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# Texas Law Review

## *See Also*

Volume 91

### Response

#### In Defense of DACA, Deferred Action, and the DREAM Act

Shoba Sivaprasad Wadhia\*

##### I. Introduction

This essay responds to *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause* by Robert J. Delahunty and John C. Yoo.<sup>1</sup> Delahunty and Yoo make four main arguments: 1) the President has a constitutional duty to execute the laws faithfully and has breached this duty by exercising deferred action for people who qualify under the Deferred Action for Childhood Arrivals (DACA) program;<sup>2</sup> 2) presidential “prerogative” is limited to actions that are related to national security in times of a war or related crisis and not to domestic immigration policy;<sup>3</sup> 3) the Administration’s implementation of DACA cannot be justified by any of the various “defenses” or exceptions that allow a President to “breach” his duty to execute the laws faithfully;<sup>4</sup> and 4) Congress, not the Administration, has the power to regulate domestic immigration law.<sup>5</sup>

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\* Clinical Professor of Law and Director, Center for Immigrants’ Rights, Pennsylvania State University, Dickinson School of Law. I send a big thank you to David A. Martin, Michael Olivas, and Margaret Stock for their comments. I also appreciate the research assistance from Stephen Coccocorese. I am grateful to Dean Phil McConaughay for his support of my scholarship and also to Hemal, Devyani, and Neelesh for their boundless love.

1. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781 (2013).

2. *Id.* at 784–785.

3. *Id.* at 812.

4. *Id.* at 835.

5. *Id.* at 837.

Though I credit Delahunty and Yoo for considering the relationship between the DACA program and the President's duties under the Take Care clause, they miss the mark in at least three ways: 1) contrary to ignoring immigration enforcement, the Obama Administration has executed the immigration laws faithfully and forcefully;<sup>6</sup> 2) far from being a new policy that undercuts statutory law, prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years;<sup>7</sup> and 3) despite the unsurprising fact that some people who could qualify for the congressionally created DREAM Act possess the kinds of equities that make them attractive for a prosecutorial discretion program like DACA, it is simply inaccurate to equate the limbo status offered with a grant under DACA to the secure status that attaches to those eligible under the congressional solution known as the DREAM Act. This essay examines these three points in greater detail below.<sup>8</sup>

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6. See *ICE Total Removals*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf>.

7. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246–52 (2010); see also Letter from a Group of Law Professors to President Obama (May 28, 2012), available at <http://lawprofessors.typepad.com/files/executive-authorityfordreamrelief28may2012withsignatures.pdf>.

8. Beyond the scope of this essay but of note is the striking position taken by Yoo during his tenure as the Deputy Assistant Attorney General during the George W. Bush Administration. Specifically, Yoo wrote a series of memoranda in support of the President's unfettered "Commander-in-Chief" authority during times of war. One of these policies, infamously known as the "torture memo," argued in eighty-one detailed pages the President's authority to seize, detain, and interrogate enemy combatants. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf>; Elise Foley, *John Yoo, 'Torture Memo' Author, Says Obama Violated Constitution With Deferred Action Policy*, THE HUFFINGTON POST (Oct. 15, 2012, 5:43 PM), [http://www.huffingtonpost.com/2012/10/15/john-yoo-obama-deferred-action\\_n\\_1966955.html](http://www.huffingtonpost.com/2012/10/15/john-yoo-obama-deferred-action_n_1966955.html). The torture memo was criticized by select members of Congress and by the Department of Justice's Office of Professional Responsibility. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (July 29, 2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>. In response to the gap between Yoo's position in favor of presidential powers in the context of "torture" with the President's authority to implement the DACA program, Yoo responded,

There is a world of difference between putting aside laws that interfere with an executive response to an attack on the country, as in Sept. 11, 2001, and ignoring laws to appeal to a constituency vital to re-election . . . . The former recognizes the president's primary duty to protect the national security. The latter, unfortunately, represents a twisting of the Constitution's fabric for partisan ends.

Foley, *supra*. I do not agree with Yoo's rationale. First, national security is itself a basis for prosecutorial discretion programs like DACA (e.g., a person who poses a national security risk is ineligible for DACA). Second, far from serving as a partisan tool for reelection, prosecutorial discretion programs like DACA reflect a reasonable administrative tool aimed at managing priorities and protecting those with compelling equities.

Before addressing Delahunty and Yoo's article, a brief description of the immigration structure and powers is necessary. The primary statute for immigration is called the Immigration and Nationality Act (INA). The INA was passed by the U.S. Congress in 1952 and has been amended many times since.<sup>9</sup> The cabinet level Department of Homeland Security (DHS) was created in the aftermath of September 11, 2001, and, as a practical matter, absorbed many of the immigration functions once handled by the Immigration and Naturalization Service (INS).<sup>10</sup> The main operating units for immigration within DHS are Customs and Border Protection (CBP),<sup>11</sup> Immigration and Customs Enforcement (ICE),<sup>12</sup> and United States Citizenship and Immigration Services (USCIS).<sup>13</sup> Another notable federal agency is the Department of Justice (DOJ), which houses both the immigration court structure known as the Executive Office for Immigration Review (EOIR)<sup>14</sup> and the Office for Immigration Litigation (OIL).<sup>15</sup>

DHS and DOJ are but two of the plethora of agencies within the Executive Branch responsible for administering and enforcing the immigration laws. The Executive Branch's role in enforcing immigration laws is breathtaking and has affected both domestic populations and countries of the world.<sup>16</sup> Moreover, the Supreme Court has interpreted the various portions of the United States Constitution to give the "political branches" the plenary power to regulate immigration.<sup>17</sup> The plenary power

9. See *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD>.

10. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in 6 U.S.C.).

11. *About CBP*, U.S. CUSTOMS AND BORDER PROTECTION, <http://cbp.gov/xp/cgov/about/>.

12. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov>.

13. U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis>.

14. *Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/>.

15. *Office of Immigration Litigation*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/civil/oil/oil\\_home.html](http://www.justice.gov/civil/oil/oil_home.html). For a more detailed discussion of the different immigration units within DHS and DOJ, see Wadhia, *supra* note 7, at 257–58.

16. Though Delahunty and Yoo create a distinction between Executive Branch decisions during times of "national security" and domestic policy, immigration law is replete with situations where the line is blurred or where national security is used by the immigration agency to interrogate, detain, and deport noncitizens living in the United States. See, e.g., Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Jennifer M. Chacón, *Commentary, Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007).

17. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

doctrine has been applied to exclude and deport noncitizens without a check from the judiciary.<sup>18</sup>

## II. The Obama Administration Has Executed the Immigration Laws Faithfully and Forcefully

Delahunty and Yoo center their argument on Article II, Section Three, of the United States Constitution (the Take Care Clause), which states in part that the President “shall take Care that the Laws be faithfully executed.”<sup>19</sup> Specifically, they argue that the Obama Administration’s DACA program is a violation of the President’s duties under the Take Care Clause because under DACA the President is failing to enforce the immigration statute.<sup>20</sup> I cannot agree. First, the DACA program does not violate or undermine the immigration statute. There is no provision in the INA that prohibits the Administration from implementing programs like DACA.<sup>21</sup> Moreover, the immigration agency is charged with utilizing the funds appropriated by Congress to enforce the immigration laws against individuals who represent a “high priority” for removal, and DACA can be justified as an effort to enforce congressionally mandated priorities.<sup>22</sup> Moreover, the Obama Administration has detained and deported noncitizens at record levels during President Obama’s tenure. To illustrate, ICE removed 392,862 noncitizens during fiscal year (FY) 2010, and a record 396,906 noncitizens during FY 2011.<sup>23</sup> Likewise, ICE detained 429,000 individuals in facilities in FY 2011, an increase of 18% from the previous fiscal year.<sup>24</sup>

Importantly, the President’s faithful execution of the immigration laws is not just limited to bringing enforcement actions against individuals and ultimately deporting them, but also to prioritizing the deportable population in a cost-effective and conscientious manner, and providing benefits to

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18. *See, e.g.*, Wadhia, *supra* note 16, at 1524.

19. U.S. CONST. art. II, § 3.

20. Delahunty & Yoo, *supra* note 1, at 785.

21. On the other hand, the discretionary component that attaches to many forms of removal relief in the INA is consistent with the discretionary nature of the Obama Administration’s DACA program, suggesting at the very least a consistency (not a contradiction) about the factors that should be considered in deciding whether individuals should be protected from removal. *See, e.g.*, INA § 240A, 8 U.S.C. § 1229b (2006).

22. *See Removal Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics/>.

23. *ICE Total Removals*, *supra* note 6. By contrast, there were 202,842 removals in 2004; 189,368 removals in 2003; and 150,542 removals in 2002. *See* MARY DOUGHERTY ET AL., U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004 6 (2005), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>.

24. JOHN SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 4 (2012), *available at* [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf). By contrast, the George W. Bush Administration detained about 235,247 noncitizens in 2004. *See* DOUGHERTY ET AL., *supra* note 23, at 1.

deportable noncitizens when they qualify for them. The President must “walk and chew gum” at the same time to carry out an effective immigration policy. Significantly, Delahunty and Yoo gloss over the significant relationship between the Take Care Clause and the exercise of prosecutorial discretion. The United States has an estimated unauthorized population of 11.5 million.<sup>25</sup> In contrast, Congress has appropriated funds to remove about 400,000 (less than 4%) of this population.<sup>26</sup>

Like with criminal law, there are far many more immigration laws and individuals who can be charged and potentially deported for having broken such laws than there are resources to prosecute them. In the criminal law field, prosecutorial discretion is frequently exercised, and prosecutors often refrain from bringing charges against people who have clearly broken the law. In the criminal context, the Supreme Court has confirmed the relationship between the exercise of prosecutorial discretion and the Take Care Clause:

A selective-prosecution claim asks a court to exercise judicial power over a “special province” of the Executive. The Attorney General and United States Attorneys retain “broad discretion” to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.” As a result, “[t]he presumption of regularity supports” their prosecutorial decisions . . . .<sup>27</sup>

Similarly, in the administrative law context, the Court elucidated the relationship between the Take Care Clause and the exercise of prosecutorial discretion:

[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>28</sup>

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25. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 2011 1, (2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

26. See Memorandum from John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement to All ICE Emps. 1 (Jun. 30, 2010), available at <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>; see also SHOBA SIVAPRASAD WADHIA, IMMIGRATION POLICY CTR., THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW 4 (2011), [http://www.immigrationpolicy.org/sites/default/files/docs/Shoba\\_-\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf).

27. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citations omitted) (internal quotation marks omitted).

28. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

The ultimate source for the exercise of prosecutorial discretion in the Federal Government is the power of the President.<sup>29</sup> Under Article II, Section 1 of the Constitution, the executive power is vested in the President. Article II, Section 3, states that the President “shall take care that the laws be faithfully executed.”

Delahunty and Yoo also question the Obama Administration’s motivations in creating the DACA program and related costs.<sup>30</sup> The analysis falls short because the authors misidentify ICE (instead of USCIS) as the agency absorbing the costs of DACA,<sup>31</sup> fail to explain how the fees generated by the DACA program (DACA applicants must pay \$465 with their application) interact with the USCIS’s funding of the program; and, perhaps most importantly, misunderstand that alongside the economic considerations are the humanitarian factors that have driven prosecutorial discretion decisions for years. I agree with Delahunty and Yoo that cost savings alone cannot explain the DACA program, but I also believe that creating non-enforcement alternatives for people who have resided in the United States from their childhood and exhibit intellectual promise is an acceptable motivation for enacting the program.

### III. Prosecutorial Discretion Actions Like DACA Have Been Part of the Immigration System for at Least Thirty-Five Years

Delahunty and Yoo fail to identify the numerous sources of authority for prosecutorial discretion in immigration law. The Supreme Court has reviewed the role of prosecutorial discretion in administrative, immigration, and criminal law contexts.<sup>32</sup> In *Arizona v. United States*, the Court highlighted the important role discretion plays in the immigration framework:

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. . . .

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien

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

30. Delahunty & Yoo, *supra* note 1, at 847.

31. *Id.* at 788.

32. See *Arizona v. United States*, 132 S. Ct. 2492, 2506–07 (2012); *Reno v. ADC*, 525 U.S. 471, 473 (1999); *Heckler*, 470 U.S. at 846.

has children born in the United States, long ties to the community, or a record of distinguished military service.<sup>33</sup>

Likewise, the U.S. Congress has affirmed the role of prosecutorial discretion in immigration law. In language identifying the evidence that would be required for proving lawful status for purposes of a federally recognized state driver's license or identification card, Congress explicitly included "deferred action" as a valid lawful status in the REAL ID Act of 2005.<sup>34</sup>

Moreover, several members of Congress encouraged the Obama Administration to exercise prosecutorial discretion pursuant to its legal authority to provide a safety valve for special populations or individuals.<sup>35</sup> The use of prosecutorial discretion has also been recognized in the immigration statute—the Immigration Nationality Act (INA) and its

33. *Arizona*, 132 S. Ct. at 2499.

34. See REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313 (codified at 49 U.S.C. § 30301), available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ13/pdf/PLAW-109publ13.pdf>. Similarly, the phrase "deferred action" appears in two other sections of the United States Code, 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (2006) ("(II) Any individual described in subclause (I) is eligible for deferred action and work authorization."; "(IV) Any individual described in subclause (III) and any derivative child of a petition described in clause (ii) is eligible for deferred action and work authorization."), and 8 U.S.C. § 1227(d)(2) (Supp. V 2011) ("(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States."). Delahunty and Yoo examine *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579 (1952), to analyze whether the Obama Administration has the prerogative power to violate the law. *Youngstown* dealt with President Truman's power to seize and operate most of the steel mills during a labor strike even though such seizure was not authorized by the Constitution or a statute. *Id.* at 582. Writing for the majority, Justice Hugo Black held that President Truman had no prerogative power because among other things, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here." *Id.* at 585. At least under this point and without conceding that the Obama Administration has violated any law, the DACA program appears to satisfy the threshold requirement under *Youngstown*, namely that deferred action stem from a Congressional act or the Constitution.

35. See, e.g., *Hinder the Administration's Legalization Temptation (HALT) Act: Hearing on H.R. 2497 Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 57–59 (2011) [hereinafter *Hearing*] (statement of Margaret D. Stock), available at <http://judiciary.house.gov/hearings/pdf/Stock07262011.pdf>; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 25–27 (2012); Letter from Members of Cong. to Att'y Gen. Janet Reno & Doris M. Meissner, Comm'r, Immigration & Naturalization Serv. (Nov. 4, 1999), available at [http://big.assets.huffingtonpost.com/Smith\\_to\\_Reno\\_1999.pdf](http://big.assets.huffingtonpost.com/Smith_to_Reno_1999.pdf); *Durbin, Reid, 20 Senate Democrats Write Obama on Current Situation of DREAM Act Students*, U.S. SENATE (April 13, 2011), <http://durbin.senate.gov/public/index.cfm/pressreleases?ID=cc76d912-77db-45ca-99a9-624716d9299c>; Rep. Luis Gutierrez, *Ten Reasons Young People Should Come Forward For Deferred Action*, THE HILL (Aug. 14, 2012, 10:27 AM), <http://thehill.com/blogs/congress-blog/homeland-security/243567-ten-reasons-young-people-should-come-forward-for-deferred-action>.



governing regulations. The general authority for prosecutorial discretion can be found in § 103(a), which reads:

The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.<sup>36</sup>

Moreover, § 242(g) of the INA cabins three particular acts of prosecutorial discretion that are shielded from judicial review, namely the commencement of proceedings, adjudication of cases, and the execution of removal orders.<sup>37</sup> Finally, the governing regulations explicitly name “deferred action” as a basis for eligibility for work authorization.<sup>38</sup>

The legal authority to exercise prosecutorial discretion is not merely theoretical. The agency’s use of deferred action was first revealed in 1975 in connection with the immigration case of music icon John Lennon.<sup>39</sup> The immigration agency (then INS) relied upon a guidance called the “Operations Instruction,” which stated, “(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.”<sup>40</sup>

While the Operations Instruction was rescinded in 1997, the agency continued to exercise prosecutorial discretion in compelling immigration cases, relying largely on a memorandum from the former INS Commissioner Doris Meissner issued in 2000 and titled *Exercising Prosecutorial Discretion*.<sup>41</sup> Following the demise of INS and creation of the DHS, and throughout the George W. Bush Administration, the Meissner Memorandum operated as good policy. During the George W. Bush Administration, DHS issued at least two documents reaffirming the principles of the Meissner Memorandum and elucidating special cases worthy of prosecutorial discretion.<sup>42</sup>

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36. INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2006).

37. *See* INA § 242(g), 8 U.S.C. § 1252(g) (2006); *see also Reno*, 525 U.S. at 482.

38. *See* 8 C.F.R. § 274a.12(c)(14) (2012).

39. *See, e.g.,* Wadhia, *supra* note 7, at 246–47; Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979).

40. *See* David v. Immigration & Naturalization Serv., 548 F.2d 219, 223 n.1 (8th Cir. 1977).

41. Memorandum from Doris Meissner, Comm’r, Immigration and Naturalization Serv., to Reg’l Dirs. et al. (Nov. 17, 2000), *available at* <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf>.

42. *See, e.g.,* Memorandum from William J. Howard, Principal Legal Advisor, on Prosecutorial Discretion (Oct. 24, 2005) (on file with author); Memorandum from Julie L. Myers, Assistant Sec’y

The exercise of prosecutorial discretion has not been limited to individual cases, but has also been applied to special categories of noncitizens.<sup>43</sup> To illustrate, from 1960 through 1990, the Attorney General used a form of prosecutorial discretion known as “Extended Voluntary Departure” (EVD) to protect classes of noncitizens for humanitarian reasons.<sup>44</sup> Today, the program is called “Deferred Enforcement Departure” (DED) and is exercised by the Secretary of Homeland Security. According to the Congressional Research Service:

The discretionary procedures of DED and EVD continue to be used to provide relief the Administration feels is appropriate, and the executive branch’s position is that all blanket relief decisions require a balance of judgment regarding foreign policy, humanitarian, and immigration concerns. Unlike [Temporary Protected Status], aliens who benefit from EVD or DED do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. If, however, they wish to be employed in the United States, they must apply for a work authorization from USCIS.<sup>45</sup>

Deferred action is another form of prosecutorial discretion the immigration agency has used to protect certain individuals from deportation. In 2005, the USCIS announced deferred action for the approximately 5,500 foreign academic students affected by Hurricane Katrina.<sup>46</sup> In 2009, USCIS announced deferred action for the widows of U.S. citizens for two years.<sup>47</sup> In the official press release, DHS Secretary Napolitano is quoted as saying,

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of Homeland Sec., Immigration & Customs Enforcement, to Field Office Dirs. & Special Agents in Charge (Nov. 7, 2007), available at <http://www.scribd.com/doc/22092973/ICE-Guidance-Memo-Prosecutorial-Discretion-Julie-Myers-11-7-07>.

43. See Wadhia, *supra* note 7, at 246–47; Letter from a Group of Law Professors to President Obama, *supra* note 7; JANUARY CONTRERAS, U.S. DEP’T OF HOMELAND SEC., DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (2011).

44. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL—REDACTED PUBLIC VERSION § 38.2, available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html>; see also *Hotel & Rest. Emps. Union, Local 25 v. Att’y Gen.*, 804 F.2d 1256, 1261 (D.C. Cir. 1986).

45. RUTH ELLEN WASEM & KARMA ESTER, CONG. RESEARCH SERV., RS20844, TEMPORARY PROTECTED STATUS: CURRENT IMMIGRATION POLICY AND ISSUES 4 (2006), available at <http://pards.org/tps/tps2006,0207-CRS.pdf>.

46. See Press Release, U.S. Citizenship and Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), available at [http://www.uscis.gov/files/pressrelease/F1Student\\_11\\_25\\_05\\_PR.pdf](http://www.uscis.gov/files/pressrelease/F1Student_11_25_05_PR.pdf); see also Short-Term Employment Authorization and Reduced Course Load for Certain F-1 Nonimmigrant Students Adversely Affected by Hurricane Katrina, 70 Fed. Reg. 70,992, 70,992–70,996 (Nov. 25, 2005) (to be codified at 8 C.F.R. pt. 214).

47. See *DHS Establishes Interim Relief for Widows of U.S. Citizens*, U.S. DEPARTMENT HOMELAND SECURITY (June 9, 2009), <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

“Granting deferred action to the widows and widowers of U.S. citizens who otherwise would have been denied the right to remain in the United States allows these individuals and their children an opportunity to stay in the country that has become their home while their legal status is resolved.”<sup>48</sup>

Deferred action has also been used to protect individuals applying for relief under the Violence Against Women Act (VAWA).<sup>49</sup> VAWA was enacted by Congress in 1994 and twice amended to include statutory remedies for abused spouses, parents, and children; victims of crimes and domestic abuse; and victims of human trafficking.<sup>50</sup> One protection under VAWA allows abused spouses and children of U.S. citizens and green card holders (lawful permanent residents) or the abused parents of U.S. citizens to file petitions for themselves with USCIS.<sup>51</sup> The self-petition process is critical to victims of domestic violence and abuse because it allows them to achieve a positive immigration status without having to rely on their abuser. If the self petition is ultimately approved, and the noncitizen is not in a legal immigration status, she is granted deferred action status, the opportunity to apply for work authorization, and eventually lawful permanent residence.<sup>52</sup> Between 1997 and 2011, 98,192 VAWA petitions were filed with the USCIS, of which 75% were approved.<sup>53</sup> Deferred action has also been used as a mechanism to keep immigrants who are the spouses, parents, and children of military members together.<sup>54</sup>

The examples identified above are not exhaustive but demonstrate how the immigration agency has long used the instrument of prosecutorial discretion and the authority under the INA to protect classes of people temporarily.

48. *Id.*

49. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. 13701).

50. See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (VAWA) 26–27 & n.143, 30 (2012), available at <http://www.fas.org/sgp/crs/misc/R42477.pdf>.

51. See INA §§ 204(a)(1)(D)(i)(II), (IV), 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV) (2009); KANDEL, *supra* note 43, at 3 (listing “abused noncitizen spouses married to U.S. citizens or LPRs; noncitizen parents in such a marriage whose children were abused by U.S. citizens or LPRs; unmarried noncitizen children under age 21 abused by a U.S. citizen or LPR parent; and noncitizen parents abused by U.S. citizen adult children” as those who may self-petition through VAWA in general); *Battered Spouse, Children & Parents*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD> (last updated Jan. 16, 2013).

52. See KANDEL, *supra* note 43, at 4; see also Mayte Santacruz Benavidez, *Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider When Interpreting Immigration Law*, 96 CALIF. L. REV. 1603, 1607, 1624–27 (2008).

53. KANDEL, *supra* note 43, at 4–5.

54. See, e.g., Letter from Janet Napolitano, Sec’y, Dep’t of Homeland Sec., to Zoe Lofgren, Representative, U.S. House of Representatives (Aug. 30, 2010), in *Hearing*, *supra* note 35, at 60 (statement of Margaret D. Stock).

#### IV. DACA Is Not the DREAM Act.

Delahunty and Yoo charge that by creating the DACA program, the Obama Administration “effectively wrote into law ‘the DREAM Act.’”<sup>55</sup> While it is true that would-be DREAMers bear the equities and qualities that would be traditionally considered under a prosecutorial discretion policy, it is inaccurate to conclude that the DACA program is identical to the DREAM Act. The Development, Relief, and Education for Alien Minors Act (DREAM Act)<sup>56</sup> is a piece of legislation that has been introduced in several Congresses, most recently in 2011.<sup>57</sup> The DREAM Act would allow for the “cancellation of removal and adjustment of status of certain alien students who . . . entered the United States as children.”<sup>58</sup> Put another way, beneficiaries of the DREAM Act are provided with a secure lawful status and benefit under the laws and the opportunity to apply for permanent status. The DREAM Act contains a series of requirements relating to continuous physical presence, good moral character, and age at the time of entry into the United States.<sup>59</sup> Significantly, the DREAM Act requires the noncitizen to show that she bears no significant criminal history and is “not inadmissible” under the INA. By contrast, DACA results in no lawful status, no path to permanent residency, and no means for qualifying for U.S. citizenship. Notably, following its announcement of DACA, the DHS published the following question and answer regarding the importance of passing the DREAM Act:

Q14: Is passage of the DREAM Act still necessary in light of the new process?

A14: Yes. The Secretary of Homeland Security’s June 15th memorandum allowing certain people to request consideration for deferred action is the most recent in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred action does not provide lawful status or a pathway to citizenship. As the President has stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only

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55. Delahunty & Yoo, *supra* note 1, at 784.

56. Development, Relief, and Education for Alien Minors Act of 2011, H.R. 1842, 112th Cong. (2011).

57. *See, e.g.*, H.R. 1842; S. 952; *see also* Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1785–86 (2009); AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., THE DREAM ACT: CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY 1, 5 (2011), [http://www.immigrationpolicy.org/sites/default/files/docs/Dream\\_Act\\_updated\\_051811.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Dream_Act_updated_051811.pdf).

58. H.R. 1842; S. 952; *see also* Olivas, *supra* note 56, at 1785 n.121.

59. *See, e.g.*, H.R. 1842 § 3(a)(1); S. 952 § (3)(b)(1).

the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.<sup>60</sup>

## V. Conclusion

While the DACA program “feels” like something more or greater in scope than previous acts of prosecutorial discretion, the authority being exercised by the agency is no greater or different. I believe the discomfort held by opponents of DACA is linked less to the legality of the program and tied more to a fear about increased immigration generally, the size of the population who appear to be eligible for DACA, the public fanfare the program has received, or a combination of the three. Contrary to the outcome drawn by Delahunty and Yoo, the Obama Administration has *not decided* “not to enforce the removal provisions of the [INA] against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States,” but has created a program that enables qualifying applicants to be considered for deferred action on an individualized basis if they meet specific criteria and in the exercise of the USCIS’s prosecutorial discretion.<sup>61</sup>

As of November 15, 2012, less than 55,000 have been granted deferred action under the DACA program.<sup>62</sup> In fact, many eligible individuals are choosing not to apply for DACA because of the costs of applying, the tenuous posture of deferred action, and related concerns about turning over information about themselves and their family members.<sup>63</sup> More importantly, it is dangerous to argue that the potential size of the class that stands to benefit from DACA or the greater transparency somehow makes the DACA program legally unsound or different. Conceivably, a future Administration could place a cap on the number of applications that can be approved under DACA, but this is a policy question, not a constitutional one.

Lastly, and fundamental to the understanding of the theory of prosecutorial discretion in immigration law, are the economic and humanitarian motivations that have driven such discretion for more than thirty-five years. Prosecutorial discretion is not just a wise enforcement policy because it enables the agency to manage resources in a paradigm

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60. *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Jan. 18, 2003), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD>.

61. Delahunty & Yoo, *supra* note 1 at 783.

62. Office Of Performance And Quality, *Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Nov. 16, 2012), available at [http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static\\_files/2012-1116%20DACA%20Monthly%20Report.pdf](http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/2012-1116%20DACA%20Monthly%20Report.pdf).

63. See, e.g., Sandra Amrhein, *Immigrants Come Out of the Shadows to Fulfill a Dream*, REUTERS (Oct. 24, 2012, 3:25 AM), <http://www.reuters.com/article/2012/10/24/us-usa-immigration-deferment-idUSBRE89N07K20121024>.

where it has the capacity to remove just a slice of the population that is technically deportable from the United States, but also because there are significant humanitarian considerations that have historically been and continue to be acknowledged in determining whether discretion should be exercised. Would-be DREAMers who are living in the shadows with a string of compelling attributes and equities in the United States present a humanitarian situation that is perfectly suited for deferred action.