. 3d 591, *supra* note 19, at 604; Letter from Law Professors in Response to Preliminary Injunction on Executive Actions (Mar. 13, 2015), https://pennstatelaw.psu.edu/_file/LAWPROFLTRHANENFINAL.pdf [hereinafter *Letter from Law Professors*].
[22] Letter from Law Professors, *supra* note 21. For a comprehensive account of the misstatements made by the district court, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58 (2015).
[23] Oral Argument, Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (No.15-40238), http://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings (search July 10, 2015 for State of Texas, et al. v. USA, et al.); Shoba Sivaprasad Wadhia, *Immigration argument at the fifth circuit*, THE HILL (July 14, 2015, 4:00 PM), http://thehill.com/blogs/congress-blog/judicial/247862-immigration-argument-at-the-fifth-circuit.

great confusion around the terms lawful presence, deferred action, and employment authorization to name a few. As I expressed in earlier commentary:

> Mildly frustrating were the flaws made by the state of Texas like calling DAPA a change in law and pointing to the administration for failing to abide by the congressional statute. Absent from this argument was the statutory authority for prosecutorial discretion decisions by DHS like section 103(a) of the Immigration and Nationality Act and the additional legal authorities and history for deferred action in immigration law. Likewise, Texas argued that there is "no" statute or rule that allows the government to grant lawful presence and yet there is a clear definition for (un)lawful presence in immigration law and reams of guidance documents about how this statute should be applied. …One revealing aspect of the hearing was that no one party was in agreement about how the term "deferred action" would be defined -- perhaps this was intentional. During the argument, the scope and definition of deferred action was identified in at least four different ways: 1) deferred action was interchanged with all forms of prosecutorial discretion; 2) deferred action was interchanged with "lawful presence;" 3) deferred action was defined as foregoing removal proceedings; 4) deferred action was identified as one basis for work authorization under the regulations. The use of multiple and sometimes misleading definitions of deferred action at the hearing made it nearly impossible to have a meaningful discussion.[24]

[24] Shoba Sivaprasad Wadhia, *Immigration argument at the fifth circuit*, THE HILL (July 14, 2015, 4:00 PM), http://thehill.com/blogs/congress-blog/judicial/247862-immigration-argument-at-the-fifth-circuit.

Following this argument, a divided three-judge panel of the Fifth Circuit Court of Appeals issued a 135-page decision on November 9, 2015 in favor of the states.[25] Policy and media commentators predicted the states would prevail in this lawsuit in part because of the composition of the panel. As described by the media outlet Politico "[T]he selection of [Judge] Smith — who wrote the opinion denying the administration's request for an emergency stay — and [Judge] Elrod suggests Obama likely won't have much luck winning the case at the Fifth Circuit, considered the most conservative appeals court in the nation."[26] Of note, Judge Carolyn King of the Fifth Circuit issued a sharp dissent that ran as long as the majority opinion.[27]

On November 20, 2015, the Administration petitioned the U.S. Supreme Court to review the decision by the Fifth Circuit Court of Appeals.[28] On January 19, 2016, the high court agreed to hear from parties on the following four questions:

> (1) Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the guidance seeking to establish a process

---

[25] *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), http://www.ca5.uscourts.gov/opinions%5Cpub%5C15/15-40238-CV0.pdf; *see also* Shoba Sivaprasad Wadhia, *Seeking to Understand the Fifth Circuit Ruling on Deferred Action*, ACSBLOG (Nov. 11, 2015), https://www.acslaw.org/acsblog/seeking-to-understand-the-fifth-circuit-ruling-on-deferred-action.

[26] Seung Min Kim, *Obama's Immigration Actions Face Skeptical Judges*, POLITICO (June 29, 2015, 11:49 AM), http://www.politico.com/story/2015/06/obama-executive-action-immigration-fifth-circuit-court-judges-119544#ixzz43x7gysXF.

[27] Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (King, J., dissenting).

[28] Petition for Writ of Certiorari, United States v. Texas, 579 U.S. __ (2016) (No. 15-674), http://www.scotusblog.com/wp-content/uploads/2015/11/us-v-texas-petition.pdf.

> for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2) whether the guidance is arbitrary and capricious or otherwise not in accordance with law; (3) whether the guidance was subject to the APA's notice-and-comment procedures; and (4) whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3."[29]

Oral arguments were heard on April 18, 2016.[30] The Supreme Court rendered a ruling on June 23, 2016.[31] The ruling was essentially a non-decision as the justices split 4-4 offering nothing more than a nine word decision "[t]he judgment is affirmed by an equally divided Court."[32] The immediate implications of a 4-4 tie are that the decision by the Fifth Circuit Court of Appeals to block the DACA Plus and DAPA programs remain. As no reasoning or analysis was provided by the justices about the Supreme Court's 4-4 split, the following analyzes the lower court decisions and oral arguments against these four questions and provides my take on which is the sounder argument.[33]

b. Standing

[29] United States v. Texas, 136 S. Ct. 906 (2016).
[30] Transcript of Oral Argument, United States v. Texas, et al., 579 U.S. __ (2016) (No. 15-674), http://www.supremecourt.gov/oral_arguments/argument_transcripts/15-674_h3dj.pdf.
[31] United States v. Texas, 579 U.S., *supra* note 2.
[32] *See id.*; *see also* Shoba Sivaprasad Wadhia, *Symposium: A meditation on history, law, and loss*, SCOTUSBLOG (Jun. 23, 2016, 2:08 PM), http://www.scotusblog.com/2016/06/symposium-a-meditation-on-history-law-and-loss/.
[33] Beyond the scope of this article is an analysis of the procedural landscape of the litigation moving forward. For a short piece on the possibilities, see: https://www.nilc.org/issues/immigration-reform-and-executive-actions/united-states-v-state-of-texas/supreme-courts-tie-vote-means-dapa-daca/

A threshold question in the case is whether Texas and the other twenty-five states have the right to bring a lawsuit in the first place. In order to have standing, the states would have to show they would suffer a direct and concrete injury.[34] Standing originates from Article III, Section 2 of the U.S. Constitution, which allows for judicial power in "cases" and "controversies" involving the United States or States.[35] In describing the standing doctrine Lyle Dinnerstein of the SCOTUS Blog reports:

> a state government — like anyone else who seeks to sue in those courts — would have to show that the action being challenged causes it a definite injury or harm. The injury cannot be theoretical or speculative; it must be real, existing right now or predictably. That is to assure that there is an actual "case or controversy," as the Constitution demands.[36]

The Administration argued that Texas is unable to show a concrete injury to themselves. Texas argued that it would suffer an injury by having to spend millions of dollars for noncitizens who are "lawfully present" and therefore eligible for a driver's license under Texas's law.[37] To prove this, Texas argued that the average price for

---

[34] Amanda Frost, *Academic highlight: State standing and United States v. Texas*, SCOTUSBLOG (Apr. 14, 2016, 11:29 AM), http://www.scotusblog.com/2016/04/academic-highlight-state-standing-and-united-states-v-texas/; Stephen Legomsky, *Supreme Court Immigration Case Will Have Profound Impact*, HUFFINGTON POST (Jan. 21, 2016, 6:24 PM), http://www.huffingtonpost.com/stephen-legomsky/supreme-court-immigration_b_9044870.html.

[35] U.S. CONST. art. III, § 2.

[36] Lyle Denniston, *Argument preview: A big, or not so big, ruling due on immigration*, SCOTUSBLOG (Apr. 15, 2016, 9:07 AM), http://www.scotusblog.com/2016/04/argument-preview-a-big-or-not-so-big-ruling-due-on-immigration/.

[37] Brief for Petitioner at 18-36, United States v. Texas et al., 579 U.S. __ (2016) (No. 15-674), http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsUnitedStates.pdf.

processing a driver's license is greater than the application fee. Importantly, any federal law or policy that benefits the foreign national is going to implicate states in some way.[38]

Throughout the litigation, Texas also argued that as a sovereign state it should be given 'special solicitude' in the standing analysis, citing the Supreme Court's decision in *Massachusetts v. EPA*[39] as support. In that case, the Court held that Massachusetts had standing to challenge the Environmental Protection Agency's failure to regulate the emissions of four greenhouse gases under the Clean Air Act.[40] Texas argued that "[t]o deny standing here, the Court would need to overrule *Massachusetts* and reject special solicitude for States in the standing analysis."[41] The United States argued that Texas should not be given "special solicitude" because unlike Massachusetts' injury (erosion of coastal property), the harm alleged by Texas is avoidable. Texas could charge more for its driver's licenses so that it doesn't lose money when providing them to deferred action recipients, or alternatively it could choose not to provide licenses to deferred action recipients. As the United States explained in its reply brief to the Supreme Court, "[w]hen a state makes a voluntary choice to tie a state-law subsidy to another

[38] Professor Stephen Legomsky has argued that Texas lacks standing and in testimony before the House Judiciary Committee noted: "If that is so, and if the mere fact that favorable immigration decisions by the federal immigration agency could have a net negative fiscal impact for a particular state were enough to confer standing, then the state in which a given noncitizen lives would have standing to challenge every individual grant of deferred action that is considered erroneous …The court's logic would permit the state to challenge every grant of every immigration benefit that leads to eligibility for a driver's license or any other state benefit. *The Unconstitutionality of Obama's Executive Actions on Immigration*: *Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 28 (2015) (testimony of Stephen Legomsky, Professor, Washington University School of Law), https://lofgren.house.gov/uploadedfiles/legomsky_testimony. pdf.

[39] Massachusetts v. EPA, 549 U.S. 497 (2007).

[40] *Id.* at 526.

[41] Brief for Respondents at 34, United States v. Texas et al., 579 U.S. __ (2016) (No. 15-674), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/15-674_resp.authcheckdam.pdf.

sovereign's actions, the State does not thereby obtain standing to sue the other sovereign whenever the latter's actions incidentally increase the cost of that subsidy."[42]

c. Legality and Lawful Presence

Throughout this litigation, the courts and plaintiff-states spent an inordinate amount of time discussing the President's legal authority to use his discretion to operate a deferred action program. However, this legal authority is abundantly clear. The legal foundation for prosecutorial discretion can be found in the United States Constitution,[43] the immigration statute created by Congress (INA),[44] binding precedent from the U.S. Supreme Court,[45] and regulations and policy documents from the DHS.[46] In *Arizona v. United States,* the U.S. 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] Congress has delegated the responsibility of administering and enforcing the immigration laws to the DHS. This delegation is explicit in section 103 of the Immigration and Nationality Act (INA or The Act).[48]

---

[42] It is an open question whether states may deny only some immigrants with deferred action from obtaining receive driver's licenses. *See e.g.*, *ADAC v. Brewer*, 818 F.3d 901 (9th Cir. 2016). Importantly, this section is selective and does not cover every argument concerning standing in the Texas case. The author thanks scholar Amanda Frost for sharing this point and her insights for this paragraph. *See* Amanda Frost, *supra* note 34. For a nice analysis about the standing issues in Texas, see Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016).

[43] U.S. CONST., *supra* note 35.

[44] *See e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1103 (2012).

[45] *See e.g.*, *Reno v.* Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 483–84 (1999).

[46] *See e.g.*, 8 C.F.R. § 274a.12(c)(14) (2016) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment").

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

[48] Immigration and Nationality Act, 8 U.S.C. § 1103 (2012).

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.[49] Animating the statute are regulations, memoranda, and a long history of the agency using deferred action as a tool for placing low priority cases on the backburner. The regulation at 8 C.F.R. § 274.12(c)(14) was published more than twenty years ago and explicitly identifies "deferred action" as one basis for work authorization.[50] The legality of these programs have also been upheld by the Department of Justice Office of Legal Counsel, DHS leadership, and more than 130 immigration law professors.[51]

---

[49] Immigration and Nationality Act, 8 U.S.C. § 1252 (2012).

[50] Seizure and Forfeiture of Conveyances, 8 C.F.R. § 274.12(c)(14) (2016). Beyond the scope of this article, but interesting to point out, is whether Texas et al. are really more concerned about the work authorization as opposed to the legality of deferred action. At one point during the oral arguments, Justice Elena Kagan asked the Texas Solicitor General, "it seems to me your real gripe here -- and you -- maybe it's a real gripe -- your real grip here is to the work authorization piece the benefits pieces; is that right?" see Transcript of Oral Argument at 53, United States v. Texas, et al., 579 U.S. __ (2016) (No. 15-674), http://www.supremecourt.gov/oral_arguments/argument_transcripts/15-674_h3dj.pdf. She continued to probe whether the Texas Solicitor General should be attacking this regulation as opposed to the legality of deferred action itself. *Id.* at 53-55. For more commentary on the relationship between work authorization and prosecutorial discretion, see Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, YALE J. ON REG. ONLINE (Feb. 10, 2016), http://www.yalejreg.com/blog/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s. *See also* Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016); Shoba Sivaprasad Wadhia, *U.S. v. Texas—True or False?*, IMMIGR. PROF BLOG (Apr. 19, 2016), http://lawprofessors.typepad.com/immigration/2016/04/us-v-texas-true-or-false-by-shoba-sivaprasad-wadhia.html.

[51] *See* Johnson Memo re: Policies, *supra* note 3; Johnson Memo re: Prosecutorial Discretion, *supra* note 10; DHS Authorization of Priority Removal, *supra* note 4. For a contrary view on the legality of these programs, raised only by a handful of scholars in contrast to the 135 plus who have supported their legality, see Jan C.

Despite this legal authority, the exchanges between the lawyers and the Justices on whether the deferred action programs are lawful persisted. In one portion of the argument, Justice Anthony Kennedy said, "the briefs go on for pages to the effect that the President has admitted a certain number of people and then Congress approves it. That seems to me to have it backwards. It's as if—that the President is setting the policy and the Congress is executing it. That's just upside down." As I concluded in my earlier analysis of his argument:

> Justice Kennedy's discomfort with the notion that the Executive Branch is dictating policy to the Legislative Branch is simply not the case here. In fact the Executive Branch's discretionary authority to temporarily protect low priority people from deportation was at the direction of Congress which explicitly delegated the administration and enforcement of immigration laws to the Department of Homeland Security and has required, by statute, the Secretary of Homeland Security to establish immigration enforcement policies and priorities.[52]

Another set of confusing exchanges during the litigation and continuing through the oral arguments centered on "lawful

---

Ting, *U.S. Immigration Policy and President Obama's Executive Order for Deferred Action*, 66 SYRACUSE L. REV. 65 (2016) and Peter Margulies, *DAPA and a Pragmatic View of Work Authorization and Family Fairness: Reply to Marty Lederman*, IMMIGR. PROF BLOG (Apr. 21, 2016), http://lawprofessors.typepad.com/immigration/ 2016/04/dapa-and-a-pragmatic-view-of-work-authorization-and-family-fairness-reply-to-marty-lederman.html.

[52] Shoba Sivaprasad Wadhia, *Understanding Justice Kennedy's "Upside Down" Argument in U.S. v. Texas*, AM. IMMIGR. COUNCIL (Apr. 20, 2016), http://immigrationimpact.com/2016/04/20/justice-kennedy-united-states-v-texas/. For a comprehensive analysis about the OLC opinion see Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

presence" which Texas et al. marketed as a "transformation" of an unlawful status to a lawful one. This might leave the mistaken impression that lawful presence and deferred action are interchangeable or perhaps even more importantly that lawful presence and legal status are the same thing. As highlighted by more than 100 law professors and a chamber of legal scholars commenting after the oral arguments, persons deemed lawfully present remain without a legal status.[53] Professor Anil Kalhan highlights the misconstruction around "lawful presence" and notes: "Properly understood, therefore, "lawful presence" should be regarded as a red herring in this litigation. To the extent that specific statutory provisions under federal, state, or local law make terms like "lawful presence" or "unlawful presence" relevant to particular legal consequences that might result for individuals who have been given notice of deferred action, those provisions operate collaterally and must be analyzed specifically and separately."[54]

While immigration scholars understand too well the rich distinctions between "lawful presence" and "lawful status," the two terms remain an enigma for lawyers outside of this field. During oral arguments, Solicitor General Donald Verrelli reacted to a question about "lawful presence" in the following way:

> … [T]hat phrase, 'lawful presence,' has caused a terrible amount of confusion in this case; I realize it. But the reality is it means something different to people in the immigration world. What it means in the immigration world is not that you have a legal right to be in the United States, that your status has

[53] *See e.g.*, Letter from Law Professors, *supra* note 21; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58 (2015); Anil Kalhan, *DAPA, "Lawful Presence," and the Illusion of a Problem*, YALE J. ON REG. ONLINE (Feb. 12, 2016), http://www.yalejreg.com/blog/dapa-lawful-presence-and-the-illusion-of-a-problem-by-anil-kalhan.

[54] Kalhan, *DAPA*, *supra* note 53.

> changed in any way, that you have any defense to removal. It doesn't mean any of those things, and it never has. And so at that fundamental level, we are not trying to change anybody's legal status.[55]

The idea that legal terms of art can differ from the ordinary meaning of a phrase is neither novel nor specific to immigration law. New York Times columnist Linda Greenhouse stated with wit that "[i]t turns out that the phrase "lawful presence," understood as a term embedded in the labyrinth of statutes, regulations and practice of immigration law, doesn't have the obvious meaning it would have in everyday speech, namely that someone is in the country legally and has the right to remain here. Is that really so hard for two of the top lawyers in the United States to understand?"[56]

d. Notice and Comment Rulemaking

The third question raised by the high court (but receiving little attention during oral arguments) revolves around "notice and comment" rulemaking. The plaintiff-states argued that rulemaking is required under the APA. For certain rules, section 553 of the APA requires agencies to engage in "informal rulemaking," where the government publishes a notice of the proposed rule and the parties then provide input primarily through the submission of written

---

[55] Transcript of Oral Argument at 27, United States v. Texas, et al., 579 U.S. __ (2016) (No. 15-674), http://www.supremecourt.gov/oral_arguments/argument_transcripts/15-674_h3dj.pdf.

[56] Linda Greenhouse, *When Smart Supreme Court Justices Play Dumb*, N.Y. TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/28/opinion/when-smart-supreme-court-justices-play-dumb.html?_r=0. For a history on how noncitizens with "lawful presence" have qualified for certain rights and benefits despite their unauthorized status and the erosion of these rights following the 1996 immigration laws, see Sara N. Kominers, *Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now*, 17 RUTGERS RACE & L. REV. 57 (2016) ("The concept of conferring rights and benefits to lawfully present but out-of-status noncitizens gained significant momentum in the 1970's through the judicially created category of noncitizens who were 'permanently residing under color of law' (PRUCOL)").

comment within a specified time period.[57] Recognizing the value of agency control over internal procedure and the importance of efficiency, section 553 exempts "general statements of policy" from the notice and comment rulemaking requirement.[58] The Supreme Court has held that "general statements of policy" include agencies' announcements as to how they plan to exercise discretionary powers going forward.[59]

In the memorandum announcing DAPA, the Secretary of Homeland Security explicitly instructed the USCIS officers to assess the facts of each individual case and to exercise discretion even in cases where all the threshold criteria – some of which are themselves discretionary – have been met.[60] Texas et al. argued that this is a pretext – i.e. in practice, USCIS officials will be pressured into approving DAPA requests mechanically.[61] To prove this, Texas relied on the low rate of denials among recipients of the earlier program, DACA 2012.[62] This rationale is flawed. First, the DAPA program has discretion built into it as confirmed by the program's actual requirement that the individual "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate."[63] Second, DACA requestors are a highly self-selected group.[64] Moreover, the DAPA program has not even begun, so there is no evidence to show that employees are *not* using discretion, assuming of course the test even rests on the discretion exercised by boots on the ground as opposed to the Secretary of DHS, a point reasonably questioned by scholar Michael Kagan.[65]

---

[57] Administrative Procedure Act, 5 U.S.C. § 553 (2012).
[58] *Id*.
[59] Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979).
[60] Johnson Memo re: Prosecutorial Discretion, *supra* note 10.
[61] Brief for Petitioner, *supra* note 37, at 64.
[62] *Id*. at 63.
[63] Johnson Memo re: Prosecutorial Discretion, *supra* note 10.
[64] The pool of DACA applicants is self-selected because the government has published guiding criteria that must be fulfilled in order to be eligible to apply.
[65] Michael Kagen, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665 (2016).

There is no basis for assuming that the DAPA approval rates will mimic those for DACA. Under the states' logic, I could determine whether my 5-year old is completing his homework based solely on my 8-year old's completion rate. Importantly, every guidance document published by the immigration agency (INS and DHS) on prosecutorial discretion ranging from the 1976 memo by Sam Bernsen,[66] 1975 Operations Instruction,[67] 2000 Meissner Memo[68] and 2011 Morton memos[69] have been in the form of policy documents and excepted from the notice and comment rulemaking requirement. As explained in a letter by 104 law professors in response to the district court opinion issued by Judge Andrew Hanen in this case, "[t]he mere existence of guiding criteria has not meant and does not with DAPA and DACA, mean that applications are merely rubberstamped."[70] In this way, the states have gravely mistaken an act of transparency for a violation of the law.[71]

e. Take Care Clause

Importantly, the Supreme Court requested briefing on the fourth question namely whether the deferred action programs violate the Take Care Clause of the U.S. Constitution. Almost absent from the oral arguments on April 18 was a discussion of this question. In my view, the Take Care Clause only supports the use of prosecutorial discretion. In its brief, Texas argued that DAPA

---

[66] Sam Bersen, Gen. Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (Jul. 15, 1976), https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf.

[67] *Id*.; (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(I)(ii) (1975).

[68] Doris Meissner, Comm'r, Immigration and Naturalization Serv., Exercising Prosecutorial Discretion (Nov. 17, 2000), http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf [hereinafter *Meissner Memo*].

[69] Morton 3/11 Memo, *supra* note 4; Morton 7/11 Memo, *supra* note 3.

[70] Letter from Law Professors, *supra* note 21.

[71] The foregoing analysis originally appeared here: Shoba Sivaprasad Wadhia, *Seeking to Understand the Fifth Circuit Ruling on Deferred Action*, ACSBLOG (Nov. 11, 2015), https://www.acslaw.org/acsblog/all/shoba-sivaprasad-wadhia.

violates the Take Care Clause. Texas reasoned that DAPA declares conduct that Congress established as unlawful to be lawful.[72] The Administration argued that a "Take Care question also is not justiciable, and respondents have no cause of action to raise such a claim. And in any event, the Secretary is faithfully executing the weighty and complex task of administering and enforcing the INA."[73] DHS has an obligation to both enforce the immigration laws against high priorities and exercise prosecutorial discretion favorably towards others-- this lies at the core of the Take Care Clause.[74] This point was highlighted by the U.S. Supreme Court in *Heckler v. Chaney* when it held that "[t]he decision of a prosecutor in the Executive Branch not to indict . . . 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 '[T]ake Care that the Laws be faithfully executed.'"[75] Possibly, if the President halted immigration enforcement altogether it would be in violation of the Take Care Clause, but that is not what we have seen during the President's tenure. Instead, there have been a record number of deportations; two million during the first five years of his tenure alone.[76] No one can really say the President has failed to enforce the immigration laws.

III. Beyond the Litigation

a. Implementation and Legitimacy

Had the U.S. Supreme Court reached a decision, DHS would

[72] Brief for Respondent, *supra* note 41, at 17.
[73] Brief for Petitioner, *supra* note 37, at 17.
[74] *See* Shoba Sivaprasad Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. 59 (2013); *see generally* Heckler v. Chaney, 470 U.S. 821 (1985); U.S. v. Armstrong, 517 U.S. 456 (1996).
[75] Heckler, 470 U.S. at 832.
[76] *See e.g.*, Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. deportations of immigrants reach record high in 2013*, PEW RESEARCH CENTER (Oct. 2, 2014), http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/.

have had a limited window to operationalize the deferred action programs and furthermore would have been required to achieve the right level of public acceptability and legitimacy. In a piece by scholar Ming H. Chen on the role of legitimacy and executive action and in the context of the Texas litigation, she notes:

> [I]f public confidence in the expanded DACA and DAPA programs begins to unravel, it will not likely be the result of a judicial pronouncement of illegality. It will instead be the result of the legitimacy concerns unveiled by the argument about the executive branch as a legitimate, fair, and trustworthy source of institutional authority."[77]

Moving forward and correctly, Chen urges us to focus on "legitimacy" as opposed to just the "legality" of executive action, which from a functional standpoint may matter most in determining how states react and recognize the program. Joseph Landau explains how the Executive can enhance this legitimacy through "bureaucratic buy-in." [78] He describes how connecting the discretionary decisionmaking between front line officers in cases may legitimize the DACA Plus and DAPA programs in meaningful ways.[79]

b. Family Separation and Enforcement Priorities

Beyond the litigation is the still operational Administration's

---

[77] *See* Ming Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 142 (2016).

[78]Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1225 (2016) ("In short, bureaucratic buy-in could supply DACA and DAPA with an added - and needed - measure of legitimacy. Indeed, presidential administrations should not refrain from touting the extent to which across-the-board enforcement policies are consistent not only with decades of agency guidelines, but also enforcement decisions rendered on the ground.").

[79] *Id.* at 1173-1240.

priorities memo or third policy described above.[80] In the wake of the non-decision in *United States v. Texas*, the current Administration has a limited window during which to implement existing prosecutorial discretion tools, including but not limited to the policy outlined in the Johnson Memo.[81] Every Dreamer[82] and parent who would have qualified for DACA Plus or DAPA is not an enforcement priority and therefore should not be targeted for enforcement by DHS. Such individuals may also qualify for another type of prosecutorial discretion like a stay of removal, parole or deferred action.[83] For example, a parent and primary caregiver to three U.S. citizen children could request deferred action with USCIS.[84] Importantly, individuals who qualify for DACA 2012 may still request deferred action using the pre-existing form and procedures outlined by DHS.[85] Finally, individuals who present other sympathetic factors should be informed about the humanitarian factors outlined in existing policy[86] and weigh the risks and possibilities of making an affirmative request.

Data obtained from USCIS in 2016 provides a snapshot of 186 deferred action cases and confirms the agency's continued

---

[80] Johnson Memo re: Policies, *supra* note 3.
[81] *See* Johnson Memo re: Prosecutorial Discretion, *supra* note 10.
[82] Individuals who would have qualified for DACA Plus.
[83] *See e.g.*, Shoba Sivaprasad Wadhia, *Beyond Deportation: Prosecutorial Discretion Requests after U.S. v. Texas*, ACSBLOG (June 28, 2016), https://www.acslaw.org/acsblog/beyond-deportation-prosecutorial-discretion-requests-after-us-v-texas.
[84] Shoba Sivaprasad Wadhia, *Standard Operating Procedure for Deferred Action (non-DACA)* (2015), *available at* https://works.bepress.com/shoba_wadhia/36/
[85] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 8.
[86] *See* Johnson Memo re: Prosecutorial Discretion, *supra* note 10; Meissner Memo, *supra* note 68; Jeh Charles Johnson, Sec'y U.S. Dep't of Homeland Sec., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf; *see also* Wadhia, *supra* note 83.

practice of deferred action.[87] Of the 185 deferred action requests provided in this data collection that were made between 2012-2015, sixty-five were granted, forty-three were denied and seventy-seven were labeled as "no action." Notably, the reasons for a deferred action grant were largely humanitarian and included both serious medical issues as well as family support requests. Deferred action may be a viable option for those affected by the Texas litigation and others who present sympathetic factors.[88]

Co-existing with the Administration's use of prosecutorial discretion to protect individuals and families from deportation for humanitarian reasons is the discretion used to enforce the immigration laws against those labeled as "enforcement priorities." Throughout, and beyond this litigation, DHS has continued to apply the Priorities Memo to individuals who appear to fall within the new priorities. This Priorities Memo has also sparked, or at least facilitated, a series of enforcement actions or immigration raids and deportations against Central American parents and children who fit within the Priorities Memo.[89] This created a firestorm of press and fear in communities and shattered the President's own commitment to keeping families together through prosecutorial discretion.[90] As described in a highly critical editorial by the New York Times:

---

[87] Letter from Jill A. Eggleston, Director FOIA Operations, U.S. Citizenship and Immigration Services, to author (Jan. 19, 2016) (unpublished FOIA response enclosed) (on file with author); For a comprehensive analysis of the data set see, Shoba Sivaprasad Wadhia, *The Aftermath of United States v. Texas: Rediscovering Deferred Action*, Yale Journal on Regulation, Notice and Comment (Aug. 10, 2016) http://yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia/

[88] Wadhia, *supra* note 83.

[89] Johnson Memo re: Policies, *supra* note 3.

[90] *See e.g.*, Gustavo Valdes, *U.S. raids target Central American immigrants*, CNN (Jan. 5, 2016), http://www.cnn.com/2016/01/05/us/immigration-raids-central-americans/; Lisa Rein, *U.S. authorities begin raids, taking 121 illegal immigrants into custody over the weekend*, WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/news/federal-eye/wp/2016/01/04/u-s-authorities-begin-raids-taking-121-illegal-immigrants-into-custody-over-the-weekend/.

> …ICE has been running amok, raiding homes and public spaces in search of deportable youths. In North Carolina and Georgia, where organized advocacy is sparse, the dragnet has been unusually aggressive. Agents seized students at home and on their way to school. Appalled teachers, students and community leaders have been signing petitions and marching, pleading for justice and putting a human face on the victims of coldblooded policies: Wildin Acosta, still in detention, as his appeal proceeds. Kimberly Pineda-Chavez, arrested on her way to school. Yefri Sorto-Hernandez, arrested at his school bus stop.[91]

Possibly, these raids enabled the Administration to showcase to the high Court and the public that it does enforce the immigration laws, and far from acting arbitrarily, targets its limited resources towards the listed priorities.[92] But for immigration advocates on the ground, these raids highlight a policy that runs afoul of the Administration's express commitment to use prosecutorial discretion wisely and keep families together.[93]

IV. *Beyond Deportation*: The Broader Context

---

[91] Editorial Board, *The Dark Side of Immigration Discretion*, N.Y. TIMES (Apr. 20, 2016), http://www.nytimes.com/2016/04/20/opinion/the-dark-side-of-immigration-discretion.html.

[92] *See e.g.*, Dara Lind, *The nationwide immigration raids targeting Central American Families*, explained, VOX (Jan. 4, 2016, 1:28PM), http://www.vox.com/2015/12/28/10673452/deportation-central-american-immigrant-families; *Families in Fear: The Atlanta Immigration Raids*, S. POVERTY L. CTR., https://www.splcenter.org/20160128/families-fear-atlanta-immigration-raids (last visited June 11, 2016).

[93] *See The Dark Side of Immigration Discretion*, *supra* note 91; *see also* Ghita Schwarz, *Obama's Two-Faced Immigration Policy*, CTR. CON. RTS., https://ccrjustice.org/home/blog/2016/04/21/obama-s-two-faced-immigration-policy (last visited June 11, 2016).

My preoccupation with prosecutorial discretion began as a law student in summer 1998, I began working for a boutique immigration law firm in Washington D.C. During my years there I met noncitizens from all over the globe seeking refuge from persecution abroad; opportunities to continue research at an internationally renowned institution; and relief from deportation (removal) to remain with their families in the United States; among others. The most compelling cases I handled as a lawyer involved prosecutorial discretion. I later spent six years with an advocacy organization committed to comprehensive immigration reform but also challenged by the sharp reaction to the terrorist attacks of September 11, 2001, which resulted in many immigration policies with far reaching consequences for Arab, Muslim and South Asian communities and with minimal attention to or understanding for the role of prosecutorial discretion in immigration cases. When I joined Penn State Law in 2008, the study of prosecutorial discretion emerged as a natural calling for my research and culminated into several law reviews and my first book: *Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases*.

Beyond Deportation is organized into eight chapters –one discusses the immigration case of John Lennon and the efforts undertaken by his attorney, Leon Wildes, to encourage the immigration agency to publish its policies about prosecutorial discretion. The Lennon case is significant because it triggered the publication of the immigration agency's first guidance on "deferred action," showcased most recently with the President's executive actions. The book provides a detailed history of "deferred action" and how it has been applied to individuals and special populations like victims of domestic violence, sexual assault, and other crimes. The book scrutinizes thousands of deferred action cases and identifies a pattern for the types of cases that are processed and granted deferred action. In the last fifty years, people have received deferred action for largely humanitarian reasons including: Long term presence in the United States; Serious medical condition or a primary caregiver

to a person with a serious medical condition; U.S. citizen family members; and/or Advanced or tender age.[94]

Much of the deferred action data analyzed in my book was obtained through the Freedom of Information Act (FOIA). In the early years of my FOIA adventures, the data was in some cases disorganized, illegible, and elusive. Even obtaining illegible data was remarkably exhausting and sometimes involved multiple communications with FOIA officers, government attorneys, and the DHS's own ombudsman. But the challenge was not limited to the shield held by the agency over the information itself or questions to myself about whether practitioners and scholars should have to file a FOIA to obtain basic information on topics like how to file a deferred action request.[95] The challenges were more complex because some of the data I sought was simply not tracked by the agency. As one example and as a result of a FOIA lawsuit with ICE over deferred action cases, ICE confirmed that it did not track deferred action cases before 2012.[96]

My own experiences in seeking and sorting data inform the book's discussion about transparency. Transparency in prosecutorial discretion matters because it improves the possibility that justice will be served for people whose roots and presence are in the United States. Transparency also promotes other administrative law values like consistency, efficiency, and public acceptability. I commend DHS for advancing these values through DACA—by creating a program that is transparent and aimed at protecting young people. *Beyond Deportation* closes with praise for DACA but is replete with recommendations to the general deferred action program, which continues to lack a form, lacks specific criteria, or even instructions on how to apply. DHS should formalize the deferred action program and centralize the processing

[94] Wadhia, *supra* note 1.
[95] Wadhia, *supra* note 84.
[96] Shoba Sivaprasad Wadhia, *Data from ICE on Deferred Action, Fall 2012* (2012), available at http://works.bepress.com/shoba_wadhia/22/.

of all cases at USCIS to promote consistency, uniformity, and efficiency. These values serve as the premise for why I recommend notice and comment rulemaking or, in the alternative, a broad deferred action program assembled with more formality like the DACA program.[97]

Importantly, my recommendation for codifying deferred action as a regulation pre-date the current litigation landscape and are unrelated to arguments espoused by Texas. As I explained in an earlier comment:

> Long before the current litigation and unrelated to the arguments espoused in *Texas* I have supported the use of notice and comment rulemaking for the longstanding deferred action program (pre-dating DACA or DAPA) or, in the alternative, a program assembled with more formality like the 2012 DACA program. But my recommendation for codifying deferred action reacts to a significant historical absence of transparency and information about the general deferred action program. No one could suggest that the current DAPA program suffers from a lack of transparency. Also important is the difference between mandatory rulemaking required by the APA and "voluntary" rulemaking that is permissive—a distinction and discussion that has had no real space in the current political landscape.[98]

[97] Wadhia, *supra* note 1, at 146-156.

[98] Shoba Sivaprasad Wadhia, *Notice and Comment Rulemaking in United States v. Texas*, ACSBLOG (April 15, 2016), https://www.acslaw.org/acsblog/notice-and-comment-rulemaking-in-united-states-v-texas; Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority - Response to Hiroshi Motomura*, https://works.bepress.com/shoba_wadhia/39/; *See also* SEC v. Chenery Corp., 332 U.S. 194 (1947).

Notably and unlike the secrecy that lines the traditional deferred action program, DACA 2012 was announced by the President himself in the White House Rose Garden with great fanfare.[99] Two years later, the President made a national and televised announcement about his plans to roll out executive actions on immigration, including extended DACA and DAPA.[100] What followed was a rigorous and controversial debate about the policy, politics and legality of the President's actions.

Beyond rulemaking, *Beyond Deportation* also calls on DHS to create a form for deferred action requests, and to require a user fee for processing the form. DHS should provide a written notification of receipt and the outcome to each applicant or his or her attorney. DHS should also make available to the public statistics about all deferred action cases. Outside of the DACA program, DHS continues to keep data about deferred action under wraps and only partially obtainable through FOIA.

As to the broader prosecutorial discretion policy, *Beyond Deportation* calls on DHS to look at the whole person when making prosecutorial discretion decisions. Since the unleashing of the now rescinded *Morton Memo on Prosecutorial Discretion* on June 17, 2011, immigration advocates and attorneys have pointed to instances where DHS failed to implement its own guidelines or, alternatively, failed to create a policy that makes it possible for a person with a specific indiscretion but strong humanitarian equities to be protected from removal through a favorable exercise of prosecutorial discretion.[101] As an illustration, DACA, established in 2012, disqualifies individuals who have been convicted of a felony,

[99] Wadhia, *supra* note 1, at 88-108.
[100] BARACK OBAMA, PRESIDENT OF THE U.S., REMARKS BY THE PRESIDENT IN ADDRESS TO THE NATION ON IMMIGRATION (Nov. 20, 2014), *available at* https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605164
[101] Wadhia, *supra* note 1, at 146-56.

"significant misdemeanor" or three "non-significant" misdemeanors.[102] Data obtained from ICE on individual deferred action cases outside of the DACA program reveals that a significant number of denials are driven by having a criminal history.[103] Likewise, immigration advocates and attorneys have featured the stories of deported individuals like Pastor Max Friesen, a husband and father to United States citizen children[104] and published related reports about those "denied" prosecutorial discretion because of a criminal history.[105] Together, these events have created a picture where only people with compelling equities and no criminal record will receive the temporary benefit of prosecutorial discretion. The application of the more recent priorities memo only affirms this sentiment.

Historically however, having a criminal record has not been fatal to a prosecutorial discretion grant. As detailed in *Beyond Deportation* and thanks to the groundbreaking research conducted by Leon Wildes (who also authored the foreword for the book), the Immigration and Naturalization Service (INS) routinely processed and granted deferred action cases for individuals with a wide range of criminal activities—turpitudinous, drug-related, and fraud-related. As described by Mr. Wildes: "In sum, [deferred action] has been granted to those who have violated almost any provision of the Act."[106] Indeed, the agency had a history of protecting imperfect people with strong humanitarian equities through prosecutorial

---

[102] *Consideration of Deferred Action for Childhood Arrivals (DACA), supra* note 8, at #guidelines.
[103] Wadhia, *supra* note 1, at 54-87.
[104] Elise Foley, *Iowa Pastor Max Villatoro Deported After Community Rallies To Keep Him In U.S.*, HUFFINGTON POST (Mar. 20, 2015), http://www.huffingtonpost.com/2015/03/20/max-villatoro-deported-_n_6911610.html.
[105] *See e.g.*, Carolina Canizales and Paromita Shah, Prosecutorial Discretion Denied, National Immigration Project (April 2015), , http://unitedwedream.org/wp-content/uploads/2015/04/PDDenied.compressed.pdf.
[106] Wadhia, *supra* note 1, at 54-87.

discretion and deferred action in particular. Many of the elements showcased by DHS in recent years as particularly positive qualities: presence of family in the United States, residence in the United States since childhood and role as a primary caregiver, among others, resemble the equities long used by INS and DHS in processing individual requests for prosecutorial discretion and deferred action in particular.[107]

Beyond Deportation also includes specific recommendations for when prosecutorial discretion should be exercised. Discretion should be exercised early in the process. As described earlier, discretionary decisions can be made at many stages that include prior to arrest, interrogation, detention, removal (deportation) proceedings and even after a removal order has been entered. While the various guidance documents suggest an early-stage enforcement, there is good reason to believe that many people are placed into the system or charged before prosecutorial discretion is considered.[108]

Beyond Deportation also calls on DHS to adopt a national policy that confirms through clear guidance how filing a Notice to Appear can serve as a favorable act of prosecutorial discretion. To summarize, the Notice to Appear or "NTA" is the charging document utilized by DHS to trigger removal proceedings against a noncitizen who is alleged to be in violation of the immigration law. The idea of treating the filing of such documents as a "positive" act of prosecutorial discretion may seem counterintuitive especially when compared against how this kind of discretion works in the criminal context but for some noncitizens this choice can be life changing. For the undocumented individual who is potentially eligible for relief like cancellation of removal, filing a Notice to

---

[107] Shoba Sivaprasad Wadhia, *Beyond Deportation: The Relationship Between Prosecutorial Discretion and Criminal Activity*, CRIMMIGRATION (Aug. 4, 2015), http://crimmigration.com/2015/08/04/beyond-deportation-the-relationship-between-prosecutorial-discretion-and-criminal-activity/; *see also* Wadhia, *supra* note 1, at 54-87.

[108] Wadhia, *supra* note 1, at 146-56; *see also* Meissner Memo, *supra* note 68.

Appear allows her to explain to an immigration judge how her longtime residence, good standing, and compelling hardship to a qualifying relative satisfy her burden for lasting relief.[109] For the Central American mom who might otherwise be deported rapidly through reinstatement,[110] a filed Notice to Appear enables her to see an immigration judge and be afforded a fair hearing and the right to apply for relief like adjustment of status (green card) or asylum.[111]

Beyond Deportation recommends that individuals who request prosecutorial discretion should be provided written notice and should have a mechanism for review, particularly when the denial is made without a rational explanation or departs from the Department's own policy.[112] Currently, there exists no formal mechanism through which an individual or applicant can appeal a prosecutorial discretion denial.[113]

Prosecutorial discretion is an important tool in immigration law that can preserve precious resources for the government while protecting those with strong roots and equities inside the United States. As *Beyond Deportation* shows, several changes to the government's current prosecutorial discretion policy can and should be examined after the politics pervading any meaningful debate subsides. Importantly however, prosecutorial discretion cannot serve as a substitute for broader legislative reforms. Only Congress can enact a comprehensive solution that enables millions of people

---

[109] Wadhia, *supra* note 1, at 146-56.
[110] Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5) (2012).
[111] Wadhia, *supra* note 1 at 146-56; *see also* Immigration and Nationality Act §§ 240A, 240(c)(4)(A) (2012). For a thorough analysis on the application of prosecutorial discretion to those individuals summary removal procedures like reinstatement, see Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2016).
[112] Wadhia, *supra* note 1, at 146-56; *see also* Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205 (1989); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000).
[113] Wadhia, *supra* note 1, *see generally* ch. 6.

without immigration status to come out of the shadows and be placed on a path to security and eventual citizenship.[114]

By the same token, prosecutorial discretion will continue to be a powerful sword even after immigration reform becomes a reality. Not every person with a compelling situation or deemed a "low priority" for enforcement will meet the affirmative requirements for a future legalization program. In this way, the humanitarian and political reasons behind prosecutorial discretion are in the same breath related and distinct. Each year Congress fails to enact a holistic immigration system that channels people arriving or residing in the United States from underground and into the rule of law, humanitarian cases swell, requiring DHS to use prosecutorial discretion as a temporary solution for those with compelling equities. However, individuals and families with equities like U.S. Citizen dependents, a medical condition or intellectual promise may be ineligible for a legislative solution perhaps because of an indiscretion that make him or her inadmissible or because the person lacks the requisite number of years of presence to apply for a legal status. Consequently, prosecutorial discretion and comprehensive immigration reform cannot be viewed as "either or" options.

As lawyers, scholars and lawmakers grapple with the wave of headlines or questions faced by the courts on the question of prosecutorial discretion, I hope this article and my book provides a deeper understanding for the historical role of ,and legal foundation for, prosecutorial discretion in immigration cases and the extent to which compassion has served as the foundation for how such decisions are made.

[114] *Id*. at 5-6.