

As prepared for delivery

**President Janet Napolitano
“Anatomy of a Legal Decision”
John A. Sibley Lecture
The University of Georgia School of Law
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Thank you, Dean Brown, and thank you for such a warm and welcoming introduction.

I am truly honored to be here today. As has been noted, it was 50 years ago, in the fall of 1964, that Professor Myers McDougal of Yale delivered the inaugural lecture of this series, addressing the somewhat expansive theme of “jurisprudence for a free society.” To be able to participate in this milestone moment makes the honor even greater.

I should add that, when I consider the quality of the speakers who have delivered this lecture in previous years, I’m more than a little bit humbled. Many of the greatest legal minds in the land, true giants, have made the pilgrimage to this podium to participate in the John A. Sibley Lectureships in Law.

Richard Posner on the right of privacy... Arthur Miller on the emerging law of the internet... Ruth Bader Ginsburg (before she was elevated to the Supreme Court) on judicial activism... Anthony Lewis on the sins of the press – did he manage to keep it to the allotted 45 minutes? ... Justice Scalia on the Constitution... Judith Resnik, Cass Sunstein, Ed Muskie, H.L.A Hart, and the list goes on and on.

More often than not, these lectures addressed, through the lens of law, critical issues of the day. Some four decades ago, for example, former Chief Justice Earl Warren came here to discuss the crisis created by the Watergate scandal, which, by that point, had moved to the televised hearings that riveted the nation.

(I was in eighth grade at the time, and I can still hear Barbara Jordan, in that great deep, dignified voice of hers, slowly, almost reverentially rolling out the words “Con-sti-tu-tion ... of ... the ... United ... States.” Looking back, it was the initial spark that would grow into my personal passion for public service and politics.)

Warren was worried about what Watergate might portend for the future of the country. He said in his lecture that listening to Nixon's enablers testify had persuaded him that the nation was failing to instill in young Americans a sense of the moral values required of those who would assume positions of public leadership.

His theme is interesting to me, and as future lawyers it should be of interest to you. And before I leave here today, I want to return to it.

Five years ago, University of Virginia scholar Frederick Schauer framed his Sibley presentation as a provocative question: "When and how (if at all) does law constrain official action?"

It's a topic Professor Schauer has explored in depth from many angles and for many years, and in his Sibley lecture he raised a host of additional provocative questions:

Do public leaders pursue bold courses of action because of the law, or do they do so in spite of it?

Or as he put it verbatim: "When do various bureaucrats enforce the letter of the law and when do they take the position that sensible interpretation and enforcement should trump faithful obedience to laws, rules, and regulations exactly as written?"

His view is that such questions deserve greater inquiry, suggesting that, quote, "public law ought to be interested in the empirical question of when and whether, if at all, officials follow the law when doing so would be inconsistent with their own best all-things-other-than-the-law-considered judgment about what to do."

End quote.

Schauer's exploration of this topic was finely nuanced at every turn, and I would do him grave injustice to over-simplify it, although I will say, and I don't doubt the professor would agree, that what we are dealing with here is not an either-or proposition. In law, and in political leadership, the equation is never that clean and easy.

Still, Schauer's scholarly presentation got me thinking about what benefit I might bring to the podium today. And it occurred to me that it might be helpful to walk

you through a personal account of the practical, interior process that produced a decision that has made a difference in the lives of hundreds of thousands of young people.

I am talking about immigration, and about an executive decision made in the first term of the Obama Administration. I am talking most specifically about Deferred Action for Childhood Arrivals, an initiative that was developed under my direction while I served as Secretary of Homeland Security.

This was an initiative that required a careful navigation between the potentially conflicting dictates of doing what is right, ... of doing what is lawful, ... of doing what is doable, ... and of doing what is defensible, both in the court of law and, to a lesser degree, the court of public opinion.

Before we push off, however, I need to carve out an important caveat. My commentary will be contained exclusively to my time at the helm of DHS, and to the specific decision to move forward with what we call in Washington's fondness for acronyms, DACA.

This is an election season, and immigration policy and DACA are still very much in political play. So let's be clear. Today I do not intend to present any fresh, insider knowledge into how these issues will be sorted out going forward.

My mission hews more toward the historical and the mechanical – to explain the decision-making process on a consequential and complex national policy matter. Along the way, I want to suggest that a well-developed working knowledge of the law is essential in determining—as a public sector leader—what you can and cannot do in the pursuit of what you believe is right.

Let me begin with a few lines from T.S. Eliot's poem, "The Hollow Men":

"Between the idea /

And the reality /

Between the motion /

And the act /

Falls the shadow"

The story of immigration policy in this land, including the development of DACA, is a story of shadows and shades of gray – it's no area for absolutists.

The policy that became DACA is rooted in a subset of young immigrants who, through no fault of their own, found themselves living in the shadows of American life.

Sons and daughters of undocumented immigrants, they had been brought into the country as children. They were kids who stayed out of trouble, who went to school, who in all but the letter of the law were Americans. Some never even spoke the language of their native land. Many went on to college, and were extraordinarily successful—from serving as a student body president, to attending law school and passing the bar.

They would come to be called Dreamers, after the proposed “DREAM Act” legislation first introduced in 2001, which would have given these young people legal status and a path to citizenship. By 2008, there were an estimated 1.4 million Dreamers living in the country. Whatever their personal accomplishments, all Dreamers lived in fear of deportation. And all endured an existence of everyday difficulties unknown to their American-born contemporaries – unable to secure drivers' licenses, work permits, or social security cards; unable to receive federal loans for college, or, after graduation, to pursue their chosen professions.

When President Obama came to the White House, immigration reform was a priority. However, we knew it would be difficult. The Congress was just a few years removed from the failed attempt at comprehensive reform by President Bush – who deserves a lot of credit for taking this issue head on by the way – along with liberal icon Senator Kennedy and my home state Senator, John McCain.

President Obama asked us to push forward. However, with the economy at rock bottom, and with the fiscal stimulus bill and health care reform emerging as urgent issues for the President, the early momentum toward meaningful immigration reform stalled. It became increasingly clear that comprehensive reform was not going to come fast, and it was not going to come easy, if at all.

That's politics. And the politics of immigration have always been arduous. We liked to joke, or rather half-joke, at DHS that if both sides were kicking us with equal vigor, well, then we must be doing something right.

This was brought home for me—starkly—on one occasion when I was testifying before the Senate Judiciary Committee. I was seated alone at the witness table when Republican Senator Jeff Sessions began criticizing DHS for, in his view, not enforcing immigration laws vigorously enough. That same moment, a group of protestors stood up in the rear of the hearing room. They began shouting, and waving signs that said DHS was enforcing immigration laws *too* vigorously.

This experience, and many others like it, highlighted that all too often immigration policy, and the debate that envelops it, resemble a washing machine at work – load, inject soap and water, churn, (also known, interestingly, as agitate,) , rinse, drain, spin, repeat. The main difference is that in the immigration realm, we never seem to graduate to the dryer—we just do it all over again.

As a former U.S. Attorney, Attorney General, and Governor of a border state, I knew that many of our immigration enforcement policies made little, if any, sense. This became even more apparent in late February, 2009, in only my second month at DHS, when Immigration and Customs Enforcement agents raided a motor manufacturing plant in Bellingham, Washington, rounding up for 28 otherwise law-abiding workers who were in the United States unlawfully.

I did not learn about this raid – the first such operation of its scale since President Obama took office – until after it occurred. The raid underscored real questions that I had been thinking about since being sworn in – how do we prioritize and use immigration enforcement resources responsibly.

For example, would it more sensible—not to mention fair—to focus our attention on the employers who hire undocumented workers, rather than the workers themselves? The answer to that immediate question came in the form of a new program of work site audits. These were intended to put employers on notice that, when it came to the legal status of their employees, they bore responsibility as well.

But the need for setting priorities extended beyond work site enforcement issues.

Consider this:

The U.S. Congress appropriates resources specifically to DHS removal and detention operations to remove less than 2% out of the 11 million individuals estimated to be in the U.S. illegally.

These numbers imply that, on an operational level, in the field, choices inevitably were being made about who should be removed, thus raising a host of important questions for DHS leadership:

Where should immigration resources be deployed, and to what end?

Should we—and could we—set priorities that made distinctions between Dreamers and, say, undocumented aliens who commit felonies or repeatedly flout the rules of the border?

And if enforcement priorities were to be set, where and with whom did the authority reside to set them?

With Congress, which makes the laws governing immigration?

With the President and his appointees, including cabinet secretaries, who are constitutionally bound to “take care that the laws be faithfully executed”?

Or, for that matter, with field agents who are sworn to uphold the law?

Enter the lawyers.

In my experience, when it comes to developing new approaches to existing problems in government, the considerations of policy and the law travel in tandem, toward the same goal, perhaps, but with different calculations. You can’t make a decision about what is the best policy based solely on the law. And you can’t make a legal decision based solely on policy preferences. Yet, at the same time, policy and law are entangled within the decision-making process, and both are moving targets.

Now, this is not a novel idea. A half century ago, in the inaugural Sibley lecture, professor McDougal lingered on this point:

He said, quote: “Too frequently law is still thought of as something that is written in a book – as rules on a piece of paper or the words that came to us in 1787. On a deeper level of understanding, we know that this conception of law as a body of rules is hopelessly inadequate.

“Whatever our roles,” he added, “whether we are judges, other officials, effective power holders, advocates, scholars, or simply members of the community – we are

interested in more than rules. We are interested in decisions, what's done, the consequences of the making and application of rules for human beings.”

End quote.

As we assumed the reins of DHS, we began to grapple more and more with decisions and consequences in the immigration arena. Through the Director of Immigration and Customs Enforcement (ICE), we had issued a series of memos to agents in the field. We instructed them to focus their enforcement efforts on the “bad actors.” This meant individuals who presented risks to national security, or who had committed felonies, or who had joined gangs, and the like would be the focus of our efforts. Similarly, to preserve the integrity of the border, we moved resources to focus on recent border crossers. Finally, we instituted a case by case review of every deportation matter pending in the nation’s immigration courts, to see whether we could expedite the cases of those we wanted to remove immediately because they fit our enforcement priorities.

As for military veterans; long-time, law-abiding residents; nursing mothers; people with certain family ties; the severely ill; and, yes, individuals who might be called Dreamers – the memos made clear that these no longer fit the priorities.

We neither could nor would ever tell immigration enforcement agents that they should stop enforcing immigration laws. But we certainly could tell them how to prioritize enforcement efforts given the limited resources that Congress provided the Department. Implementing policies to direct how law enforcement agents go about their jobs – which is known as “prosecutorial discretion” – is as common as law enforcement itself.

We are all familiar with prosecutorial discretion – because we experience it every day.

We see it when police officers choose who to pull over for speeding, instead of stopping every individual who drives over the speed limit.

We see it when state environmental protection agencies decide what factories to inspect, instead of sending agents to every factory in their state that is releasing pollutants.

And we see it when the IRS sets priorities about how to deploy its audit resources, instead of auditing every individual it suspects of being less than fully forthcoming on his, or her, taxes.

On a personal level, I myself had long exercised prosecutorial discretion—both as a former U.S. Attorney, and as a former state Attorney General. The Department of Justice, for example, does not focus on small bad check cases. It has bigger fish to fry.

Prosecutorial discretion has a long and distinguished history in immigration law, and so we were confident that we were on solid legal ground when it came setting priorities for immigration enforcement efforts. Our attorneys had done a great job exploring the issue—sifting through the precedents; pursuing legal questions that ranged from Constitutional authority, to Congressional intent, to the legal definition of the word “shall” (which is not, it turns out, the same as “must always”.)

We continued, with various rates of success, to focus enforcement efforts throughout the course of the first term. And, just before the first mid-term election in 2010, the House of Representatives passed the DREAM Act, which gave legal status and a path to citizenship to the nation’s Dreamers. Unfortunately, the legislation was filibustered by the U.S. Senate. It failed to reach the required 60 vote supermajority by just four votes. But based on my conversations with lawmakers at the time and through the course of the next year, it was clear to me that a bipartisan majority of lawmakers agreed that Dreamers were different. Of course, many lawmakers would not admit this publicly—but there was a noticeable shift in the tenor and the tone of their comments where Dreamers were concerned.

And, over the next 18 months, we began to build out our legal and administrative foundation for launching DACA.

A key element was *Heckler v. Cheney*, 470 U.S. 821 (1985), a seminal 1985 Supreme Court case involving the FDA’s authority to exclude or allow certain drugs to come to market. In that case, the Supreme Court had ruled that, quote, “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” End quote.

Heckler also had addressed the need to align priorities and resources, stressing that an agency, quote, “is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” End quote.

Another key element was the Court’s 1999 decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 US 471 (1999), where it explicitly recognized the Executive Branch’s authority to exercise prosecutorial discretion in the immigration context.

The law, we believed, was on our side. Bureaucratic momentum was not. DHS was a new entity—a vast department that brought together many distinct agencies in the aftermath of 9-11. Our earlier call for a review of the backlogged cases in removal proceedings through the lens of our stated priorities helped a bit. But in the end, it did not have the desired impact. The Dreamers remained in limbo, ensnared within the sputtering debate over immigration reform.

And so it came to pass that in the spring of 2012 I assembled a small team of advisors, including our brightest lawyers, and I asked them this:

What can we do about the Dreamers?

What can we do short of a blanket amnesty?

What can we do within the parameters of the law?

The team’s initial recommendation to me was limited to identifying Dreamers actually in removal proceedings and granting them deferred action.

I said that this was neither big enough nor bold enough. The vast majority of young people who were Dreamers were not in proceedings; they would still have to constantly look over their shoulders to see whether ICE agents were about to pick them up. I wanted to create a potential pathway to deferred action for all Dreamers, not just those already caught up in the system.

Here I should explain that in immigration-speak, the term “deferred action” generally means to suspend moving forward with certain cases for a fixed period of time. It does not mean granting amnesty or otherwise permanently resolving immigration status. But it does permit someone to live free from fear of deportation. It does permit someone to obtain authorization to work, which is so important for young students.

To apply deferred action in the form of a categorical exercise of prosecutorial discretion to an entire group across the board raised serious questions. It would run the risk of appearing to make law, and usurping Congress. Thus, it would be crucial, both legally and politically, to underscore that each case would be assessed individually, on its own merits—similar, but not identical, to how a prosecutor decides to charge a case.

The Dreamers would be required to individually step forward and apply for deferred status. As it turned out, some would be wary of leaving the shadows – what one administration might give, they reasoned, another might take away, and they would have left themselves exposed. All applicants would need to pass background checks. Those who qualified would be eligible for work authorization, pursuant to a long-standing regulation that granted such eligibility to those who received deferred action.

At this point, I could not say with any degree of certainty that we would be able to pull off this approach. Individualized review of potentially hundreds of thousands of cases would require building complex new systems and processes within the existing bureaucracy – a daunting challenge. Who knew how it all would turn out?

What I *did* know was that this was the right thing to do. What I believed was that it was lawful. And, while it would be a heavy lift, I expected it would be doable and, in the end, defensible.

We moved forward.

The first challenge was defining precisely who would be covered by the new approach. As I mentioned before, our goal was to provide individuals who had come to the United States as children, developed deep roots in this country, and become productive members of their communities with relief from the fear of deportation. Translating that goal into the specific criteria that would be used by DHS personnel on the ground as they implemented DACA required careful consideration and design.

To capture that DACA was intended to apply to young people who came to the United States as children, we required that an individual have arrived in the United States before turning 16 and be under the age of thirty on the date DACA was publicly announced.

To reflect that those who received deferred action should have strong roots in the United States, we required that, to be eligible, individuals must have lived in the United States for five years prior to the implementation of DACA and be present in the United States on the DACA announcement date.

And to ensure that recipients of DACA were productive members of their communities, we required that, to be eligible, individuals must be currently in school, have graduated from high school, have obtained a GED, or be a veteran and not have a serious criminal record or pose a threat to public safety.

We felt these criteria accurately captured the individuals – the Dreamers – that we wanted DACA to reach.

The next struggles were internal. There were serious logistical concerns at the United States Citizenship and Immigration Services (USCIS), which would bear the brunt of responsibility for implementing DACA. One of USCIS's primary concerns was that we could not implement this decision, given the size of the population we expected to seek relief. As an executive, it is important to listen, and to listen well. But it also is important not to conflate listening with agreeing, nor to let it stall important action. By 2012, I thought USCIS was prepared to deal with the needed administrative machinery to make DACA work. (And by the way, this is not something I could have said earlier in my tenure as DHS Secretary).

So, we pressed ahead and presented our proposal for DACA and its implementation to the White House. At this stage, the White House asked us to walk them through the legal rationale and the implementation challenges. The scale of our proposal was significant, perhaps more significant than any previous exercise of prosecutorial discretion in the immigration context. Our White House colleagues asked serious, tough questions along several dimensions. We had many conversations, and went back and forth several times. Eventually, they reached a comfort level with our legal position—DACA was well within the legal authority of DHS—and with our preparations for implementing DACA across the country.

We knew there would be legal challenges. We were 99 percent sure we would prevail, but there were still risks. Nonetheless, leaders who wait for 100 percent certainty of success before making a decision, whether in a legal, political or operational sense ... well, they are still waiting.

Again, we pressed ahead. On June 15, 2012, I issued a memorandum to the heads of the DHS agencies that enforce immigration laws, handle immigration benefits, and police the borders and ports.

“By this memorandum,” it began, “I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people who were brought to this country as children and know only this country as home.

“ ... Additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.”

End quote.

Anticipating, accurately, that some members of Congress would howl, I closed the memo with the following:

“This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.”

End quote.

On the same day my memorandum was issued, President Obama announced DACA from the Rose Garden. This was a significant action by the President. It put the authority of the presidency, and the White House, solidly behind our departmental efforts. And it gave us great confidence as we moved forward.

With DACA launched, it was now time for us – and make no mistake, this was an all-hands-on-deck moment – it was time for us to wade into the hard work of putting together a deferred action program on a scale never before seen in the annals of American immigration policy.

There were rules to be written. They ranged from who would be eligible, to what documents would satisfy the proof-of-qualification, to what new government forms would be needed (by the way, we converted existing ones). The amount of the application fee; how the application fees would be processed; what the processes

would be for reapplying—these, too, needed to be determined. Crucially, DACA needed to be self-supporting, which meant that the fee generated had to cover our administrative costs. And finally, we needed to set in a motion an organized effort to get the word out about DACA—not only to our own offices, but also into communities of interest across the country.

All of this had to be thought through, put to paper and, of course, run by the lawyers – every sentence, every clause, and every word. And, oh yes, we had committed to being ready to begin receiving applications in 60 days, just to add a little bit more excitement to the exercise.

So how did it all turn out?

We received what appeared to be early support for our efforts in a decision by the U.S. Supreme Court that came less than two weeks after our announcement. Although the issue before the Court in *Arizona v. United States*, 132 S.Ct. 2492 (2012), was Arizona’s restrictive immigrant enforcement measures, the Court’s opinion contained language that was directly on point to what we had done in DACA. Justice Kennedy wrote for the majority that quote, “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.” End quote. A dissent read from the bench by Justice Scalia suggested that the DACA announcement was on the Justices’ minds when they were in the final stages of drafting the *Arizona* opinion.

Nevertheless, shortly after DACA went live, we faced a legal challenge. The lawsuit, brought by a handful of immigration agents, challenged our theories of prosecutorial discretion. They argued, in effect, that DACA required them to break the law. How a law enforcement officer could confuse an effort that would enable them to focus their work on true bad actors—as compared to Dreamers—with a requirement that they break the law remains a mystery to me. Nonetheless, that was the position of some of our own agents. I should say, however, that the vast majority of ICE agents dutifully executed on DACA, and, notwithstanding the objections of a few of their colleagues, conducted themselves professionally and responsibly.

A district court judge in Dallas surprised us, and most legal scholars familiar with the issues, by ruling the case might have merit. *Crane v. Napolitano*, 2013 WL 1744422 (Apr. 23, 2013). He then dismissed it on the grounds that it belonged in an administrative setting, not in federal court. *Crane v. Napolitano*, 2013 WL

8211660 (July 31, 2013). The decision has been appealed and is now pending before the Fifth Circuit.

Also predictable was the criticism that came from some corners of Congress. To hear our Congressional critics tell it, DACA was both an open invitation for young people to illegally cross our borders, *and* a Constitutional power grab in the form of an executive amnesty program.

It was neither.

Rather, DACA has managed—in my admittedly less-than-objective view—to hit the sweet spot in public service. DACA is no substitute for comprehensive immigration reform. This is why I have never stopped advocating for comprehensive immigration reform.

I advocated for it as Arizona’s Attorney General and Governor. I advocated for it every year I spent as Secretary of Homeland Security. I advocated for it at the time we launched DACA. I advocated for it in the year afterwards. And I advocate for it to this very day.

But in the absence of action by the House of Representatives on comprehensive immigration reform, something at least needed to be done to address the plight of the Dreamers. Our answer to that challenge – DACA—was the right thing to do, and the lawful thing to do. It was doable, and it was defensible.

In the two-plus years since DACA was launched – after what the *New York Times* has described as a superhuman bureaucratic effort – more than 675,000 young people, *who were already in this country*, have come out from the shadows. Legally, and in the light of day, they have applied for and received deferred status, work authorization, and other previously forbidden pieces of paper that had dogged their day-to-day existence.

They are people like Mario Lio, who was brought here from Peru at the age of 12. He received his education in civil engineering at UC Berkeley—Go Bears!—but given his immigration status, he was unable to pursue a professional career, let alone apply for a driver’s license or Social Security number. DACA changed all that.

“So many doors opened overnight,” the 25-year-old told the Wall Street Journal. “I became a new person in some ways.”

Mario Lio now works as a project engineer for the firm that built Levis Stadium, the new home of the San Francisco 49ers.

Multiply his story by nearly 700,000 and you get an understanding how much of a difference DACA has made.

And here, on the matter of making a difference, I would like to conclude my remarks by stepping away from the DACA narrative and addressing, on a more personal level, all the prospective lawyers in the room.

In so doing, as promised, let me return to the Sibley lecture given by Chief Justice Warren amid the wallow of Watergate.

“The national mood,” the retired chief just said in this setting 41 years ago, “is leaning toward a cynicism that interprets these derelictions as being the norm of public life, and that certain people in present circumstances just happened to be caught.”

In particular, Warren voiced concerns about the country’s ability to educate the kind of capable, moral leaders required for public service, and to encourage them in a scandal-weary era to follow that path.

I am now in the education business. I could not agree more that it is a fundamental obligation of universities, especially *public* universities, to grow future leaders who will look beyond their own careers—and dreams of lucrative careers—and consider the possibilities of public service.

Let me offer some encouragement toward that end.

In this audience, I see a lot of future lawyers. I see future lawyers who I know, given their Athenian education—Go ‘Dawgs’!—will go on to great success in the profession. What I hope to see, what I want to see, and what our country *needs* to see, are talented young lawyers who will answer the call to public service.

Make no mistake. A private sector career is nice. And hey, a healthy payday is a wonderful thing, too. But I will stand here today and say this with utmost certainty: in the end, how each and every one of you comes to judge the success of your life in law will hinge on your answer to a single question.

Did I make a difference?

There are many ways to make a difference, both within the legal profession and without. But, as I hope my narrative suggested, for those who possess a legal background, there are opportunities in public service to obtain rewards that transcend the size of the paycheck.

There are opportunities, if you know how to apply law to policy, and policy to purpose, to make a difference. And anytime any of you would like to talk to me in greater detail about making a difference in public service, I'm all in.

Thank you for your attentiveness and for your Georgia hospitality, and thank for the honor of participating in this wonderful series of lectures and, I hope, learning.

And, to quote the motto of the University of California, Fiat Lux, which is Latin for this:

Let There Be Light.