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2018

# Immigration Enforcement and the Future of Discretion

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## Recommended Citation

Shoba Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 *Roger Williams U. L. Rev.* 353 (2018).

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# Immigration Enforcement and the Future of Discretion

## **Cover Page Footnote**

The article is based on a paper delivered at the 2017 Roger Williams University Law Review Symposium:  
Bans, Borders and New Americans: Immigration Law In the Trump Administration

# Immigration Enforcement and the Future of Discretion

Shoba Sivaprasad Wadhia\*

## I. IMMIGRATION 101

Immigration law is complex and is governed by several sources. The immigration statute is called the Immigration and Nationality Act (INA).<sup>1</sup> The INA was passed by Congress in 1952 and has been compared as second in complexity only to the United States tax code.<sup>2</sup> There are sections in the Act that describe how a person might qualify for admission on a temporary or permanent basis; sections about why a person might face deportation from the United States; and parts about defenses to deportation, like asylum. Many forms of immigration benefits and relief involve both rigid statutory criteria and the exercise of discretion. Decisions about whether a person should be admitted

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\* Samuel Weiss Faculty Scholar, Clinical Professor of Law and Founding Director of the Center for Immigrants' Rights Clinic at Penn State Law in University Park, Pennsylvania State University. This Article is based on remarks delivered at the Roger Williams University Law Review Symposium: *Bans, Borders and New Americans: Immigration Law in the Trump Administration*. Some ideas and excerpts contained in this Article have appeared in previous publications. See Shoba Sivaprasad Wadhia, *The Birth and Death of Deferred Action (and what the Future Holds)*, MEDIUM (June 16, 2017), <https://medium.com/@shobawadhia/the-birth-and-death-of-deferred-action-and-what-the-future-holds-168d138eb088>; Shoba Sivaprasad Wadhia, *Trump's Immigration Executive Orders: The Demise of Due Process and Discretion*, CONVERSATION (Mar. 6, 2017, 10:14 PM), <https://theconversation.com/trumps-immigration-executive-orders-the-demise-of-due-process-and-discretion-73948>.

1. 8 U.S.C. §§ 1101–1537 (2012).

2. *Chan v. Reno*, No. 95 Civ. 2586 (RWS), 1997 U.S. Dist. LEXIS 3016, at \*5 (S.D.N.Y. Mar. 14, 1997).

to, expelled from or granted relief in the United States are made primarily by employees of the Department of Homeland Security (DHS), Department of State (DOS) or Department of Justice (DOJ).

The details of the immigration law and the agencies responsible for carrying them out are indeed complex—but the humanitarian dimension is also significant. Said Justice Anthony Kennedy in *Arizona v. United States*, “[d]iscretion in the enforcement of immigration law embraces immediate human concern . . . [t]he equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.”<sup>3</sup>

## II. PROSECUTORIAL DISCRETION

One powerful form of discretion in immigration law is called “prosecutorial discretion.”<sup>4</sup> When prosecutorial discretion is exercised favorably, DHS refrains from bringing enforcement actions against a person.<sup>5</sup> There are more than one dozen types of prosecutorial discretion in immigration law, but in all cases the result is the same: a temporary reprieve—not legal status, but

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3. *Arizona v. United States*, 567 U.S. 387, 396 (2012).

4. I have written previously on the subject of prosecutorial discretion within the immigration context. *See, e.g.*, SHOBA SIVAPRASAD WADHIA, THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW (Am. Immigr. Couns. 2011) [hereinafter THE MORTON MEMO]; SHOBA SIVAPRASAD WADHIA, READING THE MORTON MEMO: FEDERAL PRIORITIES AND PROSECUTORIAL DISCRETION (Am. Immigr. Couns. 2010); Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and U.S. v. Texas*, 36 IMMGR. & NAT'LITY L. REV. 94 (2015); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015) [hereinafter *The History of Prosecutorial Discretion*]; Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39 (2013); Shoba Sivaprasad Wadhia, *Immigration Remarks for the 10th Annual Wiley A. Branton Symposium*, 57 HOW. L.J. 931 (2014) [hereinafter *Immigration Remarks*]; Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) [hereinafter *The Role of Prosecutorial Discretion*].

5. *Immigration Remarks*, *supra* note 4, at 931–32.

rather legal limbo, what I sometimes call immigration “purgatory.”<sup>6</sup> There are three important reasons prosecutorial discretion exists within the immigration context.

First, prosecutorial discretion exists for economic reasons: DHS has the funds to deport less than four percent of the roughly 11.2 million unauthorized immigrants living in the United States, roughly four-hundred thousand individuals, so choices have to be made by the agency about who to target for removal and who to place on the backburner.<sup>7</sup> This is similar to the way prosecutorial discretion operates in the criminal system—prosecutors do not bring charges against every person who fishes without a license, for example, because there are limited prosecutorial resources.<sup>8</sup>

Second, prosecutorial discretion also has a humanitarian dimension: it allows law enforcement to consider a person’s equities when deciding whether to bring action against them. In the immigration context, DHS may choose to exercise discretion in cases involving those who have lived in the United States for many years or who bear other compelling factors.<sup>9</sup> Inevitably, the pool of people who bear these factors rises with each year that Congress fails to enact a legislative solution to our outdated immigration system. Congressional inaction is a third reason we have prosecutorial discretion: greater demands are placed on the Executive Branch when Congress fails to act.<sup>10</sup>

One question that has received much attention pertains to the legality of prosecutorial discretion. The legal foundation for prosecutorial discretion is found in multiple sources. First, at the heart of the Take Care clause of the United States Constitution is the President’s responsibility to take care that the laws of the United States are faithfully executed.<sup>11</sup> Courts have interpreted

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6. *The History of Prosecutorial Discretion*, *supra* note 4, at 1286.

7. THE MORTON MEMO, *supra* note 4, at 4.

8. SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 36–37 (2015).

9. *The Role of Prosecutorial Discretion*, *supra* note 4, at 244–45.

10. See Elahe Izadi, *The Strategy to Hold Off on Deportation Changes Wins Out*, NAT’L J. (May 28, 2014), <https://www.nationaljournal.com/s/56996> (describing criticisms of the Obama Administration’s failure to act on immigration reform in the wake of Congress’s failure to pass immigration reform measures and the DREAM Act).

11. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1840 (2015).

this duty to include the exercise of prosecutorial discretion.<sup>12</sup>

Additionally, Congress has delegated the responsibility of setting priorities in immigration enforcement to DHS, and has further charged it with administering and enforcing the immigration laws in section 103 of the INA.<sup>13</sup> There are also regulations explaining how the immigration statute should be read: one was published more than twenty years ago in 1981 and explicitly identifies “deferred action” as one basis for work authorization.<sup>14</sup> These authorities were most recently explained by 105 law professors in an open letter to President Trump on August 14, 2017 to defend the legality of Deferred Action for Childhood Arrivals (DACA).<sup>15</sup> Finally, the United States Supreme Court has recognized that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials . . . [f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”<sup>16</sup>

### III. FEDERAL IMMIGRATION ENFORCEMENT AND DISCRETION UNDER THE TRUMP ADMINISTRATION

In January 2017, President Donald Trump signed three executive orders on immigration.<sup>17</sup> Two orders pertaining to immigration enforcement were signed on January 25, 2017.<sup>18</sup>

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12. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“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.’”); see also Memorandum from Sam Bernsen, Gen. Counsel, Immigration and Naturalization Serv., to Comm’r, Immigration and Naturalization Serv. 2–3 (July 15, 1976), <http://www.ice.gov/doclib/foia/prosecutorialdiscretion/service-exercise-pd.pdf>.

13. 8 U.S.C. § 1103 (2012).

14. 8 C.F.R. § 274a.12(c)(14) (2017).

15. Letter from Law Professors to Donald J. Trump, President of the U.S. 1–2 (Aug. 14, 2017), <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/LawProfLetterDACAFinal8.13.pdf>.

16. *Arizona v. United States*, 567 U.S. 387, 396 (2012).

17. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

18. Exec. Order No. 13767, *supra* note 17; Exec. Order No. 13768, *supra* note 17.

These orders were followed by implementing guidelines released by DHS in February 2017.<sup>19</sup> These orders detail new immigration enforcement priorities. First, they list specific parts of the 1952 immigration statute that target those eligible for deportation for reasons related to crimes or misrepresentation.<sup>20</sup> They also create a priority list of targeted deportable immigrants who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.<sup>21</sup>

DHS goes on to suggest that any person without documents might be a priority. It repeatedly states: “[a]ll of those in violation of the immigration laws may be subject to immigration arrest, detention and, if found removable by final order, removal from the United States.”<sup>22</sup> Arguably, an undocumented parent living in

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19. Memoranda from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs and Border Protection 2 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

20. Exec. Order. 13768, *supra* note 17.

21. *Id.*

22. U.S. DEP’T OF HOMELAND SEC., Q&A: DHS IMPLEMENTATION OF THE EXECUTIVE ORDER ON ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES (2017), <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states>.

the United States for several years and taking care of children could be targeted as a person “in violation of the immigration laws,” whereas before, this same person would have more clearly been eligible for prosecutorial discretion and not been labeled as a priority.<sup>23</sup> Similarly, a student who overstays her visa and then jaywalks may be treated as an enforcement priority if jaywalking constitutes a chargeable offense. Finally, the government’s choice to label those with final orders of removal as “priorities” creates a situation where those who have resided in the United States for lengthy periods of time pursuant to a grant of prosecutorial discretion can now be taken into custody and deported without regard to individual equities.<sup>24</sup> The cumulative effect is the fear that everyone is a priority.

Also pursuant to the same guidance, DHS rescinded most documents that previously offered guidance on the exercise of prosecutorial discretion in immigration, including, but not limited to, the 2014 Johnson Priorities Memo (named after the former DHS Secretary Jeh Johnson).<sup>25</sup> The Johnson Priorities memo was important because it provided a framework for determining who is a priority for immigration enforcement and articulated the factors that should be considered when making decisions about whether to deport someone.<sup>26</sup> For example, the now rescinded Johnson Memo instructed DHS to consider the amount of time spent living in the United States and “compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative.”<sup>27</sup> Left unknown is the status of earlier guidance documents on prosecutorial discretion in immigration. For example, a guidance document published by former Immigration and Customs Enforcement (ICE) head, John Morton, established a prosecutorial discretion policy for witnesses, victims and plaintiffs to crimes.<sup>28</sup> The policy stated in part: “Absent special

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23. *Id.*

24. *Id.*

25. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).[https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

26. See *id.* at 6.

27. *Id.*

28. See Memorandum from John Morton, Dir., U.S. Dep’t of Homeland



circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”<sup>29</sup> Similarly, former Immigration and Naturalization Service (INS) Commissioner, Doris Meissner, issued a comprehensive policy on prosecutorial discretion in 2000, which required officers to exercise discretion judiciously at every stage of the enforcement process.<sup>30</sup> As of this writing, the Trump administration has not indicated whether the Victims Memo, Meissner Memo or other earlier documents on prosecutorial discretion are still in effect.

In a separate memorandum dated June 15, 2017, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) was formally rescinded by the former Secretary of Homeland Security, now White House Chief of Staff, John Kelly.<sup>31</sup> While DAPA was never operational because of litigation that blocked the program,<sup>32</sup> the message that rescission of the program sends to affected parents, the majority of whom have lived in the United States for more than a decade, is that they are unwelcome at best and are priorities for removal at worst. DAPA would have protected an estimated 4 million parents.<sup>33</sup> By contrast, about 500,000 undocumented parents were deported between 2009 and 2013.<sup>34</sup>

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Sec., to All Field Office Dirs. (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

29. *Id.* at 1.

30. See Memorandum from Doris Meissner, Comm’r, Immigration and Naturalization Serv., to Reg’l Dirs. 1 (Nov. 17, 2000), <https://www.shusterman.com/pdf/prosecutorialdiscretionimmigration1100> [hereinafter Meissner Memo].

31. Memorandum from John F. Kelly, Sec’y of U.S. Dep’t of Homeland Sec., to Dirs. (June 15, 2017) (on file with the United States Department of Homeland Security).

32. See *U.S. v. Texas*, 136 S. Ct. 2271 (2016) (per curiam); see also Shoba Sivaprasad Wadhia, *Symposium: A meditation on history, law, and loss*, SCOTUSBLOG (June 23, 2016, 2:08 PM), <http://www.scotusblog.com/2016/06/symposium-a-meditation-on-history-law-and-loss/>.

33. Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA’s Potential Effects on Families and Children*, MIGRATION POLICY INST. (Feb. 2016), <https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families>.

34. Cecilia Menjivar & Andrea Gómez Cervantes, *The effects of parental undocumented status on families and children*, AM. PSYCHOL. ASS’N (Nov. 2016), <http://www.apa.org/pi/families/resources/newsletter/2016/11/>

Despite sweeping changes to the enforcement and discretion, DHS has left intact a policy that generally discourages immigration enforcement actions in “sensitive locations.” Sensitive locations include but are not limited to schools, hospitals, places of worship, and bus stops.<sup>35</sup> The decision by ICE to *not* treat courthouses as sensitive locations (and more recently to adopt a specific policy for courthouse arrests) has been a source of criticism. As described by CrImmigration scholar César Cuauhtémoc García Hernández,

This is a deeply worrisome trend because arrests at courthouses don’t just derail the lives of the unsuspecting people who are detained, they threaten the very operation of our judicial system. Such arrests scare people away from the courts, keeping them, for example, from testifying at trials or seeking orders of protection.<sup>36</sup>

#### IV. DACA UNDER THE CURRENT ADMINISTRATION

DACA, as announced in June 2012 and for the following five years, enabled the following individuals to apply for a form of prosecutorial discretion known as “deferred action”—those who:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching [their] 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making [their] request for consideration of deferred action with USCIS;

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undocumented-status.aspx.

35. *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited Apr. 3, 2018).

36. César Cuauhtémoc García Hernández, *ICE’s Courthouse Arrests Undercut Democracy*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/opinion/immigration-ice-courthouse-trump.html>.

“Crimmigration” describes the “criminalization of immigration law.” Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

5. Had no lawful status on June 15, 2012;
6. [Were] currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and [did] not otherwise pose a threat to national security or public safety.<sup>37</sup>

The DACA program served as a gateway for nearly 800,000 immigrant youth, the vast majority of whom are working or going to school in the United States.<sup>38</sup> The contributions of DACA recipients to the United States economic and educational space have been extraordinary.<sup>39</sup> However, on September 5, 2017, and despite the program's support by 105 law professors,<sup>40</sup> leading CEOs,<sup>41</sup> university presidents,<sup>42</sup> and several members of Congress from both parties,<sup>43</sup> President Trump announced that he

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37. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Oct. 6, 2017), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>.

38. U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF FORM I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS FISCAL YEAR 2012-2017 (2017).

39. Tom K. Wong et al., *New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes*, CTR. FOR AM. PROGRESS (Oct. 18, 2016, 12:00 PM), <https://www.americanprogress.org/issues/immigration/news/2016/10/18/146290/new-study-of-daca-beneficiaries-shows-positive-economic-and-educational-outcomes/> ("DACA recipients are making significant contributions to the economy by buying cars and first homes, which translate into more revenue for states . . . Some are even using their entrepreneurial talents to help create new jobs and further spur economic growth by starting their own businesses.").

40. Letter from Law Professors to Donald J. Trump, *supra* note 15.

41. Letter from Leaders of American Industry to Congressional Leaders (Sept. 20, 2017), <https://dreamers.fwd.us/business-leaders>.

42. Isabel Fattal, *How Higher-Education Leaders Are Fighting for DACA*, THE ATLANTIC (Sept. 1, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-higher-education-leaders-are-fighting-for-daca/538740/>.

43. See Kathryn Watson, *Congress reacts to Trump ending DACA*, CBS

would end DACA.<sup>44</sup>

The journey of how DACA ended is as troubling as the impact that its termination has on DACA individuals, their families, and our country. As a campaign promise, the President indicated that he would withdraw DACA.<sup>45</sup> For the first six months of his administration, the President sent mixed messages to the public about the fate of DACA, praising DACA-mented students one day and deporting one the next.<sup>46</sup> On June 29, 2017, a group of conservative state Attorneys General (led by Texas) wrote a letter threatening to sue the administration if DACA was not terminated by September 5th.<sup>47</sup> On September 5, 2017, United States Attorney General Jeffrey Sessions came to the stage for a press conference to announce the end of DACA.<sup>48</sup> During this press conference, he called DACA recipients “illegal aliens,” referred to DACA as unlawful and unconstitutional, and considered the rescission of the program to be in the Nation’s best interest.<sup>49</sup> He took no questions. His speech was legally dishonest and dehumanizing.

By the terms of the rescission, any person with DACA status will retain their deferred action and work authorization until it expires, unless it is terminated or revoked for a specific reason.<sup>50</sup>

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NEWS (Sept. 5, 2017, 1:01 PM), <https://www.cbsnews.com/news/congress-reacts-to-trump-administration-rescinding-daca/>.

44. See Press Release, U.S. Dep’t of Homeland Sec., Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca>.

45. See *Full Text: Donald Trump immigration speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614>.

46. See Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017), <http://time.com/4927100/donald-trump-daca-past-statements/>.

47. Letter from State Attys. Gen. to Jeff Sessions, U.S. Atty. Gen. (June 29, 2017), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-10-state-coalition-urging-trump-administration-to-phase-out>.

48. *Attorney General Sessions Delivers Remarks on DACA: Remarks as prepared for delivery*, U.S. DEP’T JUST. (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

49. *Id.*

50. Elaine C. Duke, *Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA)*, DEP’T HOMELAND SEC. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

Renewal requests were limited to those whose DACA authorization expired on or before March 5, 2018, but the window for renewal requests closed on October 5, 2017.<sup>51</sup> According to the government, more than 30,000 qualifying individuals may not have renewed their DACA.<sup>52</sup> Moreover, a delay in transmission of some 4,000 renewal applications from the United States post office box where DACA renewal requests are deposited and marked as timely by the United States Citizenship and Immigration Services (USCIS) resulted in rejected applications and an initial portrayal of the problem as stemming from DACA-mented youth rather than government agencies.<sup>53</sup> Only after the media and immigration advocates stepped in to highlight the illogic of penalizing those who timely filed renewal applications did USCIS change its mind and determine that such applications would be considered as timely.<sup>54</sup> Significantly, thousands of people have lost DACA status and continue to do so every day.<sup>55</sup> DACA-mented youth continue to live daily with uncertainty. In one story that took place hours from my own home, 27-year old Osman Aroche Enriquez was arrested and turned over to ICE by Pennsylvania State Police and then placed into custody at the York County Prison.<sup>56</sup> Osman is a graduate of Lampeter-

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51. *Id.*

52. See Esther Yu Hsi Lee, *On DACA renewal deadline day, tens of thousands of DREAMers lost deportation relief*, THINKPROGRESS (Oct. 5, 2017, 10:07 AM), <https://thinkprogress.org/42000-daca-recipients-miss-deadline-7b203d4772cf/>.

53. See Dara Lind, *The Trump administration rejected 4,000 "late" DACA renewals. Some were sitting in its mailbox at the deadline.*, VOX (Nov. 16, 2017, 10:13 AM), <https://www.vox.com/policy-and-politics/2017/11/15/16650400/daca-renewal-deadline-rejected-lockbox-uscis>.

54. See Tal Kopan, *DHS reverses course on some rejected DACA renewals*, CNN (Nov. 16, 2017, 1:39 PM), <http://www.cnn.com/2017/11/16/politics/daca-renewals-reversal/index.html>; see also Liz Robbins, *Post Office Fails to Deliver on Time, and DACA Applications Get Rejected*, N.Y. TIMES (Nov. 10, 2017), [https://www.nytimes.com/2017/11/10/nyregion/post-office-mail-delays-daca-applications.html?\\_r=0](https://www.nytimes.com/2017/11/10/nyregion/post-office-mail-delays-daca-applications.html?_r=0).

55. Tom Jawetz & Nicole Prchal Svajlenka, *Thousands of DACA Recipients Are Already Losing Their Protection From Deportation*, CTR. FOR AM. PROGRESS (Nov. 9, 2017, 6:00 AM), <https://www.americanprogress.org/issues/immigration/news/2017/11/09/442502/thousands-daca-recipients-already-losing-protection-deportation/>.

56. Andrew Forgotch, *Lancaster County man detained while waiting for DACA application*, ABC 27 NEWS (Dec. 14, 2017, 7:51 PM), <http://abc27.com/2017/12/14/lancaster-county-man-detained-while-waiting-for-daca->

Strasburg High School, received DACA protection earlier, and filed a renewal application to USCIS on time, but was still vulnerable to immigration enforcement.<sup>57</sup>

In January, a federal court in California found that the government's decision to end DACA was based on a mistake of law and as a result ordered USCIS to reinstate the policy on a limited basis.<sup>58</sup> A similar ruling was issued by a federal court in New York in February 2018.<sup>59</sup> In the latter case, I filed a declaration discussing the legal history of deferred action and unprecedented nature of DACA's end.<sup>60</sup> As the DACA rescission works its way through the courts and in the legislature (where there have been numerous attempts to pass a legislation to protect DACA recipients and similarly situated individuals to provide durable status),<sup>61</sup> one fact remains clear: the administration decision to end DACA has instilled uncertainty and fear for thousands of DACA recipients and their families. On March 7, 2018, Acting Press Secretary Tyler Q. Houlton for DHS issued a memorandum affirming that DACA recipients will not be targeted for immigration enforcement as a general policy.<sup>62</sup> However, this

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application/.

57. Tim Stuhldreher, *ICE detains Lancaster man whose DACA protection lapsed after Post Office mixup*, LANCASTER ONLINE (Dec. 13, 2017), [http://lanasteronline.com/news/local/ice-detains-lancaster-man-whose-daca-protection-lapsed-after-post/article\\_031060fa-e07c-11e7-a2ba-cf8b62ad6030.html](http://lanasteronline.com/news/local/ice-detains-lancaster-man-whose-daca-protection-lapsed-after-post/article_031060fa-e07c-11e7-a2ba-cf8b62ad6030.html).

58. *Litigation on DACA Rescission: What We Know*, PENN ST. L. CTR. FOR IMMIGRANTS' RTS. CLINIC, [https://pennstatelaw.psu.edu/sites/default/files/Litigation%20on%20DACA\\_What%20WeKnow\\_Update2.27.18.pdf](https://pennstatelaw.psu.edu/sites/default/files/Litigation%20on%20DACA_What%20WeKnow_Update2.27.18.pdf) (last updated Feb. 27, 2018) (citing *Regents of Univ. of Cal. v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018)).

59. *Id.* (citing *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018)).

60. Declaration of Shoba Sivaprasad Wadhia, *Batalla Vidal*, 279 F. Supp. 3d 401 (No. 97-1, Exhibit 1), *available at* [https://docs.wixstatic.com/ugd/6e1c09\\_619f37308a3a4263bd5a22a8e00f2bbe.pdf](https://docs.wixstatic.com/ugd/6e1c09_619f37308a3a4263bd5a22a8e00f2bbe.pdf).

61. *See, e.g., The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGRATION COUNCIL (Sept. 6, 2017), <https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers>.

62. Press Release, U.S. Dep't of Homeland Sec., Acting Press Secretary Tyler Q. Houlton Statement on Deferred Action for Childhood Arrivals (Mar. 7, 2018), <https://www.dhs.gov/news/2018/03/07/acting-press-secretary-tyler-q-houlton-statement-deferred-action-childhood-arrivals>.

policy provides little comfort in the wake of DACA's demise and the stories of those DACA recipients who have already been targets of enforcement.

#### V. THE FUTURE OF DISCRETION

The future of discretion in immigration is uncertain. Despite major changes to enforcement, guidance from DHS suggests that individual prosecutorial discretion may be exercised on a case-by-case basis.<sup>63</sup> Even without this guidance, prosecutorial discretion is in many ways inevitable—the government simply lacks the resources to carry out enforcement against every person who may be removable from the United States. However, the way prosecutorial discretion is exercised matters. One concern is that the administration will ignore its own policies such as individual prosecutorial discretion and avoiding enforcement at sensitive locations. Another concern is that instead of using priorities to guide enforcement, DHS will arbitrarily enforce the law against individuals and families who happen to be in the wrong place at the wrong time or other low-hanging fruit. Haphazard enforcement can lead to unintended or unlawful consequences, such as the separation of families and enforcement against abuses of discretion.<sup>64</sup>

Discretion was abused in the case of Rosa Maria Hernandez, a ten-year-old girl with cerebral palsy, who was stopped in an ambulance on the way to a hospital for emergency gallbladder surgery.<sup>65</sup> Hernandez has lived in the United States since she was four months old and has been cared for primarily by her mother.<sup>66</sup>

Discretion was abused when ICE targeted Fatiha Elgharib, who has lived in Ohio for more than two decades, serves as primary caregiver to a United States citizen child suffering from

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63. Memoranda from John Kelly to Kevin McAleenan, *supra* note 19, at 4.

64. See Dean DeChiaro, 'Open Season' on Immigrants as Discretion Fades, ROLL CALL (Dec. 11, 2017, 5:04 AM), <https://www.rollcall.com/news/politics/open-season-on-immigrants>.

65. Shoba Sivaprasad Wadhia, *How Discretion Failed One 10-Year-Old Girl and What the Future Holds*, IMMIGR. IMPACT (Oct. 30, 2017), <http://immigrationimpact.com/2017/10/30/rosa-maria-hernandez-immigration-enforcement/>.

66. See DeChiaro, *supra* note 64.

Down Syndrome, and faces imminent deportation on November 27.<sup>67</sup> “Fatiha became a target of immigration following her fight and support of her husband during the course of NSEERS—a Muslim registration program enacted after the attacks of 9/11.”<sup>68</sup> Fatiha’s story highlights the ongoing residual impact of NSEERS and raises important questions about the legitimacy of using a now defunct and ill-conceived policy to generate new deportations. Deferred action data from 2016 reveals that most deferred action cases processed and granted were for medical reasons.<sup>69</sup> Having studied thousands of deferred action cases throughout my research, it is without question that someone like Fatiha, who is herself a long-time resident without a criminal history and caring for a United States citizen child with Down Syndrome, should be protected through formal relief, or in the alternative, a deferred action.<sup>70</sup> DHS has the authority and the responsibility to use discretion wisely and judiciously at every stage of the immigration enforcement process.

Another concern with the uncertain future of prosecutorial discretion in the immigration context is that the federal government will use tools like “enforcement actions”—what some coin as “raids”—to carry out its immigration enforcement. In September, federal authorities conducted a nationwide sweep spanning four days, taking in nearly 500 undocumented immigrants.<sup>71</sup> The largest number of arrests, 107, took place in

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67. *Case Summary: Fatiha Elgharib of Englewood, Ohio*, AM.’S VOICE (Nov. 16, 2017), <https://americasvoice.org/blog/fatiha-case-summary/>.

68. Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 692–94 (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2821905](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821905); Sarah H., *Is my story being erased?*, MEDIUM (Nov. 2, 2017), <https://www.ofa.us/news/my-story-erased/>; Shoba Sivaprasad Wadhia, *Shutting Down Special Registration*, MEDIUM (Dec. 11, 2016), <https://medium.com/@shobawadhia/shutting-down-special-registration-e40d25e9177b>; Shoba Sivaprasad Wadhia, *Special Registration, Deferred Action and Prosecutorial (In)Discretion*, MEDIUM (Nov. 20, 2017), <https://medium.com/@shobawadhia/special-registration-deferred-action-and-prosecutorial-in-discretion-able2adaec55>.

69. Shoba Sivaprasad Wadhia, *The Aftermath of U.S. v. Texas: Rediscovering Deferred Action*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 10, 2016), <http://yalejreg.com/nc/the-aftermath-of-united-states-v-texas-rediscovering-deferred-action-by-shoba-sivaprasad-wadhia/>.

70. See Capps et al., *supra* note 33.

71. Jeff Gammage & Aubrey Whelan, *Philly immigrants hit hard in nationwide ICE sweep*, INQUIRER (Sept. 29, 2017, 12:49 PM),



Philadelphia.<sup>72</sup> More than 100 Iraqis in Michigan and northern Ohio have also been targeted for deportation,<sup>73</sup> and, according to the ICE Enforcement and Removal Operations Report, 521 Somali immigrants were deported by the agency during the 2017 fiscal year<sup>74</sup>—a significant increase from the 198 deported in the previous year.<sup>75</sup> The choice by the Trump administration to target immigrants from countries with Muslim majority populations for deportation is consistent with related immigration policies announced in the last year to ban entry for nationals

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<http://www.philly.com/philly/news/pennsylvania/philadelphia/in-nation-wide-immigration-sweep-ice-arrests-107-in-philly-20170929.html>.

<sup>72</sup> *Id.*

<sup>73</sup> Lauren del Valle & Sonia Moghe, *Iraqi Christians in Michigan Fear Deportation*, CNN (June 16, 2017, 4:16 PM), <http://www.cnn.com/2017/06/16/us/aclu-files-against-ice-for-iraqi-nationals/index.html>. See Carlos Ballesteros, *Trump Wants to Deport Iraqi Christians—Even If It’s A Death Sentence*, NEWSWEEK (Dec. 6, 2017, 6:38 AM), <http://www.newsweek.com/trump-ice-deportations-christian-refugees-iraqi-726624> (“As part of President Donald Trump’s ongoing immigration crackdown, the United States wants to deport more than a thousand undocumented Christian Iraqis back to Iraq despite fears of being persecuted, tortured, and even killed for practicing their religion upon their return.”); Lukas Mikelionis, *US judge orders release of detained Iraqis waiting deportation over criminal convictions*, FOX NEWS (Jan. 3, 2018), <http://www.foxnews.com/politics/2018/01/03/us-judge-orders-release-detained-iraqis-waiting-deportation-over-criminal-convictions.html> (“Roughly 1,400 Iraqi immigrants, including hundreds already in custody, are facing deportations back to their native country.”).

<sup>74</sup> U.S. IMMIGR. & CUST. ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 15 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

<sup>75</sup> U.S. IMMIGR. & CUST. ENF’T, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 16 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>; see also Jacey Fortin, *U.S. Put 92 Somalis on a Deportation Flight, Then Brought Them Back*, N.Y. TIMES (Dec. 9, 2017), [https://www.nytimes.com/2017/12/09/us/somalia-deportation-flight.html?\\_r=0](https://www.nytimes.com/2017/12/09/us/somalia-deportation-flight.html?_r=0) (“It was an unexpected, 5,000-mile backtrack for the migrants, some of whom have lived in the United States for years, or even decades, while on a list for deportation because they had entered the country without proper documentation.”); Stephen Snyder, *Somalis faced ‘slave ship conditions’ on failed deportation flight*, USA TODAY (Dec. 18, 2017, 6:45 AM), <https://www.usatoday.com/story/news/world/2017/12/18/somalis-faced-slave-ship-conditions-failed-deportation-flight/960271001/> (“Ninety-two Somali immigrants set to be deported from the U.S. found themselves shackled at the hands and feet and kept aboard a plane for two days earlier this month . . . . The passengers say they were denied food and water and weren’t allowed to use the bathroom.”).

hailing from such countries.<sup>76</sup>

In the first year of the Trump Administration, America has witnessed detention and deportation of individuals who clearly warrant a favorable exercise of prosecutorial discretion.<sup>77</sup> What is at stake is an inhumane policy of immigration that separates families and a breakdown of discretion and the rule of law. It is crucial for the Administration to rethink its enforcement priorities and ensure that prosecutorial discretion is exercised fairly.

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76. *Immigration After the Election*, PENN ST. L., <https://pennstatelaw.psu.edu/immigration-after-election> (last visited Feb. 24, 2018).

77. *See, e.g.*, Karen Yi, *N.J. community “devastated” after 4 Indonesian men deported*, NJ.COM (June 8, 2017, 5:37 PM), [http://www.nj.com/union/index.ssf/2017/06/nj\\_indonesian\\_community\\_devastated\\_after\\_4\\_christi.html](http://www.nj.com/union/index.ssf/2017/06/nj_indonesian_community_devastated_after_4_christi.html).