

September 3, 2014

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Executive authority to protect individuals or groups from deportation

Dear Mr. President,

As immigration law teachers and scholars, we write to express our position on the scope of executive branch legal authority to issue an immigration directive to protect individuals or groups from deportation. We do not take a formal position on what steps the administration should take. Rather, we offer legal foundations and history that we believe are critical to understanding how prosecutorial discretion fits into the immigration system.

“Prosecutorial discretion” refers to the Department of Homeland Security's authority to decide how the immigration laws should be applied.¹ It is a common, long-accepted legal practice in practically every law enforcement context.² There are multiple forms of immigration prosecutorial discretion. Discretion covers both agency decisions to *refrain* from acting on enforcement, like cancelling, serving or filing a charging document or Notice to Appear with the immigration court, as well as decisions to *provide* a discretionary remedy like granting a stay of removal,³ parole,⁴ or deferred action.⁵ A favorable grant of prosecutorial discretion does not provide formal legal status or independent means to obtain permanent residency. It does, however, provide a temporary reprieve from deportation. Some forms of prosecutorial discretion, like deferred action, confer “lawful presence”⁶ and the ability to apply for work authorization.

¹ See Thomas Aleinikoff, David Martin, Hiroshi Motomura & Maryellen Fullerton, *Immigration and Citizenship: Process and Policy* 778-88 (7th ed. 2012); Stephen H. Legomsky & Cristina Rodriguez, *Immigration and Refugee Law and Policy* 629-32 (5th ed. 2009); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L. J. 243 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476341.

² Notably, in criminal law, prosecutorial discretion has existed for hundreds of years. It was a common reference point for the immigration agency in early policy documents describing prosecutorial discretion. See Memorandum from Doris Meissner, Immigration and Naturalization Service (INS) Commissioner, *Exercising Prosecutorial Discretion* 1 (Nov. 17, 2000) [hereinafter Meissner Memo], <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>; Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>. See also, e.g., Angela J. Davis, *Arbitrary Justice* (2007); Hiroshi Motomura, *Prosecutorial Discretion in Context: How Discretion is Exercised Throughout our Immigration System*, American Immigration Council 2-3 (April 2012), http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf.

³ See, e.g., INA § 237(d)(4), <http://www.law.cornell.edu/uscode/text/8/1227>; 8 C.F.R. § 241.6, <http://www.law.cornell.edu/cfr/text/8/241.6>.

⁴ INA § 212(d)(5), <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006.html>.

⁵ See, e.g., INA § 237(d)(2); 8 C.F.R. § 274a.12(c)(14), <http://www.law.cornell.edu/cfr/text/8/274a.12>.

⁶ Memorandum from Donald Neufeld, Lori Scialabba, & Pearl Chang, U.S. Citizenship and Immigration Services (USCIS), *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009),

The application of prosecutorial discretion to individuals or groups is grounded in the Constitution, and has been part of the immigration system for many years. Furthermore, court decisions, the immigration statute, regulations and policy guidance have recognized prosecutorial discretion dating back to at least the 1970s. Notably, in 2012, the U.S. Supreme Court reiterated: “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...”⁷ Federal courts have also recognized prosecutorial discretion and with respect to deferred action in particular, discussed its reviewability.⁸

In addition to the courts, Congress, through the Immigration and Nationality Act (“INA” or the “Act”), clearly empowered the Department of Homeland Security (DHS) to make choices about immigration enforcement: “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...”⁹ Congress has also implicitly acknowledged immigration prosecutorial discretion insofar as its appropriations for immigration enforcement have fallen far below the actual number of removable people in the United States.¹⁰ Moreover, Congress also recognized legal authority for immigration prosecutorial discretion in INA § 242(g), which bars judicial review of three specific prosecutorial discretion decisions by the agency: decisions to commence removal proceedings, to adjudicate cases, and to execute removal orders.¹¹ Other sections of the Act explicitly name deferred action as a tool for protecting certain victims of abuse, crime or trafficking.¹²

The Act is guided by binding regulations which themselves indicate the prominence of prosecutorial discretion in immigration law. One regulation expressly defines deferred action as “an act of administrative convenience to the government which gives some cases lower priority” and goes on to authorize work permits for those who receive deferred action.¹³ The regulations

http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF; U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (updated June 5, 2014), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions>.

⁷ See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); see also *Reno v. ADC*, 525 U.S. 471 (1999).

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

⁹ INA § 103(a), <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-769.html>.

¹⁰ One source suggests that DHS has resources to remove about 400,000 or less than 4% of the total removable population. See John Morton, Director, U.S. Immigration & Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹¹ INA § 242(g), <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-6965.html>; see also *Reno v. ADC*, *supra* note 7.

¹² INA § § 237(d)(2), <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-5684.html>; 204(a)(1)(D)(i)(II,IV), <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1272.html>.

¹³ 8 C.F.R. § 274a.12(c)(14), <http://www.law.cornell.edu/cfr/text/8/274a.12>.

also provide work authorization for those who have been released on an “order of supervision,” another form of prosecutorial discretion for individuals who present compelling equities following a removal order.¹⁴

U.S. immigration agencies have a long history of exercising prosecutorial discretion, on both a case-by-case and group basis. For example, deferred action can be requested by any person in the United States and historically has required the individual or her attorney to document compelling humanitarian reasons.¹⁵ Even when a program like deferred action has been aimed at a particular group of people, the individual is still required to apply and be screened by the agency on a case-by-case basis; all the facts of the individual case are considered.

Numerous administrations have issued directives using prosecutorial discretion as a tool to protect specifically defined—and often large—classes. In 2005, the George W. Bush administration announced a “deferred action” program for foreign academic students affected by Hurricane Katrina.¹⁶ In 2007, the George W. Bush administration exercised prosecutorial discretion in the form of “Deferred Enforcement Departure” for certain Liberians.¹⁷ In 1990, the George Bush Sr. administration announced a “Family Fairness” policy to defer deportations and provide work authorization of up to 1.5 million unauthorized spouses and children of immigrants who qualified for legalization under legislation passed by Congress in 1986.¹⁸ In 1981, the Ronald Reagan administration issued a form of prosecutorial discretion called “Extended Voluntary Departure” to thousands of Polish nationals.¹⁹ The legal sources and history for immigration prosecutorial discretion described above are by no means exhaustive, but

¹⁴ 8 C.F.R. § 274a.12(c)(18), <http://www.law.cornell.edu/cfr/text/8/274a.12>.

¹⁵ For example, of the 698 deferred action cases processed by Immigration and Customs Enforcement between October 1, 2011, and June 30, 2012, the most common humanitarian reasons for a grant were: Presence of a USC dependent; Presence in the United States since childhood; Primary caregiver of an individual who suffers from a serious mental or physical illness; Length of presence in the United States; and Suffering from a serious mental or medical care condition. See Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 Geo. Immigr. L.J. 345, 356-69 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758.

¹⁶ See Shoba Sivaprasad Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, 91 Tex. L. Rev. 59, n. 46 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195735, citing Press Release, U.S. Citizenship and Immigration Services, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* (Nov. 25, 2005), http://www.uscis.gov/sites/default/files/files/pressrelease/FIStudent_11_25_05_PR.pdf.

¹⁷ DED Granted Country- Liberia, U.S. Citizenship and Immigration, <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/ded-granted-country-liberia/ded-granted-country-liberia> (last visited Aug. 20, 2014).

¹⁸ See Marvine Howe, *New Policy Aids Families of Aliens*, N.Y. Times (March 5, 1990), <http://www.nytimes.com/1990/03/05/nyregion/new-policy-aids-families-of-aliens.html>; 67 Interpreter Releases 204 (Feb. 26, 1990); 67 Interpreter Releases 153 (Feb. 5, 1990). Bush’s policy followed a narrower 1987 executive order by President Reagan’s immigration commissioner that applied only to children. 64 Interpreter Releases 1191 (Oct. 26, 1987). Congress later in 1990 legislatively provided some of them a path to legalization. Immigration and Nationality Act of 1990, Pub. L. 101-649, Sec. 301, 104 Stat. 4978, <http://www.justice.gov/eoir/IMMACT1990.pdf>.

¹⁹ Legomsky & Rodriguez, *Immigration and Refugee Law and Policy* 1115-17 (5th ed. 2009); See also David Reimers, *Still the Golden Door: The Third World Comes to America* 202 (1986).

underscore the legal authority for an administration to apply prosecutorial discretion to both individuals and groups.

Based on this authority, prosecutorial discretion is often carried out for economic or humanitarian reasons. When economic and human resources are limited, and people with desirable qualities like intellectual or economic promise, strong family ties, long-term residence in the United States, or other humanitarian needs are vulnerable to enforcement, prosecutorial discretion has frequently been exercised. Administrations have recognized this by issuing agency memoranda reaffirming the role of prosecutorial discretion in immigration law. In 1976, President Ford's Immigration and Naturalization Service (INS) General Counsel Sam Bernsen stated in a legal opinion, "The reasons for the exercise of prosecutorial discretion are both practical and humanitarian. There simply are not enough resources to enforce all of the rules and regulations presently on the books."²⁰ In 2000, INS Commissioner Doris Meissner issued a memorandum on prosecutorial discretion in immigration matters and asserted that "[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process," and spelled out the factors that should guide those decisions.²¹ In 2011, Immigration and Customs Enforcement (now a component of DHS) published guidance known as the "Morton Memo," outlining more than one dozen factors, including humanitarian factors, for employees to consider in deciding whether discretion should be exercised. These included tender or elderly age, long-time lawful permanent residence, and serious health conditions.²²

Some have suggested that the size of the group who may "benefit" from an act of prosecutorial discretion is relevant to its legality. We are unaware of any legal authority for such an assumption. The administration could conceivably decide to cap the number of people who can receive prosecutorial discretion or make the conditions restrictive enough to keep the numbers small, but this would be a policy choice, not a legal question.²³ A serious legal question would arise if the administration were to halt all immigration enforcement, because in such a case the justification of resource limitations would not apply. But the Obama administration to date appears to have enforced the immigration law significantly through apprehensions, investigations, detentions and over two million removals.²⁴

In conclusion, we believe the administration has the legal authority to use prosecutorial discretion as a tool for managing resources and protecting individuals residing in and contributing to the United States in meaningful ways. Likewise, when prosecutorial discretion is

²⁰ Bernsen, *supra* note 2.

²¹ Meissner Memo, *supra* note 2. Notably, the Meissner memo was a key reference point for related memoranda issued during the George W. Bush administration, among them a 2005 memorandum from Immigration and Customs Enforcement legal head William Howard and a 2007 memo from ICE head Julie Myers on the use of prosecutorial discretion when making decisions about undocumented immigrants who are nursing mothers.

²² Morton, *supra* note 10.

²³ For a broader discussion about the relationship, class size, and constitutionality, see Wadhia, *supra* note 16.

²⁴ U.S. ICE, FY 2013 ICE Immigration Removals, <http://www.ice.gov/removal-statistics/> (last visited Aug. 20, 2014); Marc R. Rosenblum & Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*, Migration Policy Institute (April 2014), <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

exercised, there is no legal barrier to formalizing that policy decision through sound procedures that include a form application and dissemination of the relevant criteria to the officers charged with implementing the program and to the public. As the Deferred Action for Childhood Arrivals (DACA) program has shown, those kinds of procedures help officers to implement policy decisions fairly and consistently, and they offer the public the transparency that government priority decisions require in a democracy.²⁵

Respectfully yours,



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²⁵ For a broader discussion of the administrative law values associated with prosecutorial discretion, *see* Hiroshi Motomura, *Immigration Outside the Law* 19-55, 185-92 (2014); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N. H. L. Rev. 1 (2012) (also providing a proposal for designing deferred action procedures), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879443.

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