

Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle

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I. INTRODUCTION: IMMIGRATION AND MARIJUANA. IT'S NOT WHAT YOU THINK.

To the extent that marijuana and immigration policy are mentioned together on the national stage, it is usually in the context of pointing out that, despite the relaxation or elimination of many states' marijuana prohibitions, marijuana possession and manufacture can still be grounds for the deportation of migrants otherwise in the country lawfully. However, these two seemingly disparate policy arenas share one other important thing in common: in the enforcement of both federal marijuana law and immigration policy, the Obama administration has quite publicly promulgated a policy of limited and selective enforcement of federal law.¹ Unable or unwilling to change federal policy in these areas through legislation, the Obama administration has, controversially, sought to use its enforcement discretion to achieve its preferred policy outcomes. Marijuana and immigration, then, serve as important tests of the permissible power of the executive to set federal policy through the selective enforcement of the law as written rather than through legislative enactment.

It is a truism, of course, that few governmental decisions are as unreviewable as the authority of a prosecutor to decline to prosecute a particular case.² In a

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¹ See, e.g., Niraj Chokshi, *How the Obama Administration Handles Immigration Like it Handles Marijuana Policy*, WASH. POST (Nov. 22, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/22/how-the-obama-administration-handles-immigration-like-it-handles-marijuana-policy/>.

² See, e.g., Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 5 (2009) (setting forth the basis of deference to a federal prosecutor's decision not to bring a claim; "neither a victim nor another interested party can contest a prosecutor's decision not to pursue a case"). Interestingly, in Europe, a victim has the right to challenge the decision of a prosecutor not to bring a case, either by direct challenge or by instituting a private prosecution. See, e.g., *M.C. v. Bulg.*, Eur. Ct. H.R., 39272/98 (2003) (successful challenge to the decision of a Bulgarian prosecutor not to bring a rape prosecution in the face of evidence that the victim had been coerced into having sex with multiple individuals).

world of limited resources and widespread criminal conduct,³ it is generally understood that the exercise of prosecutorial discretion is an essential part of enforcing the law—determining when a violation can be proven to a jury beyond a reasonable doubt and, perhaps more importantly, whether doing so is worth the candle, are exactly the kinds of judgment we generally entrust to prosecutors in the United States. Moreover, while the decision to actually prosecute a particular case is subject to veto by trial judges, juries, and appellate courts, the decision *not* to prosecute is almost always invisible and unreviewable.⁴ Thus, if we think of the Obama administration’s policies of selective enforcement as just a species of prosecutorial discretion, they should be relatively uncontroversial. Every prosecutor, every day, exercises similar discretion in the administration of her office.

However, even a prosecutor’s decision not to bring a case is not boundless, particularly when it is reduced to official policy. For example, if a prosecutor were simply to announce that she would not be bringing any future domestic violence cases regardless of the facts presented to her, we would likely agree that she was abusing her discretion and should be removed from office.⁵ In the way that we expect county clerks to enforce the law whether they agree with it or not,⁶ we would not defer to a prosecutor’s discretion to effectively strike certain laws from the books through an announced policy of complete non-enforcement.⁷ Just as obviously, an official policy *requiring* a prosecutor to bring every case reported to the police to trial would be seen as an unrealistic attempt to legislate away important and necessary discretion and judgment.⁸ If, as Justice Jackson wrote

³ See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (“[A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.”).

⁴ See, e.g., Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390–91 (2008) (describing the decision not to prosecute as a decision that is “legally authorized, but not legally regulated” and arguing that decisions not to prosecute, “[l]ike executive power in times of emergency or clemency, . . . bring us to law’s limit”).

⁵ Of course, we might decide that the means for removing her from office should be elective rather than through the courts. See *supra* notes 2 & 4 (discussing the difficulties of using the legal system to compel prosecutorial action).

⁶ Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0.

⁷ The exception might be the assertion of a prosecutor that a law is unconstitutional and therefore cannot be enforced. See, e.g., Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008) (“Far from vesting him with a discretionary Executive Disregard power, the Constitution actually *requires* the President to disregard unconstitutional statutes. This duty arises from three sources.”).

⁸ Again, the European system is contrary. See, e.g., Shawn Marie Boyne, *Procedural Economy in Pre-Trial Procedure: Developments in Germany and the United States*, 24 S. CAL. INTERDISC. L.J. 329, 336–37 (2015) (“Although German prosecutors possess a near-monopoly on the

nearly seventy-five years ago, a prosecutor can find sufficient evidence to bring a case against almost any individual,⁹ a policy of mandatory criminal law enforcement might cripple the American criminal justice system.¹⁰

Thus, we can imagine two extreme views of prosecutorial discretion, both of which are untenable. On the one hand, the power to completely invalidate a criminal statute by categorically refusing to enforce a validly enacted law is clearly beyond the authority of a prosecutor. Such a policy would be a clear usurpation of the legislative prerogative, tantamount to allowing a prosecutor to substitute her own views regarding the wisdom of criminal laws for those of a duly elected legislative body. On the other hand, the conception that prosecutorial discretion should, or even could, be completely legislated away is a fallacy.¹¹ For better or for worse, and in a world of limited resources, any sensible criminal justice system will always rely in part on the wisdom and judgment of those charged with enforcing the laws.¹²

Of course, the trick lies in determining how far toward one of these extremes executive policy may stray in practice. In this context, the experience of marijuana and immigration enforcement provides a relatively stark contrast.¹³ In one of these

state's charging power, the discretion that they possess has historically been more circumscribed than their American counterparts. The Code of Criminal Procedure aims to limit discretion through the Principle of Legality ('Legalitätsprinzip'), which requires prosecutors to initiate proceedings in all cases where there is sufficient factual basis to believe that a criminal offense has been committed." (footnotes omitted)).

⁹ See, e.g., Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940) ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.").

¹⁰ *Id.* ("If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate.").

¹¹ See *id.* ("One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.").

¹² This is particularly true of federal law enforcement. As the federal government does not have the general police power that the state governments do, it has rarely taken the lead in the enforcement of criminal law. Vijay Sekhon, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision to Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 556 (2010) ("Due to the scarcity of the Executive Branch's resources, however, federal regulators cannot investigate and prosecute every detected federal crime. The Executive Branch must exercise discretion in selecting which alleged violations of federal law to investigate and prosecute, and which alleged violations of federal law to ignore due to scarcity of resources.").

¹³ Of course, the Obama Administration has been embroiled in controversy about its use of executive orders more generally. See, e.g., 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 TEX. L. REV. 781, 781-82 (2013) ("As President, however, he has frequently taken action

areas—marijuana law—the authority of the federal government to selectively enforce the law as written has received relatively little judicial scrutiny. In the other—immigration law—the government’s decision has been deeply contested. The Supreme Court appeared ready to tackle this issue, granting certiorari in *United States v. Texas*, a challenge by twenty-six states to the Administration’s Deferred Action for Parents of Americans (DAPA) program, which would have allowed some migrants who illegally immigrated to the United States to remain here under a policy of deferred removal. However, the Court was only able to affirm the Fifth Circuit’s opinion invalidating DAPA in a terse, one-sentence opinion, indicating that the Justices were split 4-4 on the issue. A more satisfactory resolution of the power of the executive to set policy through selective enforcement will have to await the appointment of a ninth Justice to replace the late Justice Antonin Scalia.¹⁴

This article compares the appropriateness of prosecutorial non-enforcement¹⁵ policy in the contexts of marijuana law enforcement and immigration. I begin by discussing the ways in which the Obama administration has set policy in both areas through the use of memoranda directing federal prosecutors in the exercise of their discretion. I show that in both of these contexts, the administration has turned to the exercise of prosecutorial discretion rather than legislative change to achieve its policy outcomes. I turn next to the Take Care Clause, the constitutional requirement that the president faithfully execute the laws of the United States. I demonstrate that, although the Supreme Court has painted only the broadest outlines of the clause’s meaning, certain ideas seem to lie at the core of the doctrine. Finally, I apply the Take Care Clause in the two contexts; finding that in

by claiming broad executive power. In the area of national security, foreign policy, and military affairs (where the Executive has long held sway), the Administration has conducted an undeclared cyber-war against Iran, used military force to bring about regime change in Libya, pursued a proxy war in Somalia, and prepared for more extensive shadow warfare in Africa.” (footnotes omitted).

¹⁴ On October 3, 2016, the Court denied the government’s petition for rehearing, all but guaranteeing that no definitive resolution will be handed down by the eight-member Court. *See, e.g.*, Amy Howe, *Justices Issue Additional Orders from September 26 Conference (Update)*, SCOTUSBLOG (Oct. 3, 2016, 10:37 AM), <http://www.scotusblog.com/2016/10/justices-issue-additional-orders-from-september-26-conference/>.

¹⁵ For convenience, this article refers to both removal proceedings and marijuana prosecutions as “prosecutions” or “prosecutorial enforcement.” However, it is important to remember that removal proceedings are civil in nature. There are important distinctions between the two, including the lack of a constitutional right to counsel in removal proceedings. *See, e.g.*, KATE M. MANUEL, CONG. RESEARCH SERV., R43616, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF (Mar. 17, 2016) (“Aliens, as a group, generally do not have a right to counsel at the government’s expense in administrative removal proceedings under either the Sixth Amendment or the INA. The Sixth Amendment’s ‘right to . . . have the Assistance of Counsel’ at government expense, in the case of indigent persons, applies to criminal proceedings. Removal proceedings, in contrast, are civil in nature (although aliens subject to judicial orders of removal could be seen to have a Sixth Amendment right to counsel in the criminal proceedings that result in such orders).”). However, removal proceedings and marijuana prosecutions share more than divide them; they are both adversary proceedings, commenced by the government against an individual with potential, significant consequences for those targeted for enforcement.

both, the Obama administration has acted within the bounds of its constitutional authority. In neither context has the Obama administration attempted to use discretion to re-write legislation or engaged in the kind of categorical refusal to prosecute that might be constitutionally suspect.

II. PROSECUTORIAL DISCRETION AND MARIJUANA LAWS

Marijuana is a Schedule I drug under the federal Controlled Substances Act (CSA).¹⁶ As such, its manufacture, possession, and distribution are all felonies, punishable by up to decades in federal prison.¹⁷ This remains true despite the fact that since 1996 twenty-five states and the District of Columbia have passed laws making marijuana available as medicine for some patients. Five of these jurisdictions have also legalized the possession and licensed production of marijuana for adults twenty-one and older.¹⁸ A marijuana industry has arisen in many of these states, subject to state-wide regulation that ranges from robust¹⁹ to haphazard.²⁰

In all of these marijuana reform states, the legal status of marijuana is complex. Although a state is free to repeal some or all of its own criminal marijuana laws,²¹ it can do nothing to avoid the continuing federal marijuana

¹⁶ Controlled Substances Act of 1970, 21 U.S.C. §§ 801–889 (2012).

¹⁷ *Id.* § 841(b)(1)(A)(vii) (stating that in a case involving more than 1,000 marijuana plants, a defendant “shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life”).

¹⁸ See *State Marijuana Laws Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Oct. 14, 2016) (“Twenty-five states and the District of Columbia currently have laws legalizing marijuana in some form. Four states and the District of Columbia have legalized marijuana for recreational use.”).

¹⁹ See, e.g., COLORADO MARIJUANA LAWS AND REGULATIONS (LexisNexis 2015) (setting forth more than five hundred pages of rules and regulations governing Colorado’s medical and recreational marijuana industries).

²⁰ California, the first jurisdiction to pass a statewide medical marijuana law, did not pass statewide regulations to implement that law until nearly twenty years later. Until then, California remained a patchwork of county-level regulations. See Christopher Zara, *California Marijuana Legalization 2015: New Medical Marijuana Law Rankles top Cannabis Industry Investor*, INT’L BUS. TIMES (Sept. 13, 2015), <http://www.ibtimes.com/california-marijuana-legalization-2015-new-medical-marijuana-law-rankles-top-cannabis-2094342> (“Although California residents voted to approve medical marijuana back in 1996, a regulatory plan has until now eluded policymakers, who could not seem to agree on specifics. Legislators finally reached a compromise on three bills, which have been sent for final approval to Gov. Jerry Brown, who is expected to sign them into law. The legislation was approved as part of a comprehensive package pushed through on the final day of the 2015 session.”).

²¹ See, e.g., Plaintiff States’ Brief of in Support of Motion for Leave to File Complaint, *Nebraska and Oklahoma v. Colorado*, 2014 WL 7474136, at *5 (“Despite Congress’s consistent refusal to reschedule marijuana, marijuana activists have sought not only to legalize marijuana—a decision any state may make with respect to its own criminal law—but also to facilitate the creation of a marijuana industry in direct contravention of federal law.”). Note that in suing Colorado over its

prohibition. A state cannot, simply by repealing its own marijuana prohibitions, insulate its citizens from the powerful effect of the continuing federal marijuana prohibition²²—an individual’s compliance with state laws regulating or legalizing marijuana is irrelevant in a federal prosecution under the CSA.²³ Thus, the acquiescence of the federal government is necessary for a state to implement its marijuana policy successfully.²⁴ For states considering passing marijuana reform laws or implementing robust (and therefore costly) marijuana regulatory regimes, knowing whether the federal government would tolerate the states’ experimentation with marijuana legalization—or whether it would seek to hamper, frustrate or crush those efforts—became crucial.

To its credit, the Obama administration endeavored, almost throughout its entire two terms, to clarify its position regarding how marijuana laws would be enforced in those states moving away from state-level prohibition. However, despite its best intentions, the Justice Department often created more confusion than clarity. In 2009, Deputy Attorney General David Ogden circulated a memo designed to provide guidance to United States attorneys around the country regarding how they should enforce the federal Controlled Substances Act in those states adopting medical marijuana laws.²⁵ The so-called Ogden Memo informed prosecutors around the nation that medical patients and their caregivers were a poor target of scarce prosecutorial resources:

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards

licensing regime for marijuana businesses, its neighboring states admitted that Colorado remains free to legalize marijuana, just not to license and tax its production and sale.

²² See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (rejecting a Commerce Clause challenge to the CSA).

²³ See *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001) (holding that there is no medical necessity defense under the CSA and that compliance with state medical marijuana provisions is not a defense to prosecution under federal marijuana laws).

²⁴ See, e.g., Associated Press, *Federal Crackdown Busts Montana’s Medical-Marijuana Industry*, BILLINGS GAZETTE (May 12, 2013), http://billingsgazette.com/news/state-and-regional/montana/federal-crackdown-busts-montana-s-medical-marijuana-industry/article_1092e3d7-5d52-53b9-be65-074deef93230.html (“Today, thousands of medical-pot providers have gone out of business, and a health department survey showed that the number of registered users have fallen to less than a quarter of their 2011 numbers. The drop was driven in part by a tougher 2011 law on medical-marijuana use and distribution. But more than anything, marijuana advocates say, the demise of the once-booming medical pot industry was the result of the largest federal drug-trafficking investigation in the state’s industry.”).

²⁵ Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’y’s, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.²⁶

Although the memo was careful to point out that the CSA remained the law of the land and that anyone engaged in marijuana conduct remained subject to arrest and prosecution,²⁷ it was taken by many as a green light to the development of large-scale, commercial marijuana facilities in the states. The marijuana industry in the states boomed as a result.²⁸

The Obama administration quickly backtracked, however, issuing a second memo which made clear that those who had read the Ogden Memo as a general announcement of federal disinterest in the Controlled Substances Act had either intentionally or negligently misread the memo:

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such

²⁶ *Id.* at 1–2.

²⁷ *Id.* at 2 (“This guidance regarding resource allocation does not “legalize” marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.”).

²⁸ See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 881 (2013) (“In states that had adopted MMJ provisions, the [Ogden] memo was seen as a green light to the open sale of marijuana. For example, in states such as Colorado and California, 2009 saw an explosion in the number of storefront marijuana dispensaries openly doing business in a product prohibited under federal law.”).

persons are subject to federal enforcement action, including potential prosecution.²⁹

The Obama administration, as the so-called Cole Memo made clear, remained committed to enforcing the CSA against commercial marijuana operations; the Ogden Memo had meant only to discourage the use of scarce resources to prosecute legitimate, nonprofit, medical uses of marijuana.³⁰

As events changed on the ground in marijuana states, however, the Cole Memo's guidance became increasingly less clear. The passage in 2012 of "full" marijuana legalization for those twenty-one and over in Colorado and Washington brought to a head the question whether the Obama administration would tolerate marijuana cultivation and sale in the states without the legal patina of medical use. In September of 2013, a second Cole Memo once again clarified the Obama administration's position in the fast-changing circumstances of state law reform.

The Second Cole Memo, while containing all of its predecessors' lawyerly language about the CSA remaining the law of the land and marijuana cultivation and distribution remaining criminal under federal law,³¹ also marked a stark change in direction for the Obama administration. In it, the federal government acknowledged, really for the first time, the fact that the states do the lion's share of the nation's work in illicit drug enforcement.³² The memo acknowledged that a number of states now saw the best way to do this as focusing on regulation and taxation rather than outright criminalization. So long as the states' regulation of marijuana complied with eight federal priorities,³³ the memo stated, matters would generally be left to the states themselves:

²⁹ Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 2 (June 29, 2011).

³⁰ *See id.* at 1 ("The term 'caregiver' as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.").

³¹ Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding Marijuana Enforcement 1 (Aug. 29, 2013) ("As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations.").

³² *Id.* at 2 ("[T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through the enforcement of their own narcotics laws.").

³³ The criteria were as follows:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.³⁴

As I have written elsewhere, the clarity brought about by the Second Cole Memo was a great improvement on what came before it.³⁵ The Ogden and First Cole Memos created a great deal of uncertainty and unsettled expectations. With states creating elaborate regulatory regimes to comply with the perceived federal policy—and with marijuana businesses investing millions in product, facilities, and compliance measures—assurance from the federal government that it would allow the states’ experiments to go forward was welcomed news. The Second Cole Memo (and other administration pronouncements, both official and unofficial) gave the first measure of predictability to states passing marijuana law reform and those attempting to abide by state regulations implementing it. As we shall see, however, the Cole memo did not, and no similar pronouncement could, eliminate the federalism concerns that arise when the states legalize, tax, and regulate that which the federal government continues to prohibit.

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- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
 - Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
 - Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
 - Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
 - Preventing marijuana possession or use on federal property.

Id. at 1–2.

³⁴ *Id.* at 3.

³⁵ See Chemerinsky et al., *Cooperative Federalism and Marijuana Policy*, 62 UCLA L. REV. 74, 90 (2015) (“While this policy guidance constitutes a welcome step back from the federal government’s previous brinksmanship, it hardly solves the federalism problems caused by marijuana’s dual legal status.”).

III. PROSECUTORIAL DISCRETION AND IMMIGRATION

There is perhaps no more polarizing political issue in the United States today than immigration. The Immigration and Naturalization Act (INA) of 1952, creates comprehensive immigration policy for the United States—it sets forth categories of foreign nationals who are not permitted to enter the United States³⁶ and of persons who, if present in the United States, are subject to removal (formerly deportation).³⁷ Immigration and Custom Enforcement (ICE), a department within the Department of Homeland Security (DHS) which was created in the wake of 9/11, is charged with the enforcement of the INA and has primary responsibility for implementing its provisions.³⁸

By most accounts, there are more than 11 million people living in the United States without authorization;³⁹ furthermore, almost everyone agrees that the federal government lacks the resources and inclination to remove all of these individuals from the country. Many of those living without authorization in the United States have lived most of their lives in this country and have known no other home. As legislative attempts to implement comprehensive immigration reform to alter the status of some of the nation's undocumented immigrants have consistently failed,⁴⁰ the executive branch has used its enforcement discretion to determine who will be allowed to stay in the country and who will not. On June 5, 2012, the Obama Administration announced a program that became known as Deferred Action for

³⁶ Categories include those with communicable diseases with public health consequences, 8 U.S.C. § 1182(a)(1)(A)(i) (2013); those who have been convicted of certain crimes, *id.* at (a)(2)(A); those who pose security risks to the United States, *id.* at (a)(3)(A); those likely to end up a public charge, *id.* at (a)(4)(A); and those seeking work unless the Secretary of Labor has certified that there is a need for such labor or that “the employment of the alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” *Id.* at (a)(5)(A)(i)(II).

³⁷ Those subject to removal include those who were inadmissible to the United States at the time of entry, 8 U.S.C. § 1227(a)(1)(A) (2008); those convicted of certain crimes, *id.* at (a)(2); those who have failed to register with the government as required by law, *id.* at (a)(3); and anyone who “has engaged, is engaged, or at any time after admission engages in” conduct relating to espionage, or other conduct “a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force.” *Id.* at (a)(4).

³⁸ See *Who We Are*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (“ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 employees in more than 400 offices in the United States and 46 foreign countries. The agency has an annual budget of approximately \$6 billion, primarily devoted to two operational directorates—Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI).”), <https://www.ice.gov/about> (last visited Oct 14, 2016).

³⁹ See, e.g., Albert R. Hunt, *Facing the Facts on Illegal Immigration*, N.Y. TIMES (July 19, 2015), http://www.nytimes.com/2015/07/20/us/politics/facing-the-facts-on-illegal-immigration.html?_r=0.

⁴⁰ 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/>.

Childhood Arrivals, or DACA.⁴¹ Under this program, those present in the United States who had entered the United States unlawfully when they were children and who met other eligibility criteria became eligible to apply to DHS for deferred action.⁴² Under this plan, those granted deferred action after individual case review⁴³ would remain subject to removal in the future, but would be allowed to remain in the United States for a renewable two-year period. In addition, anyone granted deferred action under DACA would also be entitled to apply for work authorization, a right not otherwise available to those in the country illegally.⁴⁴ By some estimates, DACA would apply to as many as one million immigrants;⁴⁵ in the first four years DACA was in place, DHS granted more than 94% of the 836,212 initial applications for deferred action it received.⁴⁶

⁴¹ See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 5, 2012) [hereinafter DACA Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴² Those criteria include that the individual seeking deferred action:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Id. at 1–2.

⁴³ See *Deferred Action Overview*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/topic/deferred-action-overview> (“This relief will be granted only after an individualized review by DHS personnel.”).

⁴⁴ DACA Memo, *supra* note 41, at 3 (“For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.”).

⁴⁵ See Jens Manuel Krogstad & Ana Gonzalez-Barrera, *If Original DACA Program is a Guide, Many Eligible Immigrants Will Apply for Deportation Relief*, PEW RESEARCH CTR. (Dec. 5, 2014), <http://www.pewresearch.org/fact-tank/2014/12/05/if-original-daca-program-is-a-guide-many-eligible-immigrants-will-apply-for-deportation-relief/> (estimating that 1.1 million people were eligible for DACA).

⁴⁶ See *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics, and Case Status: 2012-2015 (September 30)*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821_daca_performancedata_fy2015_qtr4.pdf. The Department also approved 93% of the 513,363 renewal applications it received. *Id.*

On November 20, 2014, the Obama administration announced the implementation of a second deferred action program that became known as Deferred Action for Parents of Americans, or DAPA.⁴⁷ DAPA was designed to build on DACA by allowing for deferred action of those in the country illegally whose children are lawfully in the United States (primarily because they were born in this country). While DACA was designed to defer action on those who were brought to the U.S. illegally by their parents, DAPA was designed to avoid splitting up families by allowing parents to stay in the country if their children are here legally. Those meeting six eligibility criteria⁴⁸ were permitted to apply for deferred action (and work eligibility status) similar to that granted under DACA.

DHS describes DACA and DAPA as exercises of prosecutorial discretion, not different from discretion exercised every day in the enforcement of federal immigration laws. Such discretion has been exercised not only under the Obama Administration, but by various administrations for generations.⁴⁹ Furthermore, both the DACA and DAPA memos are clear that only Congress can create new immigration statuses and that deferred action is revocable at any time.⁵⁰ However,

⁴⁷ Memorandum from Jeh Charles Johnson, Sec'y, to León Rodriguez, Director, U.S. Citizenship & Immigration Services, 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) [hereinafter DAPA Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

⁴⁸ The memo stated that DAPA would apply to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Id. at 4.

⁴⁹ See, e.g., DACA Memo, *supra* note 41, at 2 (“Our Nation’s immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.”); DAPA Memo, *supra* note 47, at 1 (“Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law.”).

⁵⁰ See DACA Memo, *supra* note 41, at 3 (“This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”); DAPA Memo, *supra* note 47, at 2 (“As an act of prosecutorial

the exact legal effect of deferred action remains hotly contested.⁵¹ Twenty-six states have challenged DAPA in federal court, alleging that the program violated both the substantive and procedural requirements of the Administrative Procedures Act (APA)⁵² as well as the “Take Care” Clause of the Constitution.⁵³ Texas, the lead plaintiff, alleged that it was injured by the program because the state makes drivers’ licenses, among other state benefits, available to lawful residents of the state; because DAPA would increase the number of people eligible for those benefits, Texas alleged, the state would suffer financial harms as a result of the federal government’s impermissible deferred removal program.

On February 16, 2015, a temporary injunction was entered against the government, as the District Court finding that the states were likely to prevail on the merits of their APA claim.⁵⁴ A panel of the Fifth Circuit Court of Appeals denied a stay of the injunction⁵⁵ and the full court affirmed.⁵⁶ Having so determined, the district court did not reach the plaintiffs’ constitutional argument. The Supreme Court granted certiorari and took the unusual step of asking the parties to brief an issue not reached by the courts below: whether DAPA violates the Take Care Clause.⁵⁷ By asking the parties to brief the Take Care Clause in addition to the APA question,⁵⁸ the Supreme Court clearly indicated its interest in

discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency’s discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States.”).

⁵¹ See, e.g., *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015) (“‘Lawful presence’ is not an enforceable right to remain in the United States and can be revoked at any time, but that classification nevertheless has significant legal consequences.”).

⁵² The states argued both that DHS had not followed appropriate procedures in promulgating DAPA and that the agency exceeded its authority in issuing the guidelines. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (“Twenty-six states (the ‘states’) are challenging the government’s Deferred Action for Parents of Americans and Lawful Permanent Residents program (‘DAPA’) as violative of the Administrative Procedure Act (‘APA’) and the Take Care Clause of the Constitution.” (footnote omitted)).

⁵³ U.S. CONST. art II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

⁵⁴ *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

⁵⁵ *Texas v. United States*, 787 F.3d 733, 733 (5th Cir. 2015).

⁵⁶ *Texas v. United States*, 809 F.3d 134, 134 (5th Cir. 2015).

⁵⁷ “In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, Sec.3.” *United States v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/united-states-v-texas/> (last visited Oct. 20, 2016).

⁵⁸ For purposes of this paper, I focus on the Constitutional dimension of the Texas case. The APA and Take Care Clause arguments are quite closely aligned, however. See, e.g., Jay Sekulow, *Symposium: Constitutional Limits on Presidential Power – Changing the Law or Enforcing It*, SCOTUSBLOG (Feb. 8, 2016, 10:09 AM), <http://www.scotusblog.com/2016/02/symposium-constitutional-limits-of-presidential-power-changing-the-law-or-enforcing-it/> (“While the lower courts, understandably, limited their holdings to the APA violation, the rationale underlying the

weighing in on one of the most pressing intergovernmental conflicts of the last dozen years: the use of executive orders to set federal policy.⁵⁹ In an era of decreasing cooperation between the President and Congress, presidents have been resorting to unilateral action to achieve their policy goals. While this paper focuses on the use of prosecutorial discretion to affect these goals, I note that the use of Executive Orders is particular to neither these contexts nor this President.

IV. THE TAKE CARE CLAUSE

Under the Take Care Clause, the federal executive is charged with taking care that the laws of the United States are faithfully executed.⁶⁰ However, as discussed above, this command cannot be taken to mean that the federal executive's duty to administer the law is merely ministerial;⁶¹ the Take Care Clause has never been read as requiring the executive branch to carry out every federal law, in every context, precisely as written.⁶² Rather, the size and scope of the federal government and enormity of the tasks with which it is charged necessarily require the federal executive to use discretion, including the discretion not to act, in carrying out its constitutional obligation. The Take Care Clause forms a limit on this discretion, preventing administrative lawlessness in the form of overreach or inaction.⁶³ This article focuses on one particular area of the executive's authority

states' lawsuit and the district court and Fifth Circuit's rulings—the reason the APA is implicated at all—is that the president attempted to unilaterally ‘*change the law*’ governing aliens and the states under the guise of discretionary executive action. In other words, the president violated the constitutional doctrines of separation of powers and federalism in order to accomplish that which he could not through the legitimate constitutional system. And now the Supreme Court will consider the constitutionality of his actions: ‘Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, §3.’”)

⁵⁹ See, e.g., Leanna M. Anderson, *Executive Orders, “The Very Definition of Tyranny,” and the Congressional Solution, the Separation of Powers Restoration Act*, 29 HASTINGS CONST. L.Q. 589 (2002); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1 (2002); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015).

⁶⁰ U.S. CONST. art. II, § 3.

⁶¹ See Sekhon, *supra* note 12.

⁶² For a contrasting view, see Delahunty & Yoo, *supra* note 13, at 799–800 (“The Take Care Clause is . . . naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, ‘without failure’ and ‘exactly.’ It would be implausible and unnatural to read the Clause as creating a power in the President to deviate from the strict enforcement of the laws.” (footnote omitted)). For Delahunty and Yoo, the Take Care Clause does permit deviations from the presumption of full enforcement, but only where the executive has made a compelling case.

⁶³ Seth Davis, *Standing Doctrine’s State Action Problem*, 91 NOTRE DAME L. REV. 585, 613 (2015) (quoting Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 531 (2011)) (“Article II vests the ‘executive Power’ in the President, gives the President the power to appoint ‘Officers of the United States’, and obliges the President to ‘take Care that the Laws be faithfully executed.’ Together these clauses ‘protect all

under the Take Care Clause—the power of the executive not to act when it has the authority to do so.

Since the Supreme Court’s seminal decision in *Youngstown Sheet & Tube v. Sawyer*,⁶⁴ it has provided little guidance regarding the limits of the Take Care Clause. One exception, regarding the authority of an agency not to bring an enforcement action against a regulated entity is the Supreme Court’s 1985 decision in *Heckler v. Chaney*.⁶⁵ There, the Court considered the challenge brought by a number of condemned inmates against the Food and Drug Administration (FDA). Respondents argued that the states’ proposed use of certain drugs to put him to death violated a federal statute the FDA was charged with enforcing and that the agency prevent the states from doing so. The Court disagreed, holding that while many exercises of executive agency discretion are reviewable under the APA, the presumption in favor of review could be overcome if the “agency action is committed to agency discretion by law.”⁶⁶

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.⁶⁷

Applying these principles to the case at bar, the Court concluded that the decision not to bring an enforcement action is similar in structure to a decision of a

individuals from government overreaching’ by making the President accountable for executing the law.”).

⁶⁴ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

⁶⁵ *Heckler v. Chaney*, 470 U.S. 821 (1985). See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 654 (1985) (“It was thus not until its . . . decision in *Heckler v. Chaney* that the Court set out some general conclusions on the reviewability of agency inaction.” (footnote omitted)).

⁶⁶ *Chaney*, 470 U.S. at 828. As with *Texas v. United States*, there are parallel arguments regarding the deference accorded to the agency under the APA and the agency’s obligations under the Take Care Clause.

⁶⁷ *Id.* at 831–32.

federal prosecutor not to bring a case, a decision generally deemed to be completely insulated from judicial review.⁶⁸ Thus, although it seemed clear that the states were in fact planning to use execution drugs in a method not permitted under federal law, the Supreme Court insulated from review the agency's decision to do nothing about it.

In this upholding of agency inaction, the *Chaney* Court described the Take Care Clause as a shield in the hands of the executive as much as a sword in the hands of the public—the Clause is an assignment of power to the executive more than it is a limit on that power.⁶⁹ Because it is the executive, alone, that is charged with executing the laws, it is not for private litigants—or courts—to second guess those decisions without good cause. The assignment of the power to enforce laws to the executive branch, the Court declared, is often reason enough for Courts to be wary of reviewing those decisions.⁷⁰

Although the Supreme Court has not given us many interpretations of the Take Care Clause,⁷¹ we can draw certain conclusions regarding the permissible scope of agency discretion not to act from *Chaney* and elsewhere. For example, these cases tell us that deference to agency discretion is at its strongest when the agency chooses not to act rather than when it affirmatively chooses to act: “[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that

⁶⁸ *Id.* at 832 (citing U.S. CONST., art. II, § 3) (“Finally, we 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.’”).

⁶⁹ *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994) (“The very language of the Take Care Clause confirms that the President possesses unique powers with respect to the execution of the law. Thus the Clause is phrased somewhat peculiarly, as if it imposed a duty on the President rather than granting a power.”).

⁷⁰ *See, e.g.*, *Chaney*, 470 U.S. at 832 (“[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been ‘committed to agency discretion,’ and we believe that the Congress enacting the APA did not intend to alter that tradition.”).

⁷¹ Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J. L. & PUB. POL'Y 63, 70 (2015) (“Only a few Supreme Court cases have interpreted the Take Care Clause. These cases have construed the Clause as a presidential obligation to enforce the laws, rather than a presidential power to enforce the laws only when the President wishes.”); The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. 1, 5–6 (2014) (“The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is ‘faithful[]’ to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see Chaney*, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds.”).

courts often are called upon to protect.”⁷² The decision to act—to remove an individual from the country, say, or to prosecute an individual for violating federal marijuana laws—has significantly more consequences than the decision to do nothing. The harms associated with inaction, by contrast, are diffuse and difficult for a court to evaluate.

It also seems clear that Congress may limit the exercise of agency discretion through legislation. That is, if Congress feels so strongly about the way its legislation is to be enforced, the Take Care Clause provides no obstacle to Congress specifying exactly how the law is to be enforced. For example, in *Dunlop v. Bachowski*, the Supreme Court concluded that a statute mandating that the Secretary of Labor “shall” investigate union election complaints and “shall” bring a civil action if probable cause to believe that a violation has occurred was sufficiently directive to overcome the presumption against judicial review.⁷³ The *Chaney* Court found no such language or intent present, however, in the language of the FDA’s charge; the decision not to bring an enforcement action against the state was deemed to be the sort of run-of-the-mill enforcement discretion generally beyond the reach of courts to evaluate.⁷⁴

In addition, the executive is more likely to have its act of prosecutorial discretion left undisturbed by courts when it engages in case-by-case adjudication rather than making blanket policy pronouncements.⁷⁵ That is, a policy setting forth criteria to be used in determining whether or not administrative action will be initiated in a particular case is entitled to far greater deference than an announcement that no cases will be prosecuted or that only certain ones will.

One final limitation that emerges from the cases is the principle of legality. The agency cannot exercise its discretion in a way that is simply inconsistent with law.⁷⁶ So, for example, in the classic case *Youngstown Sheet & Tube Co. v.*

⁷² *Chaney*, 470 U.S. at 832.

⁷³ *Dunlop v. Bachowski*, 421 U.S. 560 (1975). See, 29 U.S.C. § 482, in which states that an aggrieved member of a labor union may file a complaint with the Secretary of Labor and that “[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization.”

⁷⁴ *Chaney*, 470 U.S. at 834–35 (“If it has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is ‘law to apply’ under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision ‘committed to agency discretion by law’ within the meaning of that section.”).

⁷⁵ See The Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. at 7 (“[L]ower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis.”).

⁷⁶ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed

Sawyer, the Supreme Court considered the decision of the Truman administration to seize the nation's steel mills in order to keep them operational in the event of a strike. The Court concluded that the seizure exceeded the President's authority under the Take Care Clause, reasoning that Congress had considered but explicitly rejected giving the executive the authority to seize steel mills in time of crisis and that the President's power to execute the laws is, rather obviously, limited by congressional enactment.⁷⁷ As the Office of Legal Counsel has described this limit: "[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to rewrite the laws to match its policy preferences."⁷⁸

Thus, the Take Care Clause provides more of a framework for evaluating executive action than a bright line rule. It both grants the Executive the authority to implement the laws and creates limits on the way the executive does so. As we shall see in the next section, when these standards are applied to the policy areas under consideration, they weigh in favor of permitting the government's limited enforcement priorities.

V. THE TAKE CARE CLAUSE AS APPLIED TO MARIJUANA AND IMMIGRATION

A. *Marijuana Enforcement*

In the context of federal marijuana law enforcement, it seems clear that the Obama administration's guidance to prosecutors regarding the allocation of scarce resources is nothing more than an exercise of prosecutorial discretion. Through these memos, the Obama Administration has not announced that it will no longer be prosecuting any marijuana conduct in the states or that the CSA is a nullity in those states. Rather, it has set forth criteria to help local federal prosecutors determine when they should and should not bring marijuana prosecutions.⁷⁹ The eight policy outcomes outlined by the administration to guide agency discretion⁸⁰—keeping marijuana distribution from being a front for the distribution of other drugs, keeping marijuana from the hands of children, making sure that it is

refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.").

⁷⁷ *Youngstown*, 343 U.S. at 588 ("The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.").

⁷⁸ The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C. at 6.

⁷⁹ See, e.g., John Ingold, 32 *Indicted in Massive Colorado Marijuana Trafficking Investigation*, DENV. POST (Mar. 23, 2015), <http://www.denverpost.com/2015/03/25/32-indicted-in-massive-colorado-marijuana-trafficking-investigation/>.

⁸⁰ Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding Marijuana Enforcement 1–2 (Aug. 29, 2013).

not trafficked from one state to another, and so on—are exactly the kinds of specific, fact-intensive criteria that prosecutors are used to evaluating in determining whether to initiate prosecutions. In fact, the Department of Justice continues to enforce the CSA against marijuana conduct in law reform states where that conduct also violates law.⁸¹

Perhaps more fundamentally, the Cole and Ogden Memos did not purport to—and do not operate to—make legal that which Congress, in its wisdom, has chosen to criminalize. Rather, they reiterate the fact that marijuana remains illegal throughout the country. This is not a distinction without a difference; the decision not to prosecute those in clear and unambiguous compliance with robust state laws regulating marijuana simply does not do the same work as legalizing that conduct. As has been well-documented,⁸² notwithstanding the federal government’s prosecutorial forbearance in those states creating robust marijuana regulations, the continuing marijuana prohibition has profound negative effects on both those who use marijuana and those who participate in the emerging marijuana industry. So, for example, for the consumer, there is the risk of losing one’s employment,⁸³ parental rights,⁸⁴ or eligibility for federal benefits.⁸⁵ For a business, the risks are less personal but no less substantial. For example, the federal prohibition on all marijuana activity means that marijuana businesses are unable to gain reliable access to banking services.⁸⁶ Federal legal protections are almost wholly unavailable to marijuana businesses: a federal bankruptcy court has held that marijuana businesses cannot benefit from federal bankruptcy protection because they come to the court with unclean hands;⁸⁷ intellectual property protections—

⁸¹ Heckler v. Chaney, 470 U.S. 821, 831 (1985) (finding that judicial oversight is particularly inappropriate where “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise”).

⁸² See, e.g., Chemerinsky et al., *supra* note 35, at 90–100.

⁸³ See Coats v. Dish Network, 303 P.3d 147 (Colo. App. 2013) (finding that a quadriplegic using medical marijuana for seizures could be fired for testing positive for marijuana, notwithstanding Colorado’s lawful off-duty conduct statute).

⁸⁴ See David Olinger, *Kansas Holds Children of Colorado Veteran Who Uses Medical Marijuana*, DENV. POST (Jan. 13, 2016), <http://www.denverpost.com/2016/01/13/kansas-holds-children-of-colorado-veteran-who-uses-medical-marijuana/>.

⁸⁵ See Memorandum from Sandra B. Henriquez, Assistant Sec’y for Pub. and Indian Hous., to all field offices and Pub. Hous. Agencies (PHAs), *Medical Marijuana Use in Public Housing and Housing Choice Voucher Programs 1* (Feb. 10, 2011) (requiring public housing authorities to “establish standards and lease provisions that prohibit admission . . . based on the illegal use of controlled substances, including state legalized medical marijuana”).

⁸⁶ Because banks are regulated federally, financial institutions are generally leery of doing business with those whose every act is a violation of federal law. As a result, marijuana remains largely a cash-only business, even as revenues in a state like Colorado approach \$1 billion annually.

⁸⁷ See, e.g., *In re Arenas*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) (“Possessing, growing, and dispensing marijuana and assisting others to do that are federal offenses. But like several other states, Colorado has legalized these acts and heavily regulates them, triggering a flourishing

principally trademark and copyright—will be either practically or legally impossible for marijuana businesses to obtain;⁸⁸ even finding a lawyer willing to represent a marijuana business in federal court may prove increasingly difficult.⁸⁹

All of these consequences are unaltered by the Obama administration's criminal enforcement memos. Although such memos provide some protection from enforcement, they provide no protections for those facing the ancillary consequences of marijuana use or commerce. Thus, it is simply incorrect to claim, as some have, that the effect of the Obama Administration's de-emphasis of marijuana law enforcement in some states has the effect of writing marijuana out of the Controlled Substances Act. Rather, the Administration has removed but one consequence of marijuana's continued prohibition—the threat of criminal or civil enforcement action. Marijuana possession, production, and sale all remain illegal, with significant potential consequences for those violating federal law, whether they are ever charged with a crime or not.

Furthermore, there has been little Congressional objection to the policy of limited enforcement of marijuana laws. Quite the contrary: rather than taking action to require the executive to enforce the laws more stringently, Congress has done almost exact the opposite. By passing the Rohrabacher-Farr amendment as part of the Omnibus Spending Bill of 2015, Congress prohibited the Justice Department from expending any funds to “prevent” twenty-four states “from implementing their own” medical marijuana laws.⁹⁰ While the exact meaning of

marijuana industry there. Can a debtor in the marijuana business obtain relief in the federal bankruptcy court? No.”).

⁸⁸ See Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 220 (2016) (“Because the bulk of IP law is federal, the federal marijuana prohibition means that much of IP law is unavailable or effectively inaccessible to the marijuana industry. Worse yet, marijuana businesses are denied the regulatory benefits of IP law while remaining subject to its burdens.”).

⁸⁹ See, e.g., *id.* at 236 (“[I]t is often difficult for marijuana business to access law and lawyers in the same way that other businesses do. This is because so long as marijuana remains illegal under federal law, there is a risk that those—such as lawyers—who facilitate the manufacture or sale of marijuana could be indicted as aiders and abettors or co-conspirators in violation of the CSA.” (footnotes omitted)). See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 886 (2013) (“[T]he CSA explicitly provides for the punishment of accomplices and coconspirators. As we shall see, these doctrines have significant implications for persons—landlords, wholesale suppliers, employees, and particularly lawyers—who do business with those running marijuana businesses. As marijuana—both medical and recreational—becomes a bigger industry, more and more people will find themselves facing the question of where the line between permissible and impermissible conduct lies.” (citations omitted)).

⁹⁰ Consolidated and Further Continuing Appropriations Act, Pub L. No. 113-235, § 538, 128 Stat. 2130 (2015) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”).

this enactment is the subject of current litigation,⁹¹ it seems clear that majorities of both houses of Congress prefer less marijuana law enforcement in the states to more. Congress's tacit endorsement of the Second Cole Memo makes it considerably harder to view that document as a usurpation of Congress' authority.

B. Immigration Law

In the immigration context, the exercise of prosecutorial discretion is more nuanced. In large part, this follows from the fact that it is unclear what the exact legal consequences of deferred action are.⁹² Obviously, deferred enforcement action is a species of prosecutorial discretion of the sort every law enforcement agency, including U.S. Immigration and Customs Enforcement, is obligated to exercise every day.⁹³ In other ways, however, deferred action looks less like a decision not to prosecute and more like an adjudication. Deferred action provides far greater predictability for those to whom it is granted than do the Justice Department's marijuana memos to marijuana users and businesspeople. For example, one eligible for deferred action is entitled to apply for and receive a formal notice of deferred action.⁹⁴ Unlike in the marijuana context—where there is no application process, no individual determination of compliance with state law, no official evaluation of the robustness of any state's marijuana regulations, and

⁹¹ See, e.g., *United States v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039 (N.D. Cal. 2015) (finding that the language of § 538 precludes the government from bringing criminal enforcement actions against any individual within the named states).

⁹² Another potential problem noted by the Fifth Circuit was the question of whether Deferred Action for Parents of Americans and Lawful Permanent Residents requires case-by-case adjudication or set a blanket policy for DHS to comply with. See *Texas v. United States*, 809 F.3d 134, 165 (5th Cir. 2015) (“[T]he government has not rebutted the strong presumption of reviewability with clear and convincing evidence that, *inter alia*, it is making case-by-case decisions here.”). But see DAPA Memo, *supra* note 47, at 5 (“Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action *will be determined on a case-by-case basis*.” (emphasis added)).

⁹³ See Brianne Gorod, *Symposium: Why It's Time to Unfreeze DAPA*, SCOTUSBLOG (Feb. 9, 2016, 1:06 PM), <http://www.scotusblog.com/2016/02/symposium-why-its-time-to-unfreeze-dapa/> (“[T]he Obama administration was simply doing what presidents of both parties have done for decades—exercising the substantial discretion Congress has conferred on the executive branch to make determinations about how best to enforce the nation's immigration laws. Moreover, the tool the administration was using to implement those priorities—deferred action on removal—is one that has been consistently employed by administrations of both parties and repeatedly endorsed by Congress on a bipartisan basis.”).

⁹⁴ See, e.g., Anil Kalhan, *DAPA, “Lawful Presence,” and the Illusion of a Problem*, DORF ON LAW (Feb. 12, 2016), <http://www.dorfonlaw.org/2016/02/dapa-unlawful-presence-illusion.html> (Deferred action “memorializes and provides notification, on a form . . . that agency officials have deprioritized the individual's removal and do not have any present intention to prioritize enforcement action against them.”).

nothing to memorialize a governmental decision to defer action—on receiving deferred action, an individual gets a piece of paper memorializing the government’s decision not to seek their removal from the United States for two years.

However, it is important to understand exactly what those who receive this notice of deferred action are actually entitled to. For example, in the *Texas v. U.S.*⁹⁵ litigation, the Fifth Circuit emphasized the fact that significant benefits accrue to those who receive written notice of deferred immigration action. While those in the United States illegally are not eligible to receive federal benefits, the Court wrote, those granted deferred removal under Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) become entitled to certain benefits not available to others present in the United States without authorization.⁹⁶ Those receiving deferred removal can become eligible to receive a Social Security card and may apply for work authorization as well.⁹⁷ This fact was clearly influential in the court’s conclusion that the federal government was exceeding its authority in the use of deferred action.⁹⁸ That is, if Congress has determined that certain individuals cannot lawfully be present in the United States, it is not for the agency, through its exercise of discretion, to come to a different conclusion.⁹⁹

Similarly, Michael Kagan has argued that the *Texas* plaintiffs have a plausible argument that DAPA and DACA create new rights and have the effect of changing federal law.¹⁰⁰ The argument, like the conclusion of the Fifth Circuit, hinges on two problematic words in the DAPA memo. In disclaiming any intention to change existing law through the use of deferred action, the Director of Homeland Security wrote: “Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an

⁹⁵ 787 F.3d 733 (5th Cir. 2015).

⁹⁶ *See id.* at 744 (quoting Brief for the United States at 48–49).

⁹⁷ *See, e.g.*, DAPA Memo, *supra* note 47, at 4.

⁹⁸ *Texas v. United States*, 809 F.3d 134, 167 (5th Cir. 2015) (“Regardless of whether the Secretary has the authority to offer lawful presence and employment authorization in exchange for participation in DAPA, his doing so is not shielded from judicial review as an act of prosecutorial discretion.”).

⁹⁹ Robert J. Delahunty and John C. Yoo have argued that this is exactly what DHS has done, achieving through an exercise of prosecutorial discretion what it could not through the legislative process. *See Delahunty & Yoo, supra* note 13, at 783–84 (“The Obama Administration has claimed ‘prosecutorial discretion’ most aggressively in the area of immigration. The most notable example of this trend was its June 15, 2012 decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States. By taking this step, the Obama Administration effectively wrote into law ‘the DREAM Act,’ whose passage had failed numerous times.” (footnotes omitted)).

¹⁰⁰ Michael Kagan, *DAPA’s Unlawful Presence Problem*, by Michael Kagan, YALE J. ON REG.: NOTICE & COMMENT (Feb. 6, 2016), <http://www.yalejreg.com/blog/dapa-s-unlawful-presence-problem-by-michael-kagan>.

individual is permitted to be *lawfully present* in the United States.”¹⁰¹ In attempting to minimize the memo’s impact, however, the Director perhaps overreached. For it is the Immigration and Nationality Act and Congress, not the actions of the executive, that determine who is lawfully permitted to be in the United States and who is not.¹⁰²

To say that deferred action allows someone to be lawfully present in the United States appears to be a misstatement of the effect of DAPA (and DACA and the DHS’s consistent policy of deferred action). As Professor Anil Kalhan has written:

Whether under those longstanding agency practices or the memos establishing DACA or DAPA, deferred action provides its recipients with nonbinding, revocable notification that officials have deprioritized enforcement action against them—but by itself does nothing more than that. Indeed, deferred action itself confers *no additional benefits of any kind*. It simply memorializes and provides notification . . . that agency officials have deprioritized the individual’s removal and do not have any present intention to prioritize enforcement action against them.¹⁰³

For this reason, I think Professor Kagan’s proposed solution to this conundrum is a sensible one. He suggests either that the DAPA Memo be reissued without reference to lawful presence in the United States¹⁰⁴ or that the Solicitor General offer the Court the alternative of striking down DAPA to the extent it purports to change the legal status of any particular applicant. It seems fairly clear that, without this offending language, DAPA begins to look more and more like the Cole Memo—just another exercise of unreviewable prosecutorial discretion.

VI. CONCLUSION

My expertise is in marijuana law and policy, not immigration law. But, I have been struck by the parallels between the way the Obama Administration has deprioritized marijuana law enforcement and the removal of certain undocumented migrants. As I hope I have shown, I believe that both actions (perhaps with some

¹⁰¹ DAPA Memo, *supra* note 47, at 2 (emphasis added).

¹⁰² See Kagan, *supra* note 100 (“[D]eferred action is a well-established form of prosecutorial discretion in immigration enforcement that the Court has long accepted. But DAPA may go a step too far by declaring that beneficiaries of prosecutorial discretion should be considered ‘lawfully present’ in the United States even though they are removable according to the Immigration and Nationality Act (INA). Texas’ strongest arguments against DAPA are about this lawful presence provision, not about deferred action.”).

¹⁰³ Kalhan, *supra* note 94.

¹⁰⁴ Kagan, *supra* note 100 (“One tempting option would be to simply reissue the policy, removing the lawful presence bit.”).

tinkering on the immigration side) are proper uses of the Executive's duty to see that the laws of the United States are faithfully executed. In a world where full prosecution is neither possible nor desirable, the transparency delivered by prosecutorial guidance should be encouraged rather than condemned.