1-1-2014

Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in Immigration Law

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SEEK JUSTICE, NOT JUST DEPORTATION: HOW TO IMPROVE PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

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Bipartisan politics has prevented meaningful reform to a system in dire need of solutions: immigration. Meanwhile, there are eleven million noncitizens with no valid immigration status that currently reside in the United States, and the Department of Homeland Security (DHS) does not have the necessary resources to effect their removal. DHS does have the authority through prosecutorial discretion to prioritize these cases and provide relief to individuals with compelling circumstances that warrant humanitarian consideration; nonetheless, DHS's exercise of prosecutorial discretion is underutilized, inconsistently applied, and lacks transparency. This Article suggests a remedy—that the immigration prosecutor's role should be redefined to be one more akin to a criminal prosecutors', with a concomitant obligation to seek justice. Others have argued that DHS prosecutorial discretion should be subject to notice-and-comment rulemaking and a presumption of judicial review. However, if prosecutorial discretion is to remain a solidly executive branch prerogative to counter legislation painted with too broad a brush (a defect of almost all legislation) and a mechanism to prioritize individuals for deportation, such as violent repeat criminal offenders, it should be shielded from rulemaking and a presumption of judicial review.

While immigration prosecutors are trained to support granting relief in cases where the evidence and law support a grant of relief, they do not see their role as separate from DHS agents and adjudicators, and thus do not see it as their role to seek justice. This Article contributes to the ongoing scholarship and dialogue, calling for heightened ethical obligations, guidelines, and principles for attorneys

∗ Professor of Law, University of New Hampshire School of Law. I am grateful for all the help and hard work of my research assistant Michael Strauss and the law students at Loyola of Los Angeles Law Review for their professionalism and editing. I would like to thank my brother Matt Corcoran and my colleagues Jessica Durkis-Stokes, Risa Evans, Keith Harrison, Elizabeth Keyes, Kimberly Kirkland, Mary Leary, Calvin Massey, and Amy Vorenberg, for their insights, comments, and thoughtful suggestions to this Article. And to Abraham and Cory, who inspire me daily, to fight to make this world a better place for all.

appearing before the Executive Office for Immigration Review (EOIR) to meet the challenges of practicing immigration law, while promoting efficiency and fairness in an effort to restore confidence and justice to a system subject to much condemnation.

TABLE OF CONTENTS

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded this class of deportable offenses and limited the authority of judges to alleviate the harsh consequence of deportation.[1]

I. INTRODUCTION

There are approximately eleven million noncitizens in the United States without valid immigration status.[2] Many of these individuals have compelling circumstances—including close family ties and the possibility of future immigration relief through comprehensive immigration reform—which warrant humanitarian consideration.[3] There are simply insufficient resources available to pursue every noncitizen for every immigration violation, especially for those whose removal is not a high priority to the Department of Homeland Security (DHS).[4] And even with congressional relief on the horizon for a subset of noncitizens currently residing in the United States without valid immigration status, there will continue to

1. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

2. Jeffery S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends 2010*, PEW RES. CENTER 1 (Feb. 1, 2011), http://www.pewhispanic.org/files/reports/133.pdf (estimating that as of March 2010, the unauthorized immigrant population in the United States is 11.2 million).

3. *See* MARC R. ROSENBLUM & RUTH WASEM, CONG. RESEARCH SERV., R43097, COMPREHENSIVE IMMIGRATION REFORM IN THE 113TH CONGRESS: MAJOR PROVISIONS IN SENATE PASSED S.744 (2013), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R43099_07102013.pdf (summarizing Senate bill, S. 744).

4. *See* Memorandum from Doris Meissner Comm'r Immigration & Naturalization Serv. on Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Memorandum from Doris Meissner] (instructing INS officers to consider a variety of factors when determining whether a case warrants a favorable exercise of discretion including immigration status, including, but not limited to: lawful permanent resident status, length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimately removing the alien, likelihood of achieving enforcement goal by other means, whether the alien is eligible or likely to become eligible for other relief, effect of action on future admissibility, honorable U.S. military service, community attention, and available resources).

be numerous other noncitizens who are deemed a low priority to deport by the United States.[5]

This Article does not wade into what immigration reform should look like; rather the focus is on how to fix the existing process to achieve more just results. DHS has the authority to decide who to deport, as well as who to let remain in the United States through the exercise of prosecutorial discretion;[6] however, this discretion, as applied, must be enhanced to achieve just results.[7] This Article contributes to the task of improving the use of prosecutorial discretion and professionalizing the role of Immigration and Custom Enforcement (ICE) trial attorneys—DHS's immigration prosecutor.

The Court in *Padilla v. Kentucky*[8] aptly noted the lack of judicial discretion or intervention to provide any ameliorative relief to immigrants.[9] Prosecutorial discretion may be the only mechanism outside of legislative action that appreciates an immigrant's individual circumstances and "alleviate[s] the harsh consequence of deportation."[10] Prosecutorial discretion is the executive branch's tool to prioritize cases when resources are limited, to target certain types of undesirable activity, and to minimize the effect of any law it deems to be overly broad.[11] Yet, there has been quite a bit of criticism levied against how and when DHS has utilized this executive branch power.

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5. *Side-by-Side Comparison of 2013 Senate Immigration Bill with 2006 and 2007 Senate Legislation*, MIGRATION POL'Y INST. ISSUE BRIEF NO. 4 (Apr. 2013).

6. *See infra* Part II.B.

7. *See infra* Part III.A.

8. 559 U.S. 356 (2010).

9. *Id.* at 363–64. For purposes of this Article, the term *immigrants* is used as a lay term to define any non-U.S. citizen/national who could also be defined as an *alien* pursuant to the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(3) (2012). Immigration law does draw a legal distinction, under INA § 1101(a)(15), between individuals who are immigrants and individuals who are nonimmigrants. Under this section, an *immigrant* that is a noncitizen coming to the United States with the intent to remain permanently in the United States. In contrast, also under this section, a *nonimmigrant* is a noncitizen coming to the United States on a temporary basis and intends to return to his or her home country. This distinction is irrelevant for purposes of this Article. I have consciously decided to not use the word *alien* to describe non-U.S. citizens/nationals because the word is derogatory. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 UNIV. OF MIAMI INTER-AM. L. REV. 263, 282–83 (1997) (arguing the use of the word "alien" to describe a noncitizen solidifies cultural and racial stereotypes).

10. *Padilla*, 559 U.S. at 360; *see* Memorandum from Doris Meissner, *supra* note 4, at 10.

11. *See* Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 354 (2014) (supporting the executive branch's use of enforcement policies to adapt general laws to individual cases, dynamic regulatory environments, and social and political change).

The criticism is divided generally into two camps. One set of criticism stems from the concern that the prosecutors at DHS—ICE trial attorneys[12]—do not use this discretionary power enough[13] in individual cases and that the exercise of the discretion is potentially arbitrary as well as lacking in transparency.[14] These advocates point to compelling cases in which ICE trial attorneys refused to consider the individual circumstances and the impact of removal on the individual's family and community.[15]

The second set of criticism questions the constitutionality of the executive branch's use of prosecutorial discretion to minimize the effects of what the executive branch deems to be bad law, particularly when DHS exercises its prosecutorial discretion authority to provide relief to large classes of immigrants.[16] This set of criticisms was reinvigorated in July 2012 by the president's directive, Deferred Action for Childhood Arrivals (DACA), which provides temporary protection from removal to a select group of immigrants who came to this country as children, but have no valid immigration status (the DREAMers[17]) and want to go to college or

12. In removal proceedings before an Immigration Judge and the Board of Immigration Appeals, an ICE trial attorney represents the government. ICE is a bureau within DHS. If either party appeals the case to a federal circuit court, typically an attorney from the Office of Immigration Litigation (OIL), a subdivision of the Civil Division at the U.S. Department of Justice, represents the government in the federal appeal.

13. *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. REV. 1, 28 (2012) [hereinafter *Sharing Secrets*] (citing the American Bar Association's testimony before the Senate Judiciary Committee on May 17, 2011, where the ABA stated "[p]riortization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system. Unfortunately, it has not been widely utilized in the immigration context." (citation omitted)).

14. *Id.* at 48–51 (discussing a lack of transparency in the decision-making process by immigration officials on the issue of whether or not to grant deferred action to an individual).

15. *See generally* Shoba Sivaprasad Wadia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 U. CONN. PUB. INT. L.J. 243, 244–45 (2010) [hereinafter *Role of Prosecutorial Discretion*] (arguing that prosecutorial discretion, as applied in the immigration context, should have guidelines subject to notice and comment due to the inconsistent application of discretion by DHS prosecutors).

16. *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 TEXAS L. REV. 781, 785 (2013) (maintaining that DACA violates the Take Care Clause).

17. This group of individuals are referred to as "DREAMers" because they are the beneficiaries of comprehensive immigration relief legislation that has been introduced multiple times in Congress entitled the "Development, Relief, and Education for Alien Minors Act" or the "DREAM Act." Since 2001, there have been at least twenty-five bills introduced that provide some path to legal residency for certain unauthorized immigrants who have completed qualified higher education or military service, and have requisite years of continuous presence in the United States. *See* Elisha Barron, *Recent Development, the Development Relief, and Education*

have served in the military.[18] Following the DACA announcement, criticism was abundant. Within the legal academy, scholars began to debate the constitutionality of the president's action,[19] while the U.S.

for Alien Minors (DREAM Act), 48 HARV. J. ON LEGIS. 623, 632–37 (2011) (summarizing the failed attempts to enact various versions of the DREAM Act from 2001–2011). While each DREAM Act bill differs slightly, most versions contemplate enabling certain unauthorized noncitizen students to obtain legal permanent resident (LPR) status through a two-stage process. First, the individual obtains a conditional status by demonstrating that he or she has at least five years of residence in the United States and a high school diploma, its equivalent, or admission into an institution of higher learning. Second, the individual, upon completion of two-year bachelor's degree or higher degree program, or two years of military service, can apply for legal permanent resident status. ADNORRA BRUNO, CONG. RESEARCH SERV., RL33863, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION 3 (2012), *available at* http://fas.org/sgp/crs/misc/RL33863.pdf. (summarizing California's attempt to provide in-state tuition to unauthorized immigrants residing in the state). In the 111th Congress (2009–2010) alone, the following DREAM Act bills were introduced: Development, Relief, and Education for Alien Minors (DREAM) Act, S. 729, 111th Cong. (2009); Development, Relief, and Education for Alien Minors (DREAM) Act, S. 3827, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education for Alien Minors (DREAM) Act, S. 3962, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education for Alien Minors (DREAM) Act, S. 3963, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education for Alien Minors (DREAM) Act S. 3992, 111th Cong. (2010) (U.S. Senate voted 59–40 to table a motion to proceed to bill to clear the way for the House-approved DREAM Act amendment to H.R. 5281, a comprehensive immigration bill); Removal Clarification Act, H.R. 5281, 111th Cong. (2010) (containing DREAM Act language) (the House of Representatives approved the bill by voice vote but it died in the U.S. Senate, when the Senate failed to invoke cloture on a vote of 55–41 (60 votes required to obtain cloture)); American Dream Act, H.R. 1751, 111th Cong. (2010); Development, Relief, and Education for Alien Minors (DREAM) Act, H.R. 6497, 111th Cong. (2010); Citizenship and Service Act, H.R. 6327, 111th Cong. (2010). In the 112th Congress (2011–2012): Development, Relief, and Education for Alien Minors (DREAM) Act, S. 952, 112th Cong. (2011); Development, Relief, and Education for Alien Minors (DREAM) Act, H.R. 1842, 112th Cong. (2011); Adjusted Residency for Military Service Act, H.R. 3823, 112th Cong. (2011); and Comprehensive Immigration Act of 2011, S. 1258, 112th Cong. (2011) (referred to Senate Committee on the Judiciary).

18. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Patrol (June 15, 2012) [hereinafter Memorandum from Janet Napolitano], *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Relying on DHS's existing prosecutorial authority, on June 15, 2012, DHS Secretary Janet Napolitano implemented the DACA directive by issuing an agency-wide memorandum instructing all departments within DHS to stop initiating deportation proceedings against DREAMers living in the United States. *See* Memorandum from John Morton, Dir. of U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens to Dirs., Special Agents, and Chief Counsel (June 17, 2011) [hereinafter Memorandum from John Morton on Exercising Prosecutorial Discretion], *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

19. Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 261 (2013) (arguing that the Obama administration instituted DACA due to the lack of congressional action and political expediency

Congress questioned the limits that the president has in exercising prosecutorial discretion in the immigration arena.[20] At the same time, ICE officers, along with the State of Mississippi, sued DHS under several legal theories, including the theory that the Immigration and Nationality Act (INA)[21] explicitly prohibits immigration officers from exercising any discretion when arresting, detaining, or placing an unauthorized immigrant in removal proceedings.[22]

Generally speaking, criminal prosecutors possess broad latitude in deciding whether to prosecute. The U.S. Supreme Court has acknowledged that "[criminal prosecutors] have this latitude because they are designated by statute as the president's delegates to help him discharge his constitutional obligation to 'take Care that the Laws be faithfully executed.'"[23] Similarly, in civil and administrative law, the Supreme Court has recognized

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surrounding the 2012 presidential election); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship Prosecutorial Discretion and the Separation of Powers*, 94 B.U. L. REV. 105, 106–07 (2014); Delahunty & Yoo, *supra* note 16, at 785 (arguing that DACA violates the Take Care Clause).

20. *See* Letter from Chuck Grassley, U.S. Senator, et al., to Barack H. Obama, President of the United States (June 19, 2012), *available at* http://www.grassley.senate.gov/sites /default/files/about/upload/061920123.pdf; Letter from Lamar Smith, Chair, House Judiciary Comm., to John Morton, Dir., U.S. Immigration and Customs Enforcement (July 3, 2012), *available at* http://lawprofessors.typepad.com/files/lamar-smith-letter-to-john-morton-3.pdf (describing the new policy as an amnesty, an overreach of executive branch authority, and a magnet for fraud). In these letters [hereinafter Congressional Memos Against DACA], members of Congress argued the new directive was unconstitutional because it usurped legislative authority, violated the President's duty under the Take Care Clause, and violated administrative law. *But see* Letter from Senator Harry Reid et al. to President Barack Obama (Apr. 13, 2011), *available at* http://wwwscribd.como/doc/53014785/22-Senators-Ltr-Obama-Relief-For -DREAMers-4 (arguing that the President does have the authority to grant deferred action to this class of individuals and urging the President to exercise such authority); *see also* Department of Homeland Security Appropriations Act, 2013, H.R. 5855, 112th Cong. § 581 (as passed by House, June 7, 2012) (using the "power of the purse" (U.S. CONST., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .")) the House of Representatives passed a bill stating, "[n]one of the funds made available in this Act may be used to finalize, implement, administer, or enforce the 'Morton Memos' . . . .'") The Morton Memos, which are described in detail *infra* at Part II.C.2, were issued by Assistant Secretary of Immigration and Customs Enforcement to all agents, officers, and attorneys at ICE and described their authority to exercise prosecutorial discretion as well as factors that should be considered in making that assessment.

21. 8 U.S.C. § 1101 (2012).

22. Amended Complaint at 15, Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. Oct. 10, 2012) (No. 12-cv-03427-O).

23. United States v. Armstrong, 517 U.S. 456, 464 (1996); Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) ("The Attorney General is the head of the Department of Justice. He is the hand of the President in taking care that the laws of the United States in protection of the interests of

> 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."[24]

Indeed, the Court in *Heckler v. Chaney*[25] held that "[the] agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[26]

While the president's DACA directive was motivated in part by Congress's failure to act, it was also motivated by ICE's failure to exercise favorable discretion in even the most sympathetic cases. In some instances, ICE or Customs and Border Protection (CBP) agents sought removal of individuals who were eligible for deferred action pursuant to an interagency memorandum.[27] Yet unlike criminal law, where only the prosecutor can bring charges, ICE trial attorneys are not the only officials who may bring charges. Other officers may institute charges, and ICE trial attorneys do not have the authority to dismiss these charges. In addition to ICE prosecutors, border patrol agents, interior enforcement agents, and hearing benefits officers[28] all have the authority to initiate the removal of an individual he or she has determined is not of valid immigration status. Moreover, an ICE attorney must seek removal pursuant to charges brought by

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the United States in legal proceedings and in the prosecution of offenses, be faithfully executed." (citation omitted)).

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

25. 470 U.S. 821 (1985).

26. *Id.* at 821 (holding that the Federal Drug Administration's decision not to pursue an enforcement action was presumptively unreviewable, as such actions are "committed to agency discretion by law" under § 701(a)(2) of the Administrative Procedure Act); *see also* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (noting that prosecutorial discretion in the immigration context is traditionally not subject to judicial review); United States v. Batchelder, 442 U.S. 114, 123–24 (1979) (holding that prosecutors have discretion over what to charge when two statutes criminalize the same conduct, but have different sentencing provisions); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting that the executive branch's decision on whether to institute criminal proceedings and what to charge is immune from judicial review).

27. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 4.

28. 8 C.F.R. § 239.1 (2013) (listing forty-one different categories of employees at DHS who have the authority to fi
le a Notice to Appear and to commence removal proceedings against a noncitizen).

others, unless the judge dismisses the case or the charging officer withdrawals the Notice to Appear (NTA).[29] There is no differentiation in the immigration system between the discretion to apprehend and the discretion to seek deportation. Once an eligible DHS agent, officer, or adjudicator[30] has initiated a removal process through the issuing of an NTA, the immigration court commences proceedings.[31] An ICE trial attorney then represents the government, regardless if the attorney made or agreed with the initial determination to place the noncitizen in a removal proceeding.[32]

Despite functioning like a prosecutor, an immigration prosecutor does not have distinct power like a criminal prosecutor does—the immigration prosecutor is just another person responsible for enforcing immigration laws. And while there are numerous memoranda that have been issued over time by several different administrations as the agency's policy has evolved,[33] there is no single definitive guidance document for agents, nor is discretion limited to immigration prosecutors. Generally, in the adversarial legal system, lawyers must zealously represent their client before the tribunal[34]—the singular exception is the criminal prosecutor, who is not just an advocate but is required to seek justice.[35] While ICE trial attorneys are trained to support the granting of relief in cases where the evidence and law support doing so,[36] immigration prosecutors,

29. *See* Memorandum from William J. Howard, Principal Legal Advisor, Immigration and Customs Enforcement at 5, n.2 (Oct. 24, 2005) [hereinafter Memorandum from William J. Howard], http://www.legalactioncenter.org/sites/default/files/docs/lac/Howard-10-24-2005-memo.pdf.

30. Immigration and Nationality Act, 8 U.S.C. § 239.1 (2012).

31. *See* Memorandum from William J. Howard, *supra* note 29, at 1–3.

32. 8 C.F.R. § 1003.4 (2013).

33. *See infra* Part II.C.2.

34. Elizabeth Keyes, *Raising the Bar: The Case for Zealous Advocacy as the Guiding Principle in Immigration Defense*, SETON HALL L. REV (forthcoming 2015), *available at* http://works.bepress.com/elizabeth_keyes/4 (discussing the long tradition in the legal profession of zealous advocacy).

35. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.1(b) (2d ed. 1980).

36. Former INS counsel David Martin notes that achieving justice is a part of the training that DOJ and DHS attorneys receive. He comments that "[s]uccessive general counsel and principal legal advisors in DHS and its predecessor agencies have made this clear and have reemphasized it in various ways at chief counsel conferences, meetings with field attorneys in their home locations, guidance memoranda, etc. As INS General Counsel, [he], often emphasized in such settings that attorneys were expected to ask serious questions in immigration court to probe a person's narrative and also to clarify details, but at the end of that process, if persuaded of the account (and its legal merit), the attorney should indicate that the government supports or

i.e., ICE trial attorneys, do not see their role as separate and distinct from DHS agents and adjudicators, and as such do not see it as their role to seek justice.[37] The number of cases where immigration judges are granting relief to an immigrant after the immigrant has been placed in removal proceedings is at an all-time high.[38]

Redefining the role of the ICE trial attorneys to be one more akin to criminal prosecutors, with a concomitant obligation to seek justice, will ameliorate many of the causes that may have led to the president granting deferred action on a class-wide basis to 1.7 million individuals.[39] This Article contributes to the ongoing scholarship and dialogue calling for heightened ethical obligations, guidelines, and principles for attorneys appearing before the Executive Office for Immigration Review (EOIR) that meet the challenges of practicing immigration law, while promoting efficiency and fairness in an effort to restore confidence to a system subject to much condemnation.[40] Specifically, this Article addresses structural problems within DHS that contribute to the flawed application of immigration prosecutorial discretion on a case-by-case basis. The Article concludes that prosecutorial discretion, as applied on a case-by-case basis, would be a more effective tool to advance broad executive branch immigration priorities and policies if DHS took more specific steps to professionalize the role of the ICE trial attorney.

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would have no objection to the grant of relief (asylum, cancellation, etc.)." Email from David Martin, to Immigration Professor listserv (Sept. 7, 2013) (on file with author).

37. *See infra* Part IV.A.1 (summarizing the criminal prosecutor's duty to seek justice).

38. In 2013, there were 192,736 new filings by DHS for removal orders. TRAC, *Number of Noncitizens ICE Sought to Remove Who Were Allowed to Remain in U.S. Through August 2014*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_stay.php (last visited Aug. 28, 2014). In 2013, immigration judges granted relief for 90,339 cases (highest number since 1998) and granted removal for 82,384 (lowest number since 1998).

39. *See* Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D, New Information Collection, 77 Fed. Reg. 49,451, 49,451–53 (Aug. 16, 2012) (1,041,300 estimated total number of responses for new Consideration of Deferred Action for Childhood Arrivals, Form 1-821D, USCIS; 1,761,300 estimated responses related to Application for Employment Authorization Document, Form I-765, USCIS; 1,385,292 responses related to Biometrics; 1,047,357 responses related to Application for Employment Authorization Document Worksheet, Form I-765WS, USCIS; and 1,761,300 responses to required Passport-Style Photographs).

40. Keyes, *supra* note 34, at 4 (arguing that immigration lawyers must adopt zealous advocacy as a guiding principle, as done by criminal defenders in the criminal setting, when representing noncitizens because immigrants are also seeking protection from the full weight of the state and the stakes in immigration proceedings are extraordinarily high).

Part II provides an overview of the history and use of prosecutorial discretion in immigration law, the statutory and judicial authority for this power, and the limits of this authority. Part III describes the contemporary criticisms of prosecutorial discretion in immigration law. Part IV summarizes the use of prosecutorial discretion in U.S. criminal law, including the obligation of prosecutors to seek justice, and articulates how discretion in criminal law ought to inform improvements to the immigration system. In Part V, I recommend that DHS professionalize the role of ICE trial attorneys within the department and I recommend that there are two important tools of criminal prosecutors that should be available to ICE trial attorneys—first, the decision to initiate removal proceedings should rest solely with an ICE trial attorney, not an immigration enforcement officer or administrative hearing officer, and that decision, regardless of the outcome, should be articulated in writing; and second, ICE should make it a priority to professionalize the ICE trial attorney unit by taking specific steps, including generating a comprehensive practice manual similar to the U.S. Attorney's Manual that proscribes, in a transparent manner, the agency's practices, policies, and priorities for the use of prosecutorial discretion in immigration law. I conclude by arguing that DHS should explicitly recognize in its policy guidance and trainings that ICE prosecutors have an affirmative obligation to seek justice—not just deportation.

II. HISTORY, USAGE, LEGAL AUTHORITY, AND LIMITATIONS OF PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

A. Prosecutorial Discretion in Immigration Is Executive Branch's Prerogative

Immigration jurisprudence has historically been fickle about the strength and scope of any inherent authority of the executive branch to make decisions determining the classes of individuals that may enter and remain in the United States.[41] The U.S. Supreme Court has ruled that immigration, and the right to regulate which individuals are allowed to enter the United States, is a power of the sovereign, thus signaling that the president has the authority to regulate entry

41. *See* Adam Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 482–83 (2009).

into the United States.[42] Yet, the Court has also stated, "over no other area is the legislative power more 'complete' than immigration."[43] It is Congress that enacts laws determining who can enter the United States, under what conditions, and for how long.[44] Congress also establishes who can be removed from the United States based on acts they commit after entry.[45] The Court, applying the plenary power doctrine, has refused to overturn or invalidate immigration statutes, holding that immigration is a matter "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of . . . government . . . exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[46] The Court's refusal to intervene in congressional decisions about who should be allowed to remain in the United States signals that immigration decisions are generally exclusively legislative,[47] unless Congress explicitly delegates authority to the executive branch.[48] Nonetheless, the executive branch has historically exercised prosecutorial discretion in the immigration arena by relying on both congressionally delegated power and inherent constitutional authority.

Prior to the passage of the INA in 1920, immigration law was primarily viewed as a function of foreign affairs, governed by treaty

42. Harisiades v. Shaughnessy, 342 U.S. 580, 586–88 (1952) (finding a noncitizen remaining in the United States is a "matter of permission and tolerance"; it is not a right); *see also* Cox & Rodríguez, *supra* note 41, at 461 (arguing that the "continued inattention to the scope of the President's power over immigration law has given rise to doctrinal confusion").

43. Cox & Rodríguez, *supra* note 41, at 461 (citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).

44. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 12–24 (5th ed. 2009).

45. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5–6 (2007) (discussing two basic types of deportation laws: "extended border control" and "post-entry social control").

46. *Harisiades*, 342 U.S. at 588–89.

47. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 201 (1993) ("Congress . . . has plenary power over immigration matters."); INS v. Chadha, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under Art. 1, § 8, cl. 4, is not open to question . . . ."); Boutilier v. INS, 387 U.S. 118, 123 (1967) ("[I]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.").

48. *See* William J. Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 269 (Austin Sarat et al. eds., 2002); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–29 (2002).

obligations, and therefore driven by the executive branch.[49] However, after the initial passage of the INA, Congress became more engaged in shaping immigration policy and regulation.[50] Yet even after the passage of the INA, as Professors Cox and Rodríguez recount in their article, *The President and Immigration Law*, there were several instances in which the executive branch relied in part on its inherent authority to admit individuals into the United States on a temporary basis.[51]

Most notable was the Bracero Program initiated during World War II, which was ultimately operated with congressional consent and through a bilateral agreement with Mexico. The Bracero Program authorized temporary employment for agricultural workers from Mexico, and approximately four to five million Mexican workers were employed under this program.[52] Ultimately, Congress approved the Bracero Program in 1943,[53] and in 1951 subsequently authorized and extended the program until 1953.[54] In instituting the Bracero Program, President Franklin D. Roosevelt relied on the Ninth Proviso of the Immigration Act of 1917,[55] and then shortly thereafter, he sought and received explicit congressional approval through legislation authorizing the program. In addition to arguing for the existence of congressionally delegated authority, the administration relied on a bilateral agreement with the Mexican government.[56]

There are also historic examples in which the executive branch's decision to admit groups of individuals in response to refugee crises and mass influx into Florida was grounded in both explicit congressionally delegated authority and implicit executive-branch authority.[57] In particular, the executive branch's responses to these

49. Cox & Rodríguez, *supra* note 41, at 483.

50. *Id.*

51. *Id.* at 485.

52. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 417 (6th ed. 2008).

53. Act of Apr. 29, 1943, ch. 82, 57 Stat. 70 (1943).

54. Act of July 12, 1951, ch. 223, 65 Stat. 119 (1951).

55. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 878; Cox & Rodríguez, *supra* note 41, at n.94 (discussing whether or not the Ninth Proviso indeed provided congressional authority to admit a large class of immigrants, as well as concluding that the Ninth Proviso was designed to provide authority for temporary admission of individual applicants for humanitarian reasons).

56. Cox & Rodríguez, *supra* note 41, at 490.

57. *See id.* at 492.

mass influxes relied primarily on "the parole power and the power to exclude aliens to prevent harm to the United States, both delegated by the INA, and inherent executive authority over foreign affairs."[58] Ultimately, through these executive branch actions, thousands of Haitians and Cubans were resettled in the United States.[59] In addition, many of these fleeing refugees were interdicted on the high seas and detained.[60] Specifically, the president relied on section 212(f) of the INA, which provides delegated authority to the president to suspend or restrict entry to any noncitizen or class of noncitizens if his or her entry could cause harm to the United States.[61] Additionally, in its role of advising the president, the Office of Legal Counsel concluded that the "President's inherent constitutional power to protect the Nation and to conduct foreign relations,"[62] also provided authority for the president's interdiction program.[63]

In these Caribbean crises, the executive branch also relied on the parole authority delegated by Congress pursuant to section 212(d)(5) of the INA. The parole authority provides that the executive branch "may . . . only on a case-by-case basis for urgent humanitarian reasons or significant public benefit"[64] allow a noncitizen who is otherwise not eligible for admission to the United States to enter the United States on a temporary basis. Typically, this authority is used to permit entry into the United States for an individual who needs medical attention or to allow for family visitation in compelling circumstances.[65] However, the executive branch argued that this discrete authority also provided a legal basis for paroling thousands of the Haitians and Cubans into the United States.[66]

Prosecutorial discretion has its historical underpinnings in the executive branch's authority, both implicit and explicit, to determine which individuals, who otherwise have no valid immigration status,

58. *Id.* at 497.
59. *Id.* at 492.
60. *Id.* at 497–98.
61. 8 U.S.C. § 1182(f) (2012).
62. *See* Proposed Interdiction of Haitian Flag Vessels, 5 Op. O.L.C. 242 (1981).
63. The U.S. Supreme Court agreed that the President's interdiction program, pursuant to an executive order, did not violate the INA, nor Article 33 of the United Nations Convention Relating to the Status of Refugees. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187 (1993).
64. 8 U.S.C. § 1182(d)(5A) (2012).
65. *See* Cox & Rodríguez, *supra* note 41, at 502.
66. *See id.* at 503.

may remain in the United States. Prosecutorial discretion in the immigration system includes enforcement discretion,[67] as well as prosecutorial decisions not to pursue deportation or to "defer action" in individual cases.[68] Deferred action is a tool used by the executive branch to provide discrete relief to certain individuals who have compelling personal circumstances that warrant compassion and a grant of humanitarian relief.[69] This tool has long been recognized as a mechanism for DHS to exercise prosecutorial discretion.[70]

Prosecutorial discretion, including deferred action, is exercised either for humanitarian reasons or because limited resources preclude prosecution of every individual who lacks valid immigration status. Moreover, the INA has expanded the types of acts that render a noncitizen deportable.[71] Often times, expansion occurs in direct response to either actual or perceived threats posed by an individual immigrant or groups of immigrants.[72] Yet, these expansions of deportable acts often result in overreach and unintentional preclusion of some individuals from admission to the United States.[73]

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67. Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

68. Memorandum from Doris Meissner, *supra* note 4, at 1–2.

69. This authority is similar to parole authority and the authority in the Ninth Proviso of the Immigration Act of 1917. *See* Immigration and Nationality Act § 212(d)(5A), 8 U.S.C § 1182(d)(5A) (providing that the Attorney General may "only on a case-by-case basis" parole noncitizens into the United States for "urgent humanitarian reasons or significant public benefit"); *see also* Cox & Rodríguez, *supra* note 41, at n.94 (explaining that the Ninth Proviso was "designed principally for the temporary admission of individual applicants for whom 'urgent necessity or . . . unusual grave hardship would result from a denial of their request'").

70. 8 C.F.R. § 274a.12(c)(14) (2013); *Role of Prosecutorial Discretion*, *supra* note 15, at 244.

71. Memorandum from Doris Meissner, *supra* note 4, at 1.

72. *See, e.g.*, Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. UNIV. L. REV. 101 (1996); Bill Ong Hing, *Immigration Policies: Messages of Exclusions to African Americans*, 37 HOWARD L.J. 237 (1994).

73. In 2005 Congress passed the REAL ID Act, a post 9-11 antiterrorism legislation, which among many things expanded the definition of material support of terrorism. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 1, 119 Stat. 231, 303–23 (2005). Any noncitizen that provided material support to terrorism is barred admission into the United States. While sensible on its face, REAL ID had unintended foreign policy consequences. For example, caught up in this expansion were Chins, who are an ethnic and religious minority in Burma that were targeted by the military junta ruling at the time. After the passage of REAL ID, ethnic Chins fleeing known persecution were denied asylum by immigration judges because they had provided food to members of the Chin National Front, which was an armed force resisting the illegitimate military junta in Burma. *See generally* Michele L. Lombardo et al., *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post-9/11, Post-Patriot Act, Post-REAL ID Act World*, 4 REGENT J. INT'L L. 261 (2006) (discussing the implications of the REAL ID Act on asylum seekers in the United States and

It was not until the 1970s, however, that the public became aware of the Nonpriority Program long utilized by the Immigration and Naturalization Service (INS).[74] The Nonpriority Program was initiated to "defer action in deportation cases in situations in which, because of humanitarian reasons, expulsion of aliens would not be appropriate."[75] In determining who might qualify for deferred action, INS gave consideration to age, length of presence in the United States, the need for physical or mental treatment that might only be available in the United States, the potential effect of deportation on the immigrant's family status, and whether the immigrant had engaged in any criminal or immoral conduct.[76]

In 1975, pursuant to a Freedom of Information Act request, John Lennon made public the Operations Instructions. The Instructions outlined the Nonpriority Program, and received public attention when Lennon attempted to invoke Nonpriority status as a remedy against his pending deportation.[77] When the INS was required to release information about the Nonpriority Program, it "steadfastly maintained that Nonpriority status was merely an intra-agency guideline, which conferred no substantive rights"; that is, it was essentially an exercise of prosecutorial discretion.[78]

B. Legal Authority for Prosecutorial Discretion in Immigration

Recently, the U.S. Supreme Court in *Arizona v. United States*[79] upheld the use of prosecutorial discretion in immigration law, noting

arguing that the expanded definition of material support, as applied, violates the U.S. international obligations to protect refugees fleeing persecution).

74. *See* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979).

75. *Id.* at 100.

76. *See* Nicholas v. INS, 590 F.2d 802, 806–07 (9th Cir. 1979) (quoting Immigration and Naturalization Service, United States Department of Justice, Operations Instructions, Regulations, and Interpretations, 103.1(a)(1)(ii) (1952, as revised 1979)) ("In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."); *see also* Wildes, *supra* note 74, at 100–101 n.5 ("When determining whether a case should be recommended for nonpriority category, consideration should include the following: (1) Advanced or tender age; (2) Many years' presence in the United States; (3) Physical or mental condition requiring care or treatment in the States; (4) Family situation in the United States—the effect of expulsion; (5) Criminal, Immoral, or Subversive activities or affiliations— recent conduct.")

77. Lennon v. Richardson, 378 F. Supp. 39 (S.D.N.Y. 1974).

78. Wildes, *supra* note 74, at 101.

79. 132 S. Ct. 2492 (2012).

that "[a] principal feature of the removal system is the broad authority entrusted to immigration officials" and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[80] The use of prosecutorial discretion in these instances may reflect "immediate human concerns" and the "equities of . . . individual case[s]," including ties to the community, children possessing U.S. citizenship and "policy choices that bear on . . . international relations."[81] This rationale builds on the Court's reasoning in *Matthews v. Diaz*,[82] that

> the relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or Executive branches than to the Judiciary.[83]

In addition, the Supreme Court has declined to invalidate the government's decision to commence removal against individuals who are without valid immigrant status and for whom the government may have targeted for investigation based on constitutionally protected grounds, such as membership in a political group.[84] In *Reno v. AADC*,[85] the Supreme Court held that the INS "may constitutionally single out aliens for investigation and deportation based on their membership in disfavored political groups, as long as it offers as a pretext some other technical basis for deportation."[86] Therefore, while the courts will in narrow circumstances review prosecutorial discretion decisions made by criminal prosecutors based on impermissible grounds such as selective prosecution,[87] this type of prosecutorial misconduct in immigration is not subject to judicial review or sanction.[88]

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80. *Id.* at 2495, 2499.

81. *Id.* at 2499.

82. 426 U.S. 67 (1976).

83. *Id.* at 81.

84. Reno v. Am-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999).

85. *Id.*

86. David Cole, *Damage Control? A Comment on Professor Neuman's Reading of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 347, 347–48 (2000).

87. *See* U.S. v. Armstrong, 517 U.S. 456 (1996) (holding that in order to file selective-prosecution claims based on race, defendants must show that the government failed to prosecute similarly situated suspects of other races). Selective prosecution is the exception to the rule due to

C. Modern Exercise of Prosecutorial Discretion in Immigration Context

Generally, the courts have upheld the use prosecutorial discretion in immigration law as a discretionary choice. The first part of this section provides an overview of this jurisprudence. The second part of this section details the various interagency guidance documents that offer examples to immigration officials for which discretion is appropriate, and also serve as the basis legal basis for the recent DACA program.

1. The Decision Not to Deport Is a Discretionary Administrative Choice

Following Lennon's public disclosure of the Nonpriority status, courts began to scrutinize the bounds and application of the INS's discretionary program. In the 1976 case *Soon Bok Yoon v. INS*,[89] the Fifth Circuit held that the "decision to grant or withhold Nonpriority status . . . lies within the particular discretion of the INS," and "decline[d] to hold that the [INS] has no power to create and employ such a category for its own administrative convenience."[90] The *Yoon* court also noted that an immigration judge had no obligation to notify an immigrant in deportation proceedings of the possibility of Nonpriority status.[91] In spite of the Fifth Circuit's interpretation, however, the Eighth Circuit saw fit to delay two deportation cases to allow the immigrants to apply for Nonpriority status.[92] These cases highlight the circuits' varying treatments of the exercise of prosecutorial discretion, culminating in the Ninth Circuit's 1979 decision *Nicholas v. INS*.[93] *Nicholas* was significant for its holding that the Nonpriority Program was not merely an administrative convenience but rather was a "substantive provision."[94] Defined as such, courts were allowed to analyze and interpret the exercise of prosecutorial discretion and review whether the benefit was properly

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the fact that courts will generally not review a prosecutor's discretionary decisions. *See* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (noting that the executive branch's decision on whether to institute criminal proceedings and what to charge is immune from judicial review).

88. *Reno*, 525 U.S. at 471.
89. Soon Bok Yoon v. INS, 538 F.2d 1211 (5th Cir. 1976).
90. *Id.* at 1213.
91. *Id.* at 1212–13.
92. David v. INS, 548 F.2d 219 (8th Cir. 1977); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976).
93. 590 F.2d 802 (9th Cir. 1979).
94. *Id.*

withheld or conferred.[95] The Ninth Circuit's ruling ran contrary to the INS's position that the Nonpriority Program was only an "intra-agency guideline."

To cement the INS's position regarding its prosecutorial discretion, in the wake of the *Nicholas* decision, the Operations Instructions were revised "to affirmatively state that grants of deferred action status were an administrative choice by the agency and in no way an 'entitlement' to the noncitizen."[96] The next significant alteration to the Operations Instructions came in 1996, following passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA):

> The IIRAIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief. Consequently, the IIRAIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases.[97]

Since the passage of IIRAIRA, the INS (ultimately DHS, following restructuring in 2002)[98] has issued a number of internal memoranda addressing guidelines and application of prosecutorial discretion.[99]

2. Prosecutorial Discretion Is Rooted in Internal Agency Guidance

One of the first comprehensive reviews of prosecutorial discretion came in 2000, when Bo Cooper, INS general counsel, wrote a memorandum outlining its use in the INS.[100] This document

95. *Id.*

96. *See Role of Prosecutorial Discretion*, *supra* note 15, at 250 (citing Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004)).

97. *Id.* at 252–53 (citing a Letter from Robert Raben, Assistant Attorney General, to Rep. Barney Frank, U.S. H.R., on Use of Prosecutorial Discretion to Avoid Harsh Consequences of IIRAIRA (Jan. 19, 2000)).

98. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

99. KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (2013).

100. *See* Memorandum from Bo Cooper, Gen. Counsel on INS Use of Professional Discretion to the Comm'r (2000) [hereinafter Memorandum from Bo Cooper], *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf.

was "intended to be the first step in the INS' examination of its use of prosecutorial discretion."[101] The memorandum reviewed the history of prosecutorial discretion and its application in the immigration context, noting that "the administrative enforcement discretion generally deferred to by courts extends far more broadly to a wide variety of INS decisions than the strictly 'prosecutorial' decision to institute removal proceedings."[102] In exploring the limits on prosecutorial discretion, the memorandum stated:

> First, in order to be a nonreviewable exercise of prosecutorial discretion, the decision must be a decision to *enforce*, or not to enforce, the law. An enforcement decision must be distinguished from an affirmative act of approval, or grant of a benefit, under a statute or other applicable law that sets guidelines for determining when the approval should be given. [*Heckler v.*] *Chaney*, 470 U.S. [821, 831 (1985)]. An enforcement decision is an exercise—or nonexercise—of an agency's *coercive* power over an individual's liberty or property. *Id.* at 832. The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions.[103]

It was further noted that certain INS decisions that might be classified as exercises of prosecutorial discretion could be reviewed for abuse of discretion, subject to constitutional considerations, and potentially limited by statutes passed by Congress.[104] Cooper's conclusion was that:

> The INS has broad prosecutorial discretion in its law enforcement activities, although that discretion is not unlimited. This authority includes the prosecutorial discretion not to place a removable alien in proceedings, but the INS does not have prosecutorial discretion to admit an inadmissible alien into the United States. The INS does not have prosecutorial discretion to provide any benefit under the INA to an alien who is not eligible to receive it.[105]

101. *Id.* at 1.
102. *Id.* at 3.
103. *Id.* at 4.
104. *See id.* at 4–9.
105. *Id.* at 12.

Cooper's memorandum was one of the first to fully explore the legal basis for the INS's use of prosecutorial discretion, and served as a foundation for continued discussion of the topic.

In November 2000, INS commissioner Doris Meissner issued her own memorandum to directors and counsel regarding the exercise of prosecutorial discretion. Building on much of the background in the Cooper memorandum, Commissioner Meissner directed:

> Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.[106]

This memorandum outlined a number of factors to be considered in the favorable exercise of prosecutorial discretion at any stage of a case, including: immigration status, length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimate removal, likelihood of using other means, effect on the community, cooperation with law enforcement, honorable United States military service, community attention, and availability of INS resources.[107] These categories were consistent with the original Nonpriority Program used by the INS in the 1970s and before. In addition to outlining the legal basis for prosecutorial discretion, Meissner's memorandum offered more practical guidelines to those who would be exercising this discretion in the immigration context.

After the INS was restructured into ICE, CBP, and the U.S. Citizenship and Immigration Services (USCIS) in 2002,[108] William J. Howard, principal legal advisor, issued a memorandum to chief counsel regarding the continued use of prosecutorial discretion

106. *See* Memorandum from Doris Meissner, *supra* note 4, at 1
107. *Id.* at 7–8.
108. *See* Homeland Security Act, 116 Stat. 2135–36.

across the several immigration branches of the DHS.[109] In particular, Howard highlighted that the volume of immigration cases coming through ICE, CBP, and USCIS was extreme, and that "[l]itigating with maximum efficiency requires that we exercise careful yet quick judgments on questions involving prosecutorial discretion."[110] Howard stressed the need for the Office of Principal Legal Advisor (OPLA) attorneys to not only become familiar with the principles of prosecutorial discretion but also identify certain situations in which the favorable exercise of prosecutorial discretion would be advised; for example, when to exercise that discretion instead of seeking an alien's removal, or when not to pursue an appeal.[111] In 2007, the issue was revisited in a memorandum by Assistant Secretary Julie Meyers, specifically addressing the need for field agents to "use discretion in identifying and responding to meritorious health related cases and caregiver issues" by exercising discretion, when appropriate, against taking nursing mothers into custody.[112]

ICE revisited the general precepts of prosecutorial discretion and its favorable exercise again in 2011.[113] Citing various prior internal treatises on the subject, Director John Morton noted the limitations on ICE's resources and the potential for maximizing those resources through the use of prosecutorial discretion. Noting that prosecutorial discretion could be used at many stages of an investigation, Morton outlined several situations in which a favorable exercise of prosecutorial discretion would be a preferred outcome. The memorandum also included a "not exhaustive" list of factors to consider in favorably exercising prosecutorial discretion; this list was considerably longer and more detailed than the general categories of factors in Meissner's 2000 memorandum.[114] For example, pregnant

109. *See* Memorandum from William J. Howard, *supra* note 29.

110. *Id.* at 2.

111. *Id.* at 1, 6–7.

112. *See* Memorandum from Julie L. Meyers, Assistant Sec'y for Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., on Prosecutorial and Custody Discretion, to All Field Office Directors and Special Agents in Charge, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. (Nov. 7, 2007) [hereinafter Memorandum from Julie L. Myers], *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf.

113. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 4.

114. *Compare* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 4 (outlining nineteen detailed factors to consider in the exercise of prosecutorial discretion, including "the agency's civil immigration enforcement priorities," and "whether the person is currently cooperating or has cooperated with federal, state or local law enforcement

and nursing women; victims of domestic violence, trafficking, or other serious crimes; and individuals present in the United States since childhood were included as individuals who should be given prompt particular care and consideration.[115] In addition, the memorandum identified negative factors that should also prompt particular care and consideration, including individuals who: (1) pose a national security threat; (2) have serious or lengthy criminal histories; (3) are known gang members; (4) pose a clear danger to public safety; (5) have an "egregious record of immigration violations, including . . . a record of illegal re-entry";[116] and (6) "have engaged in immigration fraud."[117] Ultimately, Morton's treatment of the subject reinforced the position that DHS's immigration branches should continue to use prosecutorial discretion, when appropriate, as a necessary tool for handling immigration cases.

Many of the INS and DHS memoranda about prosecutorial discretion address its general use, set forth the legal grounds for its exercise, and emphasize the need for prosecutorial discretion as a tool to efficiently handle immigration cases. In 2012, a memorandum regarding prosecutorial discretion issued by Secretary of Homeland Security Janet Napolitano called for the use of prosecutorial discretion in a specific context.[118] Building on the rights of ICE, CBP, and USCIS to exercise prosecutorial discretion generally, Napolitano's memorandum set forth particular criteria by which a certain class of individuals should benefit from a favorable exercise of prosecutorial discretion.

Yet, in all these memoranda prosecutorial discretion is understood as a tool—the same tool—for agents, investigators, adjudicators, and prosecutors. There are no distinct roles or protocols for the various, distinct actors in the immigration system. The criteria to grant a favorable exercise of discretion and not apprehend an individual are the same for the decision on whether or not to initiate removal proceedings against an immigrant. ICE trial attorneys are

authorities"), *with* Memorandum from Doris Meissner, *supra* note 4, at 7–8 (outlining thirteen broad factors, including immigration status, criminal history, and availability of INS resources).

115. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 5.

116. *Id.*

117. *Id.*

118. *See* Memorandum from Janet Napolitano, *supra* note 18, at 1.

not seen as administrators of justice, with unique ethical duties inherent in the role of a criminal prosecutor; rather, they are enforcers—simply another extension of immigration police power.

III. CRITICS CITE UNDERUSE AND OVERBROAD APPLICATION AS FUNDAMENTAL FLAWS TO PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

A. Discretion Underutilized: Structural Critiques of Prosecutorial Discretion in Immigration Law

One of the main critiques of prosecutorial discretion in the immigration context is that it is not used consistently[119] or enough.[120] Advocates point to compelling cases in which ICE attorneys refused to consider the individual circumstances and the impact of removal on the family and community.[121] A related concern is that while there is guidance to the field from DHS national headquarters on how to use prosecutorial discretion, at the local level its usage varies significantly.[122] Therefore, an immigrant's ability to avail herself of this relief is more dependent on the jurisdiction she resides in than the merits of her individual situation.[123]

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119. Data from an August 31, 2014, study shows the variance by immigration court location in the use of prosecutorial discretion to "close" cases. For example, 28.1 percent of cases closed in Seattle, Washington were a result of prosecutorial discretion (of the 7,373 cases closed, 2,075 were pursuant to prosecutorial discretion). In comparison, in San Antonio prosecutorial discretion accounted for 3.9 percent of case closures (of the 10,662 cases closed, 418 were closed with prosecutorial discretion). TRAC, *Immigration Court Cases Closed Based on Prosecutorial Discretion*, TRAC IMMIGR. (Aug. 31, 2014), http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html.

120. Data from the same August 31, 2014, study indicates that only 6.8 percent of cases before immigration courts were closed through the exercise of prosecutorial discretion. *Id.* Contrast this figure with criminal law, where prosecutors use their prosecutorial discretion to plea and charge bargain in about 90 percent to 95 percent of cases. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 59 (2004); *see also Sharing Secrets*, *supra* note 13, at 28 (discussing the American Bar Association's testimony before the Senate Judiciary Committee on May 17, 2011, where the ABA stated "[p]rioritization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system. Unfortunately, it has not been widely utilized in the immigration context." (citation omitted)).

121. *Sharing Secrets*, *supra* note 13, at 40–44.

122. *See* TRAC, *supra* note 119.

123. *See, e.g.*, Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (concluding that one of the strongest variables in determining the outcome of an asylum claim was not nationality of applicant or type of claim, rather it is what immigration district in the United States the applicant applied in).

Another recurring criticism about immigration officers in relation to the exercise of discretion is the lack of transparency about how these decisions are made.[124] Advocates argue that without knowing the criteria for when an immigration officer or attorney decides to exercise prosecutorial discretion, they have no guarantee that the decisions being made are not arbitrary. Publicly available guidance is needed so that attorneys know what is required to prevail on a request to not pursue action that could result in the removal of their client. In addition, if DHS departs from this guidance, the immigrant placed in removal proceedings should be able to pursue judicial recourse as a remedy.[125]

Similarly, a common critique about deferred action—one example of prosecutorial discretion in immigration law—exists. In fact, in a recent article, *The Role of Prosecutorial Discretion in Immigration Law*, Professor Shoba Sivaprasad Wadhia argues that the deferred action authority, which is derived from the INS operating instruction, is a substantive, not procedural rule and should be subject to informal rulemaking pursuant to the Administrative Procedure Act (APA).[126] Professor Wadhia contends that deferred action generally is quasi-legislative, should be codified into regulations, and should ultimately be subjected to judicial review like any other legislative rule.[127] Her solution appears to conclude that deferred action is distinct from prosecutorial discretion generally and should be treated like a legislative or binding rule.[128]

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124. *See Sharing Secrets*, *supra* note 13, at 48–51 (discussing the lack of transparency in decision-making process by immigration officials on whether to grant deferred action to an individual).

125. *See id.* at 56.

126. *See Role of Prosecutorial Discretion*, *supra* note 15, at 282–86 (arguing for clear administrative guidelines for deferred action, including publicly available criteria that is subject to notice-and-comment rulemaking pursuant to section 553 of the APA).

127. *See Sharing Secrets*, *supra* note 13, at 61–63.

128. While Professor Wadhia has argued that deferred action should be subject to the rules of administrative law, pursuant to section 553 of the APA and judicial review under section 706 of the APA, she also posits that President Obama's DACA initiative, granting deferred action for a subset of individuals, is a legitimate act of prosecutorial discretion and is well within his executive branch powers and is therefore immune from judicial review and congressional intervention. *See* Shoba Sivaprasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59 (2012). In Professor Wadhia's most recent article, she disagrees with DHS's view that the exercise of prosecutorial discretion does not confer any legal right, or enforceable benefit, shielding it from judicial review. *See* 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) [hereinafter *The Immigration*

Professor Michael Asimow, in his article *Nonlegislative Rulemaking and Regulatory Reform*, summarizes the difference between legislative and nonlegislative rules:

> The theoretical difference between legislative and nonlegislative rules is clear. A legislative rule is essentially an administrative statute—an exercise of previously delegated power, new law that completes an incomplete legislative design. Legislative rules frequently prescribe, modify, or abolish duties, rights, or exemptions. In contrast, nonlegislative rules do not exercise delegated lawmaking power and thus are not administrative statutes. Instead, they provide guidance to the public and to agency staff and decisionmakers. They are not legally binding on members of the public.
>
> Interpretive rules and policy statements serve distinct functions. An interpretative rule clarifies or explains the meaning of words used in a statute, a previous agency rule, or a judicial or agency adjudicative decision. A policy statement, on the other hand, indicates how an agency

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Prosecutor and Judge]. Notably, courts have held that deferred action is a general statement of policy and therefore not subject to APA's notice-and-comment requirements. In these cases, courts have held that the decision to grant, or refuse, deferred action to an otherwise removable immigrant is a valid exercise of prosecutorial discretion and therefore also not subject to judicial review. Alcaraz v. INS, 384 F.3d 1150, 1160–61 (9th Cir. 2004) (holding that INA § 242(g) precludes the Court from reviewing claim on behalf of a noncitizen challenging any decision by the attorney general to commence proceedings, adjudicate cases, or execute removal orders). In addition, in *Heckler v. Chaney*, the Supreme Court held that prosecutorial discretion is an inherent executive branch function and that exercises of prosecutorial discretion are agency actions "committed to agency discretion" and exempt from judicial review under § 701(a)(2) of the APA. 470 U.S. 821, 837–38 (1985). Professor Wadhia counters and argues that individuals should be able to challenge "prosecutorial denials" when an agency takes an enforcement action against an individual pursuant to § 706 of the APA because the agency action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See The Immigration Prosecutor and the Judge*, *supra* note 128, at 55–58. This line of argument assumes that a person who is not in valid immigration status has a legal right, or basis, in the law to not have charges brought against them because the agency has the authority to not prosecute violations of the INA. Professor Wadhia cites to dicta in *Heckler*, where the Supreme Court makes a distinction between the courts' role when an agency decides to not enforce versus taking enforcement action. The Court reasoned that there is a role for a court to review what process agency provided when an individual's liberty or property interests are implicated. *Id.* at 58 (citing *Heckler*, 470 U.S. at 832). I would argue the role a court has when an agency does take action is to review the procedure the agency provided and to make sure an individual's constitutional due process rights were met. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that review of agency decisions involves consideration the specific due process and procedural protections the situation requires).

> hopes or intends to exercise discretionary power in the course of performing some other administrative function.[129]

However, prosecutorial discretion, as outlined by former INS commissioners and other DHS officials, looks much more like policy statements about enforcement priorities than an effort to fill missing gaps in the INA. The only way deferred action should be subject to notice-and-comment rulemaking would be if it is understood to be a modification or exemption to the INA. If that were the case, deferred action would either be an immigration benefit or approval, and therefore not a function of prosecutorial discretion.[130] Yet, deferred action is an essential component of prosecutorial discretion in immigration law, and the more politically palatable solution to increasing its use on a case-by-case basis is to modify the role of ICE trial attorneys to be more similar to that of criminal prosecutors.

Certainly judicial review should be available[131] when ICE trial attorneys act egregiously and are motivated by impermissible reasons in denying a favorable exercise of prosecutorial discretion. However, if prosecutorial discretion is to remain a solidly executive branch prerogative to counter legislation painted with too broad a brush (a defect of almost all legislation) and a mechanism to prioritize individuals for deportation, such as violent repeat criminal offenders, it generally should be shielded from judicial review. What is necessary is not judicial intervention but internal and cultural changes at the ICE trial attorney office that will professionalize the role of the immigration prosecutors and demand higher ethical standards akin to that of U.S. federal prosecutors.[132]

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129. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985).

130. *See* Memorandum from Doris Meissner, *supra* note 4, at 3 ("Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when approval should be given.").

131. This may be an aspirational goal given the Court's ruling in *Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). The majority held that the INS "may constitutionally single out aliens for investigation and deportation based on their membership in disfavored political groups, as long as it offers as a pretext some other technical basis for deportation." Cole, *supra* note 86, at 347–48. Therefore, where the courts will in narrow circumstances review prosecutorial discretion decisions made on impermissible grounds including selective prosecution, this type of prosecutorial misconduct in immigration is not subject to judicial review or sanction. *See* U.S. v. Armstrong, 517 U.S. 456, 458 (1996) (holding that in order to file selective-prosecution claims based on race, defendants must show that the government failed to prosecute similarly situated suspects of other races).

132. *See infra* Part V.

B. Recent Challenges to Executive Branch's Application of Prosecutorial Discretion to Classes of Individuals

When the president announced his DACA directive as a valid exercise of prosecutorial discretion, critics countered that DACA is decidedly different from the historical use of prosecutorial discretion, in both the immigration and criminal law contexts; DACA departs from the prosecutorial discretion framework by exercising discretion on a case-by-case basis.[133] It is this departure from precedent that critics argue makes the DACA directive constitutionally suspect. Specifically, Congress has not delegated to the president open-ended immigration authority for immunizing large classes of individuals from removal, nor does the president have inherent authority for this action. The president and immigration advocates[134] assert that his decision to grant deferred action to a class of 1.7 million[135] individuals is an example of a well-established "back end" authority of prosecutorial discretion on a case-by-case basis.[136] Individually assessed DREAMers meet the DHS criteria for a favorable exercise

133. *See* Margulies, *supra* note 19, at 111–19 (arguing that prosecutorial discretion cannot support the DACA directive).

134. *See* Memorandum from Janet Napolitano, *supra* note 18; Letter from Immigration Law Professors to President Obama, Executive Authority to Grant Administrative Relief to DREAM Act Beneficiaries (May 28, 2012) (on file with author), *available at* http://lawprofessors.typepad.com/files/executiveauthorityfordreamrelief28may2012withsignatures.pdf; Letter to Interested Parties from Cheryl Little, Exec. Dir., Americans for Immigrant Justice, to Interested Parties (May 18, 2012) (on file with author).

135. *See* U.S. Citizenship and Immigration Services, Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form 1-821D, New Information Collection; Emergency Submission to the Office of Management and Budget, Comment Request, 77 Fed. Reg. 49451 (Aug. 16, 2012) (1,041,300 estimated total number of responses for new Consideration of Deferred Action for Childhood Arrivals, Form 1-821D, USCIS); U.S. Citizenship and Immigration Services, Agency Information Collection Activities: Application for Employment Authorization, Form 1-765, Revision of a Currently Approved Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request, 77 Fed. Reg. 49453 (Aug. 16, 2012) (1,761,300 estimated responses related to Application for Employment Authorization Document, Form I-765, USCIS; 1,385,292 responses related to Biometrics; 1,047,357 responses related to Application for Employment Authorization Document Worksheet, Form I-765WS, USCIS; and 1,761,300 responses to required Passport-Style Photographs).

136. Professors Adam Cox and Cristina M. Rodríguez make a compelling argument that "[t]he President's power to decide which and how many noncitizens should live in the United States operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit." Cox &. Rodríguez, *supra* note 41, at 464.

of prosecutorial discretion.[137] Specifically, they are in "pursuit of education in the United States" and "have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degree at a legitimate institution of higher education in the United States."[138] In addition to these specific criteria, DREAMers also have other general equities that DHS considers when deciding whether to exercise prosecutorial discretion. They are not criminals, they are not an enforcement priority, they do not have any criminal history, and they have strong family and community ties.[139]

This section outlines the arguments that have surfaced around the president's directive and organized the section into the types of individuals leveling their criticism. First, the section summarizes some of the prominent legal academics' arguments around the constitutionality of the initiative. Second, it discusses reactions of members of Congress to the president's initiative. The section concludes with a summary of the litigation brought by DHS border patrol agents challenging the initiative's application.

1. The Legal Academy

One line of argument against the president's DACA directive is that it is not based in any express or delegated statutory authority. For example, Professor Peter Margulies argues in his recent article *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, "the INA is comprehensive legislation, in scope resembling the provisions of the labor management legislation the Court cited in *Youngstown* itself."[140] Congress has created a complex framework in which, under various conditions, noncitizens can be granted affirmative relief even if they are in the United States without valid immigration status.[141] Congress also has created broad categories defining who is ineligible for immigration relief and lacks a legal basis to remain in

137. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 4.

138. *Id.*

139. *Id.*

140. *See* Margulies, *supra* note 19, at 122 (arguing that prosecutorial discretion cannot support the DACA directive).

141. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1229(b)(2) (2012) (victims of domestic violence); 8 U.S.C. § 1101(a)(42) (2012) (refugees).

the United States.[142] The president cannot sidestep or override this comprehensive statutory structure by granting broad relief to 1.7 million immigrants residing in the United States without any valid immigration status, because the action supersedes any delegated authority to the executive branch.[143] In the INA, Congress explicitly authorized the president to provide temporary relief in emergency circumstances on a case-by-case basis for individuals fleeing war or natural disaster.[144] Professor Margulies, however, does not think the president is without authority to grant this relief; rather the power to do so is not grounded in the authority Congress has delegated to him. Instead, Professor Margulies posits that the stewardship argument provides the necessary authority to insulate the president from constitutionality attacks.[145]

Others critics of the president's broad DACA directive have argued that the president's action is outside of the scope of prosecutorial discretion afforded to immigration cases. For example, in concluding that the president had violated the Take Care Clause of the Constitution, Professors Robert J. Delahunty and John C. Yoo, in their recent article *Dream On: The Obama's Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, argue "the Obama Administration has provided no adequate excuse or justification for its nonenforcement decision."[146] The authors conclude that the president's directive violates the Take Care Clause of the Constitution,[147] which imposes a duty for the president to take due care while enforcing the laws.

2. The Legislative Branch

In response, both House and Senate Republicans sent letters to DHS and President Obama questioning the legal authority to proscribe this new directive.[148] In these letters, members of Congress

142. Immigration and Nationality Act, 8 U.S.C. § 1227 (a)(1)(A) (2012).

143. *See* Margulies, *supra* note 19, at 126.

144. *Id.* at 120.

145. *Id.* at 128–29.

146. Delahunty & Yoo, *supra* note 16, at 785 (2013) (providing an argument for DACA violating the Take Care Clause).

147. *Id.* at 784–85.

148. *See* Letter from Lamar Smith to John Morton, *supra* note 20. *But see* Letter from Senator Harry Reid et al. to President Barack Obama (Apr. 13, 2011), *available at* http://wwwscribd.como/doc/53014785/22-Senators-Ltr-Obama-Relief-For-DREAMers-4

argued that the new directive was unconstitutional because it usurped legislative authority, violated the president's duty under the Take Care Clause,[149] and violated administrative law. In addition, the House of Representatives, using the "power of the purse,"[150] passed a bill that stated, "None of the funds made available in this Act may be used to finalize, implement, administer, or enforce the 'Morton Memos.'"[151] The Morton Memos, which are described in detail below, were issued by the assistant secretary of ICE to all agents, officers, and attorneys at ICE. These memoranda described ICE's authority to exercise prosecutorial discretion, as well as factors that should be considered in making that assessment.

3. The Judiciary

In a recent federal lawsuit, several ICE officers and the state of Mississippi challenged the DACA directive.[152] In the complaint, the plaintiffs argue that the directive

> commands ICE officers to violate their oaths to uphold and support federal law, violates the Administrative Procedure Act, unconstitutionally usurps and encroaches upon the legislative powers of Congress, as defined in Article I of the United States Constitution, and violates the obligation of the executive branch to faithfully execute the law, as required by Article II, Section 3, of the United States Constitution.[153]

While it ultimately deferred ruling on a petition for preliminary injunction, on April 23, 2013, the district court did find that Plaintiffs had a substantial likelihood of prevailing on the merits.[154] In its order, the court did not address the two constitutional arguments advanced by the plaintiffs: (1) the executive branch usurpation of

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(members of the Senate arguing that the President does have the authority to grant deferred action to this class of individuals and urging the President to exercise such authority).

149. *See* U.S. CONST. art. II, § 3.

150. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

151. *See* Department of Homeland Security Appropriations Act, H.R. 5855, 112th Cong. § 581 (as passed by the House, June 7, 2012).

152. Amended Complaint, Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. Oct. 10, 2012) (No. 12-CV-03247-O).

153. *Id.*

154. Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 1744422, at *1 (N.D. Tex. April 23, 2013).

legislative powers, and (2) the violation of the Take Care Clause.[155] The court did, however, discuss the statutory arguments. The plaintiffs contended that when an agent of the executive branch encounters an unauthorized immigrant, that agent has no discretion to place the unauthorized immigrant in removal proceedings.[156] The crux of this argument concerns the question of whether 8 U.S.C § 1225 (INA § 235), as amended by the IIRAIRA,[157] allows for prosecutorial discretion before an immigrant is placed in removal proceedings.[158]

The plaintiffs argued that three provisos within 8 U.S.C. § 1225 require immigration officers to arrest and detain any individual they come in contact with that is "an applicant for admission." The plaintiffs further contended that immigration officers have no discretion to decide whether or not to place the individual in removal proceedings. The complaint argues:

> 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225 (a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225 (b)(2)(A), which mandates that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding [in immigration court]."[159]

Recently, the court dismissed this case for lack of subject matter jurisdiction, holding that the Collective Bargaining Agreement and Civil Reform Act provides a comprehensive and exclusive scheme

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155. *Id.*; *see also* Delahunty & Yoo, *supra* note 16 (providing an argument for DACA violating the Take Care Clause). *But see* Wadhia, *supra* note 128 (addressing Professors Delahunty and Yoo's arguments, and countering with an explanation as to why DACA is constitutional).

156. Amended Complaint at 15–16, *Crane*, 920 F. Supp. 2d 724 (No. 12-cv-03427-O).

157. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

158. *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012), http://www.yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade.

159. Amended Complaint, *supra* note 156, at 15.

for resolving disputes brought by federal employees.[160] Therefore, the ICE agents were precluded from seeking relief in federal district court. In its order, the court opined that there was merit to the underlying claim, despite the court's lack of subject matter jurisdiction.[161] While this case was dismissed on procedural grounds, the question still remains: Does the INA legally mandate that immigration enforcement officers *must* place a removable noncitizen in removal proceedings or does it provide discretion? If this issue finally discovers a proper vehicle for judicial resolution, a court may find a valid, but nonconstitutional, grounds for enjoining the DACA directive.[162] If this type of claim were to prevail, a likely resolution would be no discretion in an arrest, decision to detain, or issuance of a Notice to Appear (NTA).

Professor David Martin, former INS general counsel, in his most recent article *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, provides a compelling argument for why the plaintiffs misinterpreted the statute on its face, as well as ignored the legislative history of INA § 235. In 1996, Congress added a new provision to § 235 of the INA, § 235(a)(1), which applies to all persons present in the United States who were not inspected or admitted as applicants for admission.[163] Professor Martin points out that prior to 1996, immigrants physically residing in the United States who had not entered lawfully and were not inspected at a point of entry, were considered as entering the United States and subject to deportation proceedings instead of exclusion proceedings.[164] This distinction was crucial because an immigrant in a deportation proceeding did not have the same burden of proof as an immigrant in an exclusion proceeding, which made deportation proceedings more favorable to an immigrant. This

160. Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 8211660, at *1 (N.D. Tex. July 31, 2013).

161. *Id.* at *3 ("While the Court finds that Plaintiffs are likely to succeed on the merits of their claim challenging the Directive and Morton Memorandum as contrary to the provisions of the Immigration and Nationality Act, *see generally* Mem. Op. & Order, Apr. 23, 2013, ECF No. 58, Congress has determined that this Court does not have jurisdiction . . . .").

162. Ann R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 491, 519 (2011) ("[T]he doctrine of constitutional avoidance and 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien' may cause the Court to favor noncitizens when interpreting immigration statutes.").

163. Martin, *supra* note 158, at 170–71.

164. *Id.* at 172–73.

distinction had some anomalous results. For example, a person with no visa who snuck across the border would be accorded more process than a person attempting to make a lawful entry with a travel document whose admissibility was questioned.[165] The 1996 amendment sought to eliminate this absurd result by specifying that any person who was had not been admitted or inspected was an applicant for admission.[166] Professor Martin further notes that not all DACA-eligible immigrants were entrants without inspection (EWI). Upwards of half of these immigrants were admitted, or paroled, and ultimately overstayed their status.[167] The plaintiffs' position, which eliminates prosecutorial discretion, would actually apply to EWI but not to those who have overstayed. But Professor Martin goes even further to argue that the plain language and legislative history of INA § 235 does not statutorily bar prosecutorial discretion for EWIs.[168]

Consequently, while this litigation has been dismissed, a court has yet to rule on the merits of the legal dilemma: Does the INA provide immigration officers with prosecutorial discretion? Given this controversy, Congress could seek to clarify this question or, given the congressional discontent with the DACA directive, could seek to further limit the use of prosecutorial discretion by DHS.

165. *Id.*

166. *Id.* at 173 ("In short, the key factor in determining which substantive provisions apply and which procedures govern is now admission, not entry.").

167. *See id.* at 171.

168. Professor Martin discusses a complicated issue that arose during the drafting of the 1996 amendments, as well as how individuals who have been paroled into the United States should be categorized, immediately after their parole status lapses, as if they were actively trying to depart from the United States. *Id.* at 173–77. His discussion of the Board of Immigration case *Matter of Badalmenti* and its impact on the legislative drafting process is significant but beyond the scope of this article. Ultimately, this case was the reason Congress provided broad discretion on when, in the immigration process, to charge an EWI with inadmissibility regardless of the holding in *Badalmenti*. *Id.* at 177.

IV. CRIMINAL LAW: PROVIDING ALTERNATIVES TO ENHANCE THE USE OF PROSECUTORIAL DISCRETION BY ICE PROSECUTORS

A. Use of Prosecutorial Discretion in Federal Criminal Law

The American legal tradition of prosecutorial discretion has its roots in English criminal law,[169] the U.S. Constitution,[170] and the ethical duty of prosecutors to "seek justice."[171] The phrase "prosecutorial discretion" was first used in the Supreme Court case *Poe v. Ullman*.[172] As its notion has evolved, courts have justified the use of prosecutorial discretion by relying on a mixture of separation

169. Historically, private citizens brought forth criminal prosecutions generally on behalf of the Crown. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 547 (2005). The *nolle prosequi* was a procedural power granted to the English attorney general to dismiss pending cases and was often exercised at the discretion of the Crown, and was not reviewable by the court. *Id.* at 579; *see* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL L. REV. 1, 16 (2009) (citing Abraham S. Goldstein, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 12 (1981)). "[W]hen the Attorney General issued a *nolle*, the court would terminate the prosecution without any inquiry." Kraus, *supra* (citing Goldstein, *supra*). Even if brought by a private citizen, criminal prosecutions were ultimately considered the province of the Crown. "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society . . . . [F]or that reason, all proceedings, '*ad vindictam et pœnam*' are called in the law, the pleas or suits of the Crown . . . . As indictments and informations, granted by the King's Bench, are the King's suits, and under his controul [sic]; informations filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure." Wilkes v. The King, (1768) 97 Eng. Rep. 123 (K.B.) 125. As the American colonies were settled, the *nolle prosequi* was adopted as a part of early American criminal law. *See* Krauss, *supra* at 16. Governors of the colonies or district attorneys "could direct and end official prosecutions." Prakash, *supra* (citing Oliver W. Hammonds, *The Attorney General in the American Colonies*, *in* 2 ANGLO-AMERICAN LEGAL HISTORY SERIES 1, 5, 7, 9, 11, 16, 20 (1939)).

170. *Armstrong*, 517 U.S. at 464 (confirming the authority of the executive to exercise prosecutorial discretion in the criminal context stems from the Take Care Clause); *see also* MANUEL & GARVEY, *supra* note 99 (explaining that "prosecutorial discretion may be appropriately characterized as a constitutionally based doctrine.").

171. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1983) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict."); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1281 (1997); *see* MODEL RULES OF PROF'L CONDUCT R. 3.8, cmt. 1 (2004).

172. 367 U.S. 497, 530 (1961) (Harlan, J., dissenting) (referring to a prosecutor's right to enforce statutes); Krauss, *supra* note 169, at 26.

of powers,[173] the Take Care Clause,[174] and the duties of a prosecutor as an appointee of the president.[175] Hence, judicial review of a prosecutor's exercise of discretion[176] is limited to "vindictive" or unconstitutional uses of power, which the Supreme Court has held are "both reviewable and impermissible."[177]

Prosecutorial discretion covers a wide array of decisions made in criminal cases, ranging from whether to bring charges, to whether to dismiss a case or to plea bargain with the defendant.[178] Moreover, prosecutorial discretion allows prosecutors to prioritize cases when resources are scarce, when caseloads are heavy, when the evidence available is not sufficient to secure a conviction,[179] and finally, when there are compelling humanitarian reasons to not pursue prosecution.[180] Today, the criminal justice system cannot function without prosecutorial discretion.[181]

Title IX of the United States Attorneys' Manual, entitled *Principles of Federal Prosecution*, offers approximately forty pages outlining the use of prosecutorial discretion in the criminal context

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173. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .") (citing *Confiscation Cases*, 74 U.S. 454 (1869)).

174. U.S. CONST., art. II § 3.

175. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed . . . . Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." (internal citations omitted)).

176. *See, e.g.*, *Confiscation Cases*, 74 U.S. 454 (1869); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

177. Heckler v. Chaney, 470 U.S. 821, 846 (1985) (Marshall, J., concurring) (citing Blackledge v. Perry, 417 U.S. 21, 28 (1974)).

178. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

179. *See* U.S. DEPARTMENT OF JUSTICE, United States Attorney Manual § 9-27.230 (2002), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230.

180. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000) (prosecutor's "power is widely seen as necessary, and frequently a good thing: It permits mercy, and it avoids flooding the system with low-level crimes").

181. Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1064 (arguing that "plea bargaining is a defining, if not the defining, feature of the present federal criminal justice system").

and provides guidance to United States Attorneys at nearly every stage of a criminal proceeding, from initiating prosecution to sentencing.[182] The *Principles of Federal Prosecution* is "cast in general terms with a view to providing guidance rather than to mandating results."[183] Central to the prosecutorial discretion guidelines is the notion that "[t]he manner in which Federal Prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens."[184]

1. Prosecutors Have a Duty to Seek Justice

Embedded in the manual's guidance is the notion that prosecutorial discretion in criminal law is anchored to the prosecutor's professional and ethical duty "to seek justice."[185] This duty can be traced to a mid-1800s essay, which was the basis for the American Bar Association's first code of ethics.[186] In part, this duty beseeches a prosecutor to not prosecute a person whom she believes to be innocent.[187] The Supreme Court has invoked this professional canon in admonishing overzealous prosecutors.[188] This unique role "places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other."[189] In addition, prosecutors are viewed not solely as advocates, but they

182. *See id.* at 1076; Department of Justice, *supra* note 179, at §§ 9-27.001–760.

183. Department of Justice, *supra* note 179, at § 9-27.001.

184. *Id.*

185. *See* MODEL RULES R. 3.8, cmt. 1; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict."); *see also* Secunda, *supra* note 171, at 1281 ("All current and past ethical rules for prosecutors operate, to one degree or another, under the premise that prosecutors should not merely convict, but they should attempt to 'do justice.'").

186. *See* Bruce Green, *Why Should Prosecutors "Seek Justice"*, 26 FORDHAM URB. L.J. 607, 612 n.10 (1998–1999) (citing to Hon. George Sharswood, AN ESSAY ON THE PROFESSIONAL ETHICS (F.B. Rothman 5th ed. 1993) (1854).

187. *See, e.g.*, Wellar v. People, 30 Mich. 16, 22–23 (1874) ("[A] public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty . . . .").

188. Berger v. United States, 295 U.S. 78, 88 (1935) (criticizing the prosecutor's conduct, stating "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

189. *See* Green, *supra* note 186, at 615 (citing to AM. BAR ASS'N, *supra* note 35, Standard 3-1.2(b) ("'The prosecutor is an administer of justice, an advocate, and an officer of the court.'").

are also required to seek justice.[190] Prosecutors also may not seek waivers to important pretrial rights from unrepresented defendants.[191] Moreover, prosecutors have an independent ethical obligation to disclose to a defendant any exculpatory evidence—that is, evidence that mitigates culpability, both during a trial, as well as in the sentencing phase.[192]

Generally speaking, criminal prosecutors are confronted with the decision to exercise discretion in two situations.[193] First, the prosecutor must believe that the individual suspected of committing a crime is indeed guilty of the act.[194] This is where the duty to seek justice is most often invoked and easily understood. If the United States' justice system is grounded in the rule of law, then an innocent person should not be convicted or jailed for a crime she did not commit.[195] While due process is the constitutional embodiment of this value, the prosecutor's duty to seek justice is the ethical guarantee. Second, a prosecutor can exercise discretion even where the prosecutor believes a person did violate a criminal statute. In this instance, a prosecutor may choose not to pursue a conviction or may argue for leniency.[196] The reasons are plenary. For instance, the prosecutor may not have the required resources to charge and try every person who has committed a criminal act and therefore must prioritize who to pursue.[197] Or the prosecutor may want to provide leniency or immunity for one individual in order to pursue a criminal accomplice.[198] Finally, a prosecutor may decide that the punishment

190. *See* MODEL RULES R. 3.8, cmt. 1.

191. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(c) (2004); *see, e.g.*, Hood v. State, 546 N.E.2d 847, 849–50 (Ind. App. 1989) ("Here, not only did the State plea bargain with an uncounseled defendant, it also made the uncounseled defendant's waiver of his right to counsel as a condition of the plea agreement.").

192. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004).

193. *See* Green, *supra* note 186, at 634.

194. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

195. Hurd v. People, 25 Mich. 405, 415–16 (1872) (stating "[a]nd however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.").

196. *See* Vorenberg, *supra* note 178, at 1527.

197. *See* Arthur Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972–1973) (quoting Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960)).

198. *See* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 653–55 (2006) (explaining that virtue is something acquired by practice and training, assumes that the

for the crime is too harsh or that there are compelling circumstances that warrant not charging an individual.[199]

Professor Bruce Green notes that the responsibility to seek justice is most often advanced by two theories: (1) the prosecutor's power, and (2) the prosecutor's professional role in representing the sovereign.[200] First, a prosecutor's immense amount of power creates an inherit imbalance of power between prosecutor and criminal defendants. Prosecutors have more resources than their adversaries—that is, they are equipped with more funding and personnel. Their adversaries are marginalized, powerless, and often indigent.[201] In addition, prosecutors have broad powers as extensions of the sovereign, which include the power to apply for search warrants and arrest warrants, the power to conduct wiretaps, and the power to grant immunity from prosecution.[202] They also make decisions on behalf of the government, not just for a client.[203]

Second, Professor Green asserts, "the duty to seek justice is the prosecutor's professional role," which "make[s] prosecutors different from other government lawyers and from lawyers for even the most powerful private clients."[204] It is this role of representing the sovereign, not just simply serving as a lawyer for the sovereign, which distinguishes a prosecutor and thereby creates this affirmative obligation to carry out the sovereign's overarching objective in criminal law to "do justice."[205] Professor Green argues that in addition to enforcing the criminal code and avoiding punishment of the innocent, the sovereign has two additional primary objectives:

> One is to treat individuals with proportionality, that is, to ensure that individuals are not punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated the same way. Sometimes these various

person will do the right thing most of time, requires practical wisdom, and is acquired through deliberation, judgment, and decision).

199. *See* Vorenberg, *supra* note 178, at 1551.

200. *See* Green, *supra* note 186, at 635.

201. *Id.* at 626.

202. *Id.* at 626 (quoting N.Y.S. Bar Association Comm. on Professional Ethics, Formal Op. 683 at 3 (1996)).

203. *Id.* at 627–28.

204. *Id.* at 633.

205. *Id.* at 634.

> objectives are in tension. It is the prosecutor's task, in carrying out the sovereign's objectives, to resolve whatever tension exists among them in the context of individual cases.[206]

The prosecutor's role is not only to represent the sovereign but also to act as if she were the sovereign, and to make decisions that "the client," her country, would typically make.

2. Charging Decisions

Prosecutors are also permitted to decline to prosecute a case that is supported by legal evidence, when the punishment is disproportionate or harsh.[207] In making such a determination, prosecutors may consider "[the] insignificance of wrongdoing, the defendant's prior exemplary conduct, or the defendant's frail physical condition."[208] *The Principles of Federal Prosecution* instructs prosecutors to decline to prosecute cases where: (1) no substantial federal interest would be served by prosecution, (2) the person is subject to effective prosecution in another jurisdiction, or (3) there exists adequate non-criminal alternative to prosecution.[209] In deciding whether there is a federal interest, federal prosecutors are instructed to consider both federal enforcement priorities as well as the nature and seriousness of the offense. The manual instructs prosecutors not to waste federal resources on "inconsequential cases or cases in which the violation is only technical."[210] Prosecutors are to also consider the person's personal circumstances including age, mental or physical impairment, and other compelling factors unique to the accused.[211]

Federal criminal prosecutors are required to document their decision not to prosecute and articulate the reasons for exercising a favorable grant of discretion.[212] While police officers apprehend an individual based on probable cause that the individual committed a

206. *See id.*
207. AM. BAR ASS'N, *supra* note 35, Standard 3-3.9(b)(iii).
208. *See* Green, *supra* note 186, at 623.
209. U.S. DEPARTMENT OF JUSTICE, United States Attorney Manual 6 (2002), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230.
210. *Id.* at 7.
211. *Id.* at 8–9.
212. *Id.* at 13.

crime, it is ultimately up to the prosecutor to decide whether to try the individual.

B. Critiques of the Use of Prosecutorial Discretion in Criminal Law

The ethical mandate for prosecutors to "seek justice" in deciding when to exercise a favorable grant of discretion is not a panacea for abuse of power or arbitrary decision-making. There are legitimate concerns about the use of prosecutorial discretion in criminal law. If prosecutorial discretion in criminal law has value, then it is paramount for the immigration system that, when designing an effective model for ICE trial attorneys, DHS understands the challenges criminal prosecutors face in fulfilling their ethical obligation to seek justice. Critics lament that prosecutorial discretion is a law enforcement tool subject to little oversight or limitation by the legislative and judicial branches of government.[213] In addition, prosecutors will decline to prosecute a case due to lack of sufficient admissible evidence, compelling life circumstances of the accused, other larger systemic office or agency priorities, or simply a lack of resources. Related is the criticism that prosecutors are making case-by-case determinations based on their own personality, whims, and preferences, which have little, if nothing, to do with the defendant and the alleged conduct.[214] Yet, this criticism is not ontological; rather, it is normative. It is not the existence of the awesome power to decide whether to prosecute that is problematic; rather, the challenge arises when an individual prosecutor exercises (or does not exercise) this power in an appropriate way given the particular circumstances.[215]

While there are some outer limits on discretion—both external limits[216] and self-imposed limitations[217]—federal prosecutors are not

213. *See* Moses v. Kennedy, 219 F. Supp. 762, 764–65 (D.C. 1963) (stating "[t]he prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government."), *aff'd sub. nom.* Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965) (per curiam); Vorenberg, *supra* note 8, at 1539–42.

214. *See* Vorenberg, *supra* note 8, at 1534; Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004).

215. *See* Green, *supra* note 186, at 619–21.

216. External limitations include judicial review of a plea agreement, judicial doctrine against retaliatory prosecutions, and the criminal code. *See* Vorenberg, *supra* note 8, at 1537–43 (discussing the external limitations on prosecutorial discretion).

bound by any formal regulations.[218] In addition, prosecutorial discretion suffers from regional disparity and, as a result, there is a lack of prosecutorial consistency throughout the country. In the federal system, the U.S. Attorneys' offices are primarily responsible for the prosecution of federal law offenders.[219] These decisions are serious not only for the U.S. government, but also for the victims and their families, and criminal investigators, as well as the defendants, and their families and communities.[220] Yet, the decision to prosecute on similar facts will vary depending on the office. Congress expressed concern about the lack of consistency among the U.S. Attorneys' offices across the country.[221] This resulted in then Attorney General Civiletti issuing the Principle of Prosecution in 1980. Professor James Vorenberg argued that this memo pushed discretion up the chain of command within the various offices, but failed to create consistency among them.[222]

The most compelling and sophisticated criticism about prosecutorial discretion is the fact that there is no concrete guidance or judicial explanation on what it means to "seek justice." This mandate is amorphous. In trying to create a workable architecture for this duty, Professor Michael Cassidy argues that virtue—"in particular Aristotelian virtues of courage, fairness, honesty, and prudence"[223]—should inform what it means to seek justice, and he also contends that prosecutors, as individuals, must possess virtue to be successful.[224] He recommends that, to ensure that prosecutors are

217. Internal limitations can range from formally adopted regulations to informal customs and in between office memoranda and public or internal statements. *See id.* at 1543–45.

218. *See* Leland Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AMER. U. L. REV. 310, 313–21 (1978) (concluding that while the U.S. Department of Justice has guidelines for exercising prosecutorial discretion they are not binding regulations); Fred C. Zacharias, *Structuring Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 47–52 (1991) (arguing that the noncompetitive "do justice" approach is inadequate because the professional codes do not exempt prosecutors from the requirements of zealous advocacy).

219. *See* O'Neill, *supra* note 214, at 1440.

220. *Id.* at 1442.

221. *See* Vorenberg, *supra* note 8, at 1543–44 (discussing the findings of the congressional committee investigating use of prosecutorial discretion in U.S. Attorney offices and Congress's subsequent demand for guidelines and policies to cure the regional disparity).

222. *Id.* at 1545.

223. Cassidy, *supra* note 198, at 640.

224. *Id.* Cassidy discusses that virtue is something acquired by practice and training, assumes that the person will do the right thing most of time, requires practical wisdom, which is acquired through deliberation, judgment, and decision. In addition, he concludes that the rules of

able to fulfill their ethical mandate to seek justice, prosecutor offices should be selective about whom they hire and should proactively create positive role models and mentors for young attorneys.[225] Ultimately, Professor Cassidy concludes: "Finally, my analysis leads me to one cautiously optimistic observation about the professional life of prosecutors. As elastic and amorphous as the 'seek justice' obligation may seem, it can be a source of professional aspiration and satisfaction for virtuous prosecutors who take it seriously."[226]

C. Why Criminal Law Principles Matter in Immigration Cases: Consequences of Removal

In recent years, Congress has actively criminalized non-violent, minor immigration violations and stripped immigration judges of almost all authority to exercise favorable discretion in cases where the equities may merit suspending deportation.[227] Moreover, the federal judiciary is extremely limited in what immigration decisions it can take on appeal. The existing draconian laws, coupled with recent court-stripping provisions, increase the stakes for an immigrant facing removal. As a result, there is a growing recognition by the Supreme Court that immigration, while it may not be solely a creature of criminal law, bears a greater resemblance to criminal law than civil law, where it has been historically situated.

The consequences of losing a case before an immigration judge are dire.[228] Immigrants in removal proceedings often face consequences akin to a criminal conviction; however, immigration proceedings are civil in nature.[229] Moreover, immigration laws are

professional responsibility do not provide enough guidance to prosecutors who are faced with external political pressures, internal pressures, daunting workloads, and underfunded and understaffed offices, and usually don't have all the information needed to make an informed decision. *Id.* at 652–53.

225. *Id.* at 693–94.

226. *Id.* at 694.

227. *See* Memorandum by Doris Meissner, *supra* note 4, at 1. "Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the [INS's] prosecutorial discretion." *Id.*

228. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Jennifer L. Coyler et al., *Increasing Pro Bono Activity: The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 464 (2009) (citing Fung Ho v. White, 259 U.S. 276, 284 (1922)) (noting "removal can 'result . . . in loss of both property and life; or of all that makes life worth living'").

229. *See generally* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship, *Stigma, and Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011) (discussing the case law distinguishing criminal and civil law and arguing for an alternative litmus test, including

complex, constantly changing, and often inaccessible.[230] Justice Stevens, in delivering the opinion for the U.S. Supreme Court in *Padilla v. Kentucky*[231] concluded, "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."[232]

The Supreme Court held in *Padilla* that deportation is not just a mere collateral consequence of a criminal plea.[233] Therefore, while the petitioner was not entitled to government counsel, he could bring an ineffective-assistance-of-counsel claim in challenging his criminal conviction, based on his criminal defense attorney's failure to inform him of the immigration consequences of his plea.[234] In *Padilla*, the petitioner was a lawful permanent resident of the United States for over forty years[235] who pled guilty to a drug charge that made his deportation "presumptively mandatory."[236] Prior to accepting the plea, Padilla's attorney did not inform him that deportation was a possibility; in fact, his attorney assured him that the charge would have no bearing on his immigration status.[237] Padilla argued ineffective assistance of counsel; however, the Supreme Court of Kentucky held that the Sixth Amendment did not protect a criminal defendant from unreliable advice about deportation because the immigration issue was not within the state court's sentencing authority, and thus was a collateral consequence.[238] The U.S. Supreme Court disagreed, stating that deportation has long been recognized as a severe penalty and that "[a]lthough removal proceedings are civil in nature, deportation is nevertheless intimately

whether some sort of stigma is imposed and whether or not someone is deprived of liberty in determining when and what constitutional-guaranteed procedural protections should attach to a given procedure).

230. *See* Careen Shannon, *Addressing Inadequate Representation: Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 579 (2009) (referring to federal judges' remarks on the complexity of U.S. immigration laws).

231. 559 U.S. 356 (2010).

232. *Id.* at 364.

233. *Id.* at 366.

234. *Id.* at 368–69.

235. *Id.* at 359.

236. *Id.* at 369.

237. *Id.* at 359.

238. *Id.* at 359–60.

related to the criminal process."[239] As a result, the Court held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel"[240] and that *Strickland v. Washington*[241] applied to Padilla's claim.[242]

Padilla has laid some important groundwork about what is at stake for immigrants faced with deportation. First, the case firmly establishes that both the severity of deportation and its frequent ties to criminal prosecution require some level of protection in the context of plea arrangements.[243] Justice Stevens's recount of the increasing strictness of mandatory deportation regulations, and the rapid decline in the amount of authority provided to judges to set aside deportation after weighing other competing concerns, demonstrates that individuals facing deportation need adequate representation.[244] No longer is discretionary relief prominent; as Justice Stevens states, "changes to our immigration law have dramatically raised the stakes . . . . The importance of accurate legal advice for noncitizens accused of crimes has never been more important."[245]

Padilla also underscores the severe consequences of losing an immigration case.[246] Justice Stevens focused on the severity of deportation and the need for legal advice when deportation is a consequence of the commission of a crime, yet there are a significant

239. *Id.* at 365 (citation omitted).

240. *Id.* at 366.

241. 466 U.S. 668 (1984) (establishing reasonably effective assistance as a constitutional requirement and devising a two-prong test to be used when analyzing whether defense counsel's performance fell below the objective standard of reasonableness).

242. *Padilla*, 559 U.S. at 366.

243. *Id.* at 359–62. In fact, this decision has spurred scholars to renew arguments for government-funded counsel in immigration proceedings. *See, e.g.*, Alice Chapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 603 (2011) (arguing that the *Padilla* decision calls in question the current assumptions on what cases trigger Sixth Amendment protection and could allow courts to revisit the scope of the Sixth Amendment without overturning *Scott v. Illinois*, 440 U.S. 367 (1979)).

244. *Padilla*, 559 U.S. at 359–62.

245. *Id.* at 364.

246. Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: Challenging Construction of the Fifth-And-A-Half Amendment*, 58 UCLA L. REV. 1461, 1474–75 (2011) (arguing the majority opinion in *Padilla* begins to see punitive nature of deportation); *see also* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1332 (2011) (arguing that the *Padilla* decision is a departure from previous United States Supreme Court jurisprudence, which had held deportation was purely civil in nature, whereas in *Padilla* the Court recognized that deportation is related to the criminal process).

number of individuals who did not commit crimes but face removal from the country.[247] These individuals must navigate the complex and unforgiving immigration system without any procedural safeguards—not knowing that one small mistake may render it impermissible for them to remain in the United States. This Supreme Court decision has been used to advance arguments for why immigrants facing removal should be afforded a government-funded counsel in the civil immigration proceeding.[248] This decision also underscores the need to import other trappings of the criminal justice system and require prosecutors to "seek justice" in immigration law.

V. RECOMMENDATIONS TO IMPROVE THE USE OF PROSECUTORIAL DISCRETION IN IMMIGRATION LAW

A. Decisions to Prosecute Should Rest with the Prosecutor: Why ICE Attorneys Should Have Sole Authority to Issue Charging Documents

One of the major differences between the historical development of prosecutorial development in immigration law and criminal law is that in immigration law it is not just the prosecutors—that is, the government lawyers representing the state's interest—who have been accorded discretion;[249] instead, other executive branch agents, such as immigration enforcement officers and border patrol agents, have been accorded this awesome power to decide who to deport. Currently, almost any immigration officer has the authority to issue

247. The Executive Office for Immigration Review (EOIR) does not keep statistics on what type of relief was sought by a Respondent placed in removal proceedings. However, EOIR does track the number of asylum cases before immigration judges. In fiscal year 2011, there were 338,114 cases before the immigration court system and approximately 576 of those cases were requests for asylum. OFFICE OF PLANNING ANALYSIS & TECHNOLOGY, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK C1–C3 (Feb. 2012) [hereinafter FY 2011 STATISTICAL YEARBOOK], *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

248. *See, e.g.*, Chapman, *supra* note 243, at 589 (arguing that the Sixth Amendment right to government-funded counsel should be extended to immigrants in removal proceedings in light of the Supreme Court of the United States' holding in *Padilla*).

249. CENTER FOR IMMIGRANTS' RIGHTS, PENNSYLVANIA STATE UNIVERSITY'S DICKENSON SCHOOL OF LAW, TO FILE OR NOT TO FILE A NOTICE TO APPEAR: IMPROVING THE GOVERNMENT'S USE OF PROSECUTORIAL DISCRETION 51–52 (2013) (citing an email from Judge Bruce Einhorn lamenting that "one of the great regulatory flaws" in the immigration system is allowing non-attorneys to file NTAs and how this differs greatly from federal district court cases in which a U.S. Attorney or Assistant U.S. Attorney is required to sign off on all complaints and subsequent pleadings and is therefore "accountable for the filing and substance of the documents"), *available at* https://law.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf.

an NTA.[250] In criminal law, the corollary would be that a police or parole officer, a detective, or a police chief could indict a suspected criminal and a trial would commence. While an ICE trial attorney represents the government in the hearing and is an immigrant's adversary, there is no requirement that the immigration prosecutor decide to go forward with a trial for the proceedings to commence and confer jurisdiction to the immigration court.[251] While almost any immigration officer can initiate a removal proceeding, once the NTA has been filed with the immigration court, jurisdiction over the hearing is vested solely with the immigration court[252] or the charging agent, who can withdraw the NTA.[253] Therefore, even if the ICE trial attorney agrees with the noncitizen and moves to dismiss the proceedings, the decision rests with the immigration judge.[254]

In October 2013, the Center for Immigrants' Rights at Penn State's Dickinson School of Law prepared a report for the American Bar Association Commission on Immigration entitled *To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion*.[255] In gathering information for this report, the authors surveyed immigration attorneys, filed Freedom of Information Act (FOIA) requests, and interviewed attorneys, advocates, and scholars.[256] The authors discovered that the individuals placed in removal proceedings were not the types of cases that DHS has identified as high-priority cases for deportation.[257] In addition, DHS filed NTAs against a significant number of noncitizens who were ultimately granted some type of relief by the EOIR.[258] This report ultimately concluded that

> DHS may not be consistently exercising favorable prosecutorial discretion in issuing and filing NTAs in

250. *See* 8 C.F.R. §§ 1003.14, 239.1 (2013).

251. *Id.* § 239.1 (listing forty-one different categories of employees at DHS who have the authority to file a NTA and commence removal proceedings against a noncitizen).

252. *Id.* § 1003.14.

253. *Id.*. § 239.2(a).

254. *Id.* § 239.2(c); Bavakan Avetisyan, 25 I&N 688 (Bd. Of Immigration Appeals Jan. 31, 2012); Memorandum from Brian M. O'Leary, Chief Immigration Judge, U.S. Dep't of Justice, Executive Office for Immigration Review on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure (Mar. 7, 2013), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf.

255. CENTER FOR IMMIGRANTS' RIGHTS, *supra* note 249, at 1.

256. *Id.* at 4.

257. *Id.* at 5.

258. *Id.*

> appropriate cases as prescribed in various memoranda. As the survey results show, instead of focusing their limited enforcement resources exclusively on high priority individuals, DHS has initiated removal proceedings against low priority individuals without sufficiently considering the equities.[259]

A very pragmatic step toward increasing consistency in charging decisions would be to further limit who at DHS has the authority to issue NTAs. The authors of this report recommended that DHS "[e]stablish a permanent program requiring approval of a DHS lawyer prior to the filing of any NTA by a DHS officer."[260]

This would be a vast improvement over the current system, but even further changes are necessary. Given the severity of deportation as a consequence, ICE trial attorneys should have the sole discretion to issue NTAs. This is not to say other agents or attorneys within DHS cannot be consulted, or provide recommendations to ICE prosecutors and their supervisors. The apprehending DHS agents, or adjudication officers, would provide an affidavit or statement of the facts articulating the reasons they believe the immigrant should be placed in removal proceedings. This record, along with agency guidance on enforcement, would serve as material information for the ICE trial attorneys as he or she decides whether to commence removal proceedings against a particular individual.

As with criminal prosecutors, ICE attorneys are resource deficient. They do not have the funding and personnel to try every noncitizen on their docket. ICE attorneys are authorized to exercise discretion[261] and grant requests from a noncitizen's attorney to administratively close the case[262] or defer action. Like criminal prosecutors, ICE attorneys are responsible for charging the

259. *Id.* at 45–46.

260. *Id.* at 56.

261. Memorandum from Peter Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Sec., on Case-By-Case Review of Incoming and Certain Pending Cases, to all Chief Counsel and Office of the Principal Legal Advisor, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. 2 (Nov. 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.

262. Administrative closure is a procedure in which the Immigration Judge or Board of Immigration Appeals moves a case from its docket as a matter of administrative convenience. *See* Avetisyan, *supra* note 254, at 690. A joint motion from the ICE attorney and the Respondent initiates the process. *See id.*

noncitizen with removability. If DHS adopts the recommendation to limit the NTA-issuing authority to ICE attorneys, they would serve as the gatekeeper to determine if removal hearings are appropriate.[263] ICE attorneys, like criminal prosecutors, would have the full authority to decline charging an immigrant, as well as the authority to terminate the adjudication later on for resource or humanitarian reasons.

In addition, ICE trial attorneys should be required to file a memorandum accompanying each NTA. The memorandum would articulate in writing the reasons that this particular immigrant's deportation is a departmental priority. Currently, the existence of internal agency guidance is not being fully operationalized at local levels.[264] This documenting requirement would expand on the already existing requirement for DHS officers, agents, or attorneys to provide written documentation when they decide to exercise discretion favorably.[265] Currently, if prosecutorial discretion is exercised, the DHS employee must provide the legal and factual basis for his or her decision and place this document in the immigrant's file.[266] By requiring the ICE trial attorney to articulate his or her rationale for each decision about whether to commence removal proceedings, the attorney must be familiar with the factors to consider when choosing whether to exercise discretion. It also provides a mechanism to determine if prosecutorial discretion is being applied consistently around the country.

B. Grounding Prosecutorial Discretion for ICE Attorneys in the Ethical Obligation to Seek Justice

On June 17, 2011, John Morton issued comprehensive guidance on prosecutorial discretion. The first memorandum articulated comprehensive instructions to ICE agents, officers, and attorneys about exercising discretion at all stages of the immigration enforcement process.[267] The second memorandum addressed victims,

263. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 2–3.

264. *See* CENTER FOR IMMIGRANTS' RIGHTS, *supra* note 249, at 60.

265. *See* Memorandum from Doris Meissner, *supra* note 4, at 11–12.

266. *Id.*

267. *See* Memorandum from John Morton on Exercising Prosecutorial Discretion, *supra* note 18, at 1–6.

witnesses, and plaintiffs in civil rights actions.[268] Yet, despite this high-level guidance, an overwhelming number of ICE trial attorneys did not change their practices based on the directives.[269] Recently, the American Immigration Council surveyed 252 cases representing all of the ICE field offices and offices of chief counsel that were active after the Morton Memos were issued.[270] The study concluded that in the majority of offices, ICE agents, trial attorneys, and supervisors admitted that they had not implemented the memoranda and that no changes were made to policy or practice.[271] Moreover, many trial attorneys indicated that they had not received further guidance or training on how to execute the June 17, 2011 Morton Memos.[272] The Obama administration has clearly expressed a preference for using prosecutorial discretion to administratively close cases, grant deferred action, and to forgo placing individuals in removal proceedings when the noncitizens are not an enforcement priority and do not threaten public safety or national security.[273] The administration's stance, however, has not changed the entrenched culture among ICE trial attorneys that their primary responsibility is to deport.[274] There needs to be cultural change among ICE attorneys that their primary responsibility is to seek justice.

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268. *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, to Field Office Directors, Special Agents in Charge and Chief Counsel (June 17, 2011), *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

269. ALEXSA ALONZO ET AL., AMERICAN IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 4 (Nov. 10, 2011), *available at* http://www.aila.org/content/default.aspx?docid=37615.

270. *Id.*

271. *Id.*

272. *Id.*

273. *See id.*

274. CHI. APPLESEED FUND FOR JUSTICE, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS, 16–18 (2009), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf (noting tendency of ICE attorneys to adhere to "deport-in-all-cases culture"); BETSY CAVENDISH & STEVE SCHULMAN, CHI. APPLESEED FUND FOR JUSTICE, REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE: TRANSFORMATIVE CHANGE FOR THE IMMIGRATION JUSTICE SYSTEM 39–48 (2012), *available at* http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf (observing persistence of ICE's "deport at all costs" approach in immigration court); *ICE Seeks to Deport the Wrong People*, TRAC IMMIGR. (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/ (reporting between one-third and one-half of ICE's deportation requests are rejected by immigration courts). Yet, there is one phenomenal exception to this deportation-centered mentality. *See* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 181–84

While there are several memoranda, including the recent Morton Memos, memorializing how prosecutorial discretion should be understood and applied, there is not a central prosecutor handbook or manual akin to the U.S. Attorney Manual. The Meissner Memorandum references the U.S. Attorney Manual as the framework for prosecutorial discretion in immigration.[275] The EOIR has recently completed the Immigration Court Practice Manual,[276] which it updates regularly.[277] Accordingly, ICE should also have a manual similar to the U.S. Attorney Manual and the EOIR Immigration Court Practice Manual.

The manual should include specific instructions to ICE trial attorneys that they are duty bound to seek justice, not just deportation. And in seeking justice, the ICE attorney has an affirmative obligation to make sure that a person who is eligible for affirmative relief to removal is not denied that relief. When a noncitizen is placed in removal proceedings, there are affirmative defenses that will allow particularly vulnerable individuals to remain in the United States even if they have overstayed their visa or entered the country illegally. Such affirmative defenses include asylum,[278] temporary protected status,[279] and cancellation of removal.[280] In these circumstances, ICE attorneys may either work with the noncitizen in support of their application, or may actively oppose it and advocate for the immigration judge to deny this relief.[281]

In addition, the immigrant, not the ICE prosecutor, has the burden of proof in removal proceedings to establish that he or she is

(2013) (documenting the herculean efforts of ICE trial attorneys in Charlotte, North Carolina, who administratively closed deportation cases against noncitizens who were arrested unlawfully by local police officers); *see* AM. BAR ASSOC. COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1-25 to 1-29 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (noting "[i]nsufficient use of prosecutorial discretion" as a systemic issue).

275. Memorandum from Doris Meissner, *supra* note 4, at 4–5.

276. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL (Aug. 2009), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf.

277. U.S. Dep't of Justice, *Immigration Court Practice Manual Current Updates*, JUSTICE.GOV, http://www.justice.gov/eoir/vll/OCIJPracManual/current_updates.html.

278. 8 U.S.C. § 1101(a)(42) (2012).

279. *Id.* § 1254(a).

280. *Id.* § 1229b(a), (b).

281. *See* Memorandum from William J. Howard, *supra* note 29, at 1–2.

eligible for immigration relief and should not be deported.[282] Conversely, in criminal law, the state carries the high burden of proving the criminal defendant is guilty beyond a reasonable doubt. As a result, unlike criminal prosecutors, who are duty bound to make their own professional assessment about the guilt of an individual before pursuing charges and to not rely on defense counsel making the case, ICE attorneys have no professional ethical requirement to make such an assessment before seeking removal of a noncitizen.

Despite this disparity in ethical obligations, ICE attorneys and criminal prosecutors' power and professional roles are quite similar. The two recognized justifications for criminal prosecutors' duty to seek justice equally apply in the immigration context: the prosecutor's power and the prosecutor's professional role as representative of the sovereign.[283] The power that ICE attorneys have in immigration cases is well established.[284] As with criminal prosecutors, their adversaries are marginalized, powerless, and often indigent.[285] Additionally, the consequences of pursuing a case are similar in a criminal trial and removal hearing.[286] Like criminal prosecutors, ICE attorneys have vast powers as an extension of the sovereign. ICE attorneys' roles are more akin to criminal prosecutors than that of lawyers representing the government in civil proceedings,[287] and thus they should share the same ethical obligation and duties. ICE trial attorneys should be bound by the

282. 8 U.S.C. § 1229a(c)(4).

283. *See* Green, *supra* note 186, at 625–26.

284. *See Role of Prosecutorial Discretion*, *supra* note 15, at 274.

285. Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 646–52 (2012) (discussing the stakes for immigrants, barriers to accessing competent representation and challenges for pro se litigants in removal proceedings).

286. *Id.* at 646–49 (discussing how the Supreme Court decision in *Padilla* provides support for the argument that the consequences of removal are akin to a criminal conviction).

287. Most government agency lawyers view the agency as their client and tend to view their ethical obligations like lawyers who have private clients. *See, e.g.*, ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-387 (1994) (stating that government lawyers do not have an ethical obligation to review from filing a suit that is time-barred or to inform opposing counsel that the statute of limitation has lapsed). That is not to say that government lawyers do not have any additional responsibilities and that they should not be held to a higher standard. In fact, Chief Judge Mikva, remarking on the ethical duties for lawyers in the Federal Energy Regulatory Commission, argued that the standard articulated by the Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935), stating that the obligation of a representative of the sovereign is to not just to win a case but to see that justice is done, should apply to all government lawyers. Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992).

same ethical canon as federal criminal prosecutors—they should have "a duty to seek justice."

DHS should memorialize this duty in an ICE Prosecutor Manual. In addition, when DHS is hiring ICE trial attorneys, they should look for individuals who possess the virtues that make successful prosecutors, including "justice, courage, honesty and prudence."[288] DHS should provide regular trainings to new and experienced ICE trial attorneys on how seeking justice means "seeking to achieve a 'just,' and not necessarily the most harsh, result,"[289] and "seeking justice" is a virtue that is acquired through practice.[290]

VI. CONCLUSION

Immigration prosecutors, like criminal prosecutors, not only represent the sovereign as a client, they are the sovereign. In other civil litigation or in criminal defense, the attorney represents a client or an organization that appoints an agent to make legal decisions. Prosecutors are one in the same—they represent the government, their client, and they decide whom the government should prosecute. This awesome power is held in check by the criminal prosecutors' ethical and professional obligation to seek justice. Similarly, ICE trial attorneys decide whom to deport, not only on behalf of the sovereign, but also as the sovereign. ICE attorneys have been vested with the extraordinary power to prioritize which noncitizens may stay and which will go; as such, this power must be tempered with the simultaneous duty to seek justice. If DHS can create a culture where deferred action or no action is a just result, then prosecutorial discretion can truly be a tool to maximize resources, demonstrate mercy, and achieve justice.

288. *See* Cassidy, *supra* note 198, at 646–52 (discussing how these virtues are essential for a prosecutor to be ethical and that a prosecutor must possess "practical wisdom," i.e., "the ability to deliberate well—to recognize and perceive proper ends, and then to select those means that are likely to achieve such ends.").

289. *See* Green, *supra* note 186, at 608.

290. *See* Cassidy, *supra* note 198, at 643.