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Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law

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Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law

SHOBA SIVAPRASAD WADHIA*

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> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
>
> - James Madison[1]

I. INTRODUCTION

This Article is about deferred action and transparency in related immigration cases falling under the jurisdiction of the Department of Homeland Security (DHS). While scholars from other genres have written extensively on the topic of prosecutorial discretion, the subject is largely absent from immigration scholarship, with the exception of early research conducted by Leon Wildes in the late 1970s and early 2000s,[2] and a law review article I published in 2010 outlin-

1. THE FEDERALIST NO. 51, at 286 (James Madison) (Scott ed., 2002).
2. *See* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1980) [herein-

ing the origins of prosecutorial discretion in immigration law and related lessons that can be drawn from administrative law and criminal law.[3] That article ends with specific recommendations for the agency, such as codifying deferred action into a regulation and recognizing it as a formal benefit as opposed to a matter of "administrative convenience," and streamlining the array of existing memoranda of prosecutorial discretion floating within each DHS agency.[4] An additional recommendation included increasing oversight of prosecutorial discretion to ensure that officers and agencies that fail to exercise prosecutorial discretion by targeting and enforcing the laws against low-priority individuals are held accountable.

In this Article, and building upon recommendations published in *The Role of Prosecutorial Discretion in Immigration Law*,[5] I describe the state of prosecutorial discretion and deferred action in particular by surveying the political climate, public reaction, and advo-

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after Wildes, *The Operations Instructions*]; Leon Wildes, *The United States Immigration Service v. John Lennon: The Cultural Lag*, 40 BROOK. L. REV. 279 (1974); Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1977) [hereinafter Wildes, *The Litigative Use of the FOIA*]; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part I*, 53 INTERPRETER RELEASES 25 (January 26, 1976) [hereinafter Wildes, *The Nonpriority Program Part I*]; Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service - A Measure of the Attorney General's Concern for Aliens, Part II*, 53 INTERPRETER RELEASES 33 (January 30, 1976) [hereinafter Wildes, *The Nonpriority Program Part II*]; Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Cases*, 41 SAN DIEGO L. REV. 819 (2004) [hereinafter Wildes, *A Possible Remedy*].

3. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

4. ICE prefaced its most recent memorandum on prosecutorial discretion as building upon the pre-existing memoranda. *See* John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 1–2 (2011) [hereinafter Morton Memo on Prosecutorial Discretion], http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

5. *See* Wadhia, *supra* note 3, at 293–99.

cacy efforts in the last two years. I also chronicle my repeated Freedom of Information Act (FOIA) requests to DHS for information about deferred action, and the stumbling blocks I encountered during this 19-month journey. The Article will show that while deferred action is one of the very few discretionary remedies available for noncitizens with compelling equities, it currently operates as a secret program accessible only to elite lawyers and advocates. Moreover, the secrecy of the program has created the (mis)perception by some, that deferred action can be used as a tool to legalize the undocumented immigrant population or ignore congressional will. This Article explains why transparency about deferred action is important and makes related recommendations that include, but are not limited to, subjecting the program to rulemaking under the Administrative Procedures Act, issuing written decisions when deferred action is denied, posting information about the application process, and maintaining statistics about deferred action decisions. Without these remedies, noncitizens that possess similarly relevant equities will face unequal hardships.

A. *Background*

The Department of Homeland Security (DHS) is a cabinet-level agency with jurisdiction over many immigration functions.[6] The Department has jurisdiction over immigration "services" such as asylum, citizenship, and green card applications;[7] border-related enforcement actions such as border patrol and inspections;[8] and interior enforcement activities, such as the detention and removal of noncitizens.[9] The immigration court system is called the Executive Office for Immigration Review (EOIR) and rests within the Department of

6. *See* U.S. DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/index.shtm (last visited Aug. 9, 2011).
7. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis (last visited Aug. 9, 2011).
8. *See* U.S. CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/ (last visited Aug. 9, 2011).
9. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/ (last visited Aug. 9, 2011).

Justice.[10] Removal proceedings are initiated by DHS and operate as adversarial hearings at which U.S. Immigration and Customs Enforcement attorneys represent the DHS. On the other hand, noncitizens are entitled to find their own lawyers at no expense to the government.[11] Many noncitizens in removal proceedings are unrepresented because the proceeding itself is considered "civil" and without guaranteed safeguards like court-appointed counsel.[12] At a removal proceeding, an Immigration Judge reviews allegations and charges with the noncitizen defendant, as well as enters pleas.[13] If appropriate, the Immigration Judge presides over applications for relief from removal such as asylum, adjustment of status, and cancellation of removal.[14] The noncitizen bears the burden of proving that she is eligible for such relief.[15] Decisions by the Immigration Judge may be appealed with the Board of Immigration Appeals.[16] Not every noncitizen residing or entering the United States without legal authority is placed in removal proceedings.[17] Some are removed expeditiously by the Department through other means, while others are considered for prosecutorial discretion.[18]

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10. *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, http://www.justice.gov/eoir/ (last visited July 17, 2011).

11. *See* Immigration and Nationality Act (INA) § 292, 8 U.S.C. § 1362 (2006).

12. For a more detailed look at noncitizens' lack of representation, see Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 2 INSIGHT (MIGRATION POLICY INSTITUTE) (Apr. 2005), *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf; Andrew I. Shoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 55–56 (2008).

13. *See Office of the Chief Immigration Judge*, U.S. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, http://www.justice.gov/eoir/ocijinfo.htm (last visited Aug. 9, 2011).

14. *Id.*

15. *See U. S. Dep't of Justice*, U.S. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, http://www.justice.gov/eoir/press/04/ReliefFromRemoval.htm (last visited Dec. 30, 2011).

16. *Office of the Chief Immigration Judge*, *supra* note 13.

17. *Id.*

18. Note that this background section is intended as a brief review of the Department of Homeland Security and the removal process. For a more detailed discussion of the removal process and the agency components involved, see Wadhia, *supra* note 3. For an organizational chart listing the different components of

A favorable exercise of "prosecutorial discretion" identifies the Department of Homeland Security's authority to not assert the full scope of the agency's enforcement authority in each and every case.[19] The Department's motivations for exercising prosecutorial discretion are largely economic and humanitarian.[20] According to the agency's own statistics, Immigrations and Customs Enforcement (ICE) has the resources to remove less than 4% of the total undocumented population.[21] Moreover, many individuals and groups who present redeeming qualities such as lengthy residence, employment or family ties in the United States, and/or intellectual, military, or professional promise are living in the United States, vulnerable to immigration enforcement and without a statutory vehicle for legal status. In the first two years of the Obama Administration, such humanitarian cases have swelled in the wake of congressional stalemates over even discrete immigration reforms. At one time, prosecutorial discretion was called "nonpriority" and later "deferred action," but today, prosecutorial discretion is associated with many

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DHS and a description of each, see *Organizational Chart*, U.S. DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/xabout/structure/editorial_0644.shtm (last visited Aug. 9, 2011).

19. *See, e.g.*, Morton Memo on Prosecutorial Discretion, *supra* note 4, at 5; memorandum from William J. Howard, Principal Legal Advisor, on Prosecutorial Discretion, 2, 8 (Oct. 24, 2005) [hereinafter Howard Memo], *available at* http://www.shusterman.com/pdf/prosecutorialdiscretionimmigration2005.pdf; memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion, 2 (Nov. 17, 2000) [hereinafter Meissner Memo], *available at* http://www.scribd.com/doc/22092970/INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00; memorandum from John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens, 4 (March 2, 2011) [hereinafter Morton Memo on Civil Enforcement Priorities], *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf; memorandum from John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) [hereinafter Morton Memo on Certain Victims, Witnesses, and Plaintiffs], *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf; memorandum from Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion, 4 (Nov. 7, 2007) (on file with author);

20. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 1.

21. *Id.*

different actions by the government.[22] For example, a DHS officer can exercise favorable discretion by granting a temporary stay of removal, joining in a motion to terminate removal proceedings, granting an order of supervision, cancelling a Notice to Appear, or granting deferred action.[23] Prosecutorial discretion can also be exercised during different points in the enforcement process, including, but not limited to, interrogation, arrest, charging, detention, trial, and removal.[24]

This Article is limited to the Department's exercise of prosecutorial discretion and deferred action in particular. This Article does not discuss immigration adjudications before DHS (beyond deferred action) or the EOIR. Notably, many scholars have written extensively about immigration adjudications in these contexts.[25] On the other hand, I rely on process values that have been analyzed in other immigration adjudicatory contexts to analyze and advance the importance of transparency in deferred action.

B. *Summary of Deferred Action Process*

In theory, any person who is in the United States without authorization may apply for deferred action before any component of DHS, including CBP, ICE, and USCIS. Oft-times deferred action requests are reviewed by a local office, and following up to three levels of review, are either granted, denied, or unresolved.[26] There is no for-

22. Wildes, *A Possible Remedy, supra* note 2, at 820-23; *see* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 2; Meissner Memo, *supra* note 19, at 2; Howard Memo, *supra* note 19, at 2.

23. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 2; Howard Memo, *supra* note 19, at 2; Meissner Memo, *supra* note 19, at 2.

24. *See* Morton Memo on Prosecutorial Discretion, *supra* note4, at 2; Howard Memo, *supra* note 19, at 2; Meissner Memo, *supra* note 19, at 2.

25. *See, e.g.*, Jill E. Family, A Broader View of the Immigration Adjudication Problem, 23 GEO. IMMIGR. L.J. 595 (2009); Steven Legomsky, Restructuring Immigration Adjudication, 59 DUKE L. J. 1635 (2010); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 1, 3 (2008).

26. *See, e.g.*, *Ombudsman Recommendation: Recommendations on USCIS Deferred Action Processing*, U.S. DEPARTMENT OF HOMELAND SECURITY (July 11, 2011), http://www.dhs.gov/files/programs/cisomb-recommendation.shtm (citing the Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, § 442(c), 116

mal deferred action application form or fee. Upon receiving deferred action, the person may remain in the United States and may apply for work authorization unless, and until, the agency decides to target the person for enforcement under the immigration laws.[27] Specifically, the regulations governing immigration contain a specific subsection for individuals applying for work authorization on the basis of deferred action.[28] If a person is denied deferred action, there is no mechanism for review by the Department or the immigration court, nor is there a guarantee that the person will receive a notification about the Department's decision.[29] Because deferred action is a function of prosecutorial discretion, decisions are generally immune from judicial review in the absence of equal protection claims involving "outrageous discrimination."[30] Moreover, decisions about deferred action often rest with one agency and in many cases non-attorney employees of the Department, despite the fact that grave consequences attach when an agency fails to consider or denies a person deferred action status.[31] As of this writing, the Department does not keep public records about deferred action grants, nor does it

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Stat. 2135, 2194); Department of Homeland Security Secretary Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003) (delegating authority to grant voluntary departure under section 240B of the INA 8 U.S.C. § 1229c, and deferred action).

27. *See id.*

28. *See* 8 C.F.R. § 274a.12(c)(14) (2011) ("An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment . . . .").

29. While the June 17 memorandum from DHS on prosecutorial discretion includes some additional procedures that would include a case to be initiated by the ICE officer, private attorney, or ICE agent, it does not appear to include a specific method for notifying the noncitizen when they have been denied deferred action. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4.

30. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

31. Notably, the June 17, 2011 Morton Memo on prosecutorial discretion enables ICE attorneys to review the charging decisions by ICE, CBP, and USCIS. *See* Morton Memo on Prosecutorial Discretion, *supra* note 4, at 3. By including and amplifying the role of the ICE attorney, the memo includes an important and new check to the deferred action process before ICE and prosecutorial discretion generally. *See id.*

make information about the program available on its website, forms, or memoranda.

II. Department Guidelines on Prosecutorial Discretion

A. *Operations Instruction and Meissner Memo*

Two seminal policy statements on deferred action that have survived enormous structural changes of the immigration agency and immigration statute include a former "Operations Instruction" on deferred action, and a memorandum published by former INS Commissioner Doris Meissner.[32] The Operations Instruction (O.I.) was revealed in the 1970s in connection with litigation filed on behalf of John Lennon. That now-defunct Operations Instruction advises officers to consider:

> (1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States—effect of expulsion; (5) criminal, immoral or subversive activities or affiliations. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.[33]

That Operations Instruction was the subject of significant courtroom traffic beginning in the late 1970s that revolved around whether deferred action operates as a substantive benefit or an act of pure administrative convenience.[34] Concluding that the O.I. on deferred

32. Meissner Memo, *supra* note 19; (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

33. (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

34. *See* Velasco-Gutierrez v. Crossland, 732 F.2d 792, 798 (10th Cir. 1984); Pasquini v. Morris, 700 F.2d 658, 661 (11th Cir. 1983); Nicholas v. Immigration & Naturalization Serv., 590 F.2d 802, 807 (9th Cir. 1979); Soon Bok Yoon v.

action operated like a substantive benefit, the Ninth Circuit in *Nicholas v. INS* articulated the five criteria listed in the O.I., the directive language of the O.I., and the fact that a grant of deferred action provided the benefit of "an indefinite delay in deportation."[35] From the agency's point of view, the tension of what to call deferred action (administrative convenience or substantial benefit) was eliminated with a tweaking of the O.I. in 1981 and more explicit language in future memoranda including the Meissner Memo.[36]

Published in 2000, the Meissner memo identifies a list of examples of factors that should be considered by immigration officers in making prosecutorial decisions like deferred action, including, but not limited to:

- immigration status of the applicant;
- length of residence in the United States;
- criminal history and circumstances surrounding such history;
- humanitarian concerns such as family times, tender age at the time of entry into the United States, special medical conditions or conditions and circumstances in the country to which the beneficiary could be potentially removed; likelihood of being removed;
- current or past cooperation with law enforcement;

Immigration & Naturalization Serv., 538 F.2d 1211, 1213 (5th Cir. 1976); Lennon v. Immigration & Naturalization Serv., 527 F.2d 187, 193 (2d Cir. 1975); Wan Chung Wen v. Ferro, 543 F. Supp. 1016, 1017–18 (W.D.N.Y. 1982); Zacharakis v. Howerton, 517 F. Supp. 1026, 1027–28 (S.D. Fla. 1981); *see also* Siverts v. Craig, 602 F. Supp. 50, 53 (D. Haw. 1985) (construing 1981 instruction).

35. Nicholas, 590 F.2d at 806–807.

36. The relevant part of the amended instruction reads "Deferred action. The district director may, at his discretion, recommend consideration of deferred action, an act of administrative choice to give some cases lower priority and in no way an entitlement, in appropriate cases . . . ." (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1981). Despite the disclaimers placed in the amended O.I. and subsequent memoranda, the data below combined with the agency's continued application of deferred action based on specific factors present a strong argument for recognizing deferred action as a substantive benefit.

- service in the U.S. military; immigration history; and
- likelihood that she could be eligible for a legal immigration status in the future among other factors.[37]

B. *Morton Memoranda*

In the last two years, the immigration agency has published additional guidance about its authority to exercise prosecutorial discretion.[38] In June 2010, ICE issued a broad memorandum about its "Civil Enforcement Priorities" and limited resources, highlighting the importance of prosecutorial discretion during the apprehension, detention, and removal of noncitizens.[39] The memo reaffirms earlier memoranda on prosecutorial discretion and further states "Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens."[40] In

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37. Meissner Memo, *supra* note 19, at 7–8.

38. For a detailed description of memoranda and policy about prosecutorial discretion prior to 2010, see Wadhia, *supra* note 3.

39. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 1. EOIR highlighted the relationship between implementation of the June 2010 Morton Memo and an increased detained docket at EOIR. *Immigration Court System: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Director, Executive Office for Immigration Review), *available at* http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf ("As DHS enforcement programs reach their full potential, EOIR is planning ahead and shifting resources to meet the anticipated corresponding increase in the agency's detained caseload."). Note that Morton's June 30, 2010 memo on Civil Enforcement priorities was reissued by ICE on March 2, 2011, with one additional clause at the end to confirm that the memo itself did not create any right or benefit or limit the legal authority of ICE to enforce immigration laws. *See* Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 4 ("These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.").

40. Morton Memo on Civil Enforcement Priorities, *supra* note 19, at 4. For an in-depth analysis of the June 30 Morton memo, see Shoba Sivaprasad Wadhia, *Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*, IMMIGRATION POLICY CENTER-AMERICAN IMMIGRATION COUNCIL, THE PENNSYLVANIA STATE UNIVERSITY LEGAL STUDIES RESEARCH PAPER NO. 46-

June 2011, ICE issued another memorandum on prosecutorial discretion that was intended to support the Morton Memo on Civil Enforcement Priorities and also build upon many of the historic policy memoranda by INS and DHS on the subject of prosecutorial discretion.[41] The broad Morton Memo on Prosecutorial Discretion contains a tone similar to previous memoranda in that it identifies the resource limitations of the agency, furnishes a laundry list of largely humanitarian factors that ICE may consider in deciding whether or not to assert the full scope of enforcement authority available to ICE, and "clarifies" that the directive itself confers no right to the noncitizen or limitation on the agency to apprehend, detain, or remove "any" alien unlawfully within the United States.[42] The factors posted for consideration by ICE include, but are not limited to:

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;

2010 (2010) [hereinafter Wadhia, *Reading the Morton Memo*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723165.

41. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 1. ICE issued a second memorandum on prosecutorial discretion specific to certain victims, witnesses, and plaintiffs. *See* Morton Memo on Certain Victims, Witnesses, and Plaintiffs, *supra* note 19. This memo highlights the importance of exercising prosecutorial discretion towards:

> victims of domestic violence, human trafficking, or other serious crimes; witnesses involved in pending criminal investigations or prosecutions; plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and individuals engaging in a protected activity related to civil or other rights who may be in a non-frivolous dispute with an employer, landlord, or contractor.

Id. at 2. That memo also states somewhat conclusively "[I]t is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime." *Id.* at 1.

42. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 4, 6.

- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and condition in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from re-

moval, including as a relative of a U.S. citizen or permanent resident;

- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.[43]

The Morton Memo on Prosecutorial Discretion also articulates that "particular care" should be given to the following classes of individuals:

- veterans and members of the U.S. armed forces
- long-time lawful permanent residents
- minors and elderly individuals
- individuals present in the United States since childhood
- pregnant and nursing women
- victims of domestic violence, trafficking, or other serious crimes
- individuals who suffer from serious mental or physical disability; and
- individuals with serious health conditions.[44]

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43. *Id.* at 4.

44. *Id.* at 5. For a detailed analysis about the Morton Memo on Prosecutorial Discretion, see Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGRATION POLICY CENTER, 6 (July 20, 2011), *available at* http://www.immigrationpolicy.org/special-reports/morton-memo-and-prosecutorial-discretion-overview-0.

The Morton Memo on Prosecutorial Discretion is somewhat unique from previous memoranda in that it explicates who within ICE has authority to exercise prosecutorial discretion and the special role of ICE attorneys to "exercise prosecutorial discretion in any immigration removal proceeding before EOIR" including any removal proceedings that have been proposed by CBP or USCIS.[45] Rather than relying on the initial charging agency's decision to issue an NTA, the Morton Memo on Prosecutorial Discretion suggests that the ICE Chief Counsel or Deputy Director for ICE should handle any conflicts that arise between the charging agency and the ICE trial attorney seeking to exercise prosecutorial discretion.[46]

C. *Other ICE Policies*

ICE also released a "toolkit" for U.S. Prosecutors in April 2011, which contains a separate section on prosecutorial discretion and the related tools of deferred action and administrative stays of removal.[47] In describing the concept of deferred action, the toolkit advises:

> Deferred Action (DA) is not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority. There is no statutory definition of DA, but federal regulations provide a description: "[D]eferred action [is] 'an act of administrative convenience to the government which gives some cases lower priority. . . .'" There are two distinct types of DA requests: (i) those seeking DA based on sympathetic facts and a low-enforcement priority, and (ii) those seeking DA based on his/her status as an important witness in an investigation or prosecution. Basically, DA means the

45. Morton Memo on Prosecutorial Discretion, *supra* note 4, at 3.

46. *Id.* For a more detailed analysis of the Morton Memo on Prosecutorial Discretion, see Wadhia, *supra* note 44, at 5.

47. *Protecting the Homeland: Toolkit for Prosecutors*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 4–8 (2011), *available at* http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

> government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.[48]

The enforcement activities of ICE bear a direct relationship to the activities undertaken by the immigration court system, housed within the Department of Justice's Executive Office for Immigration Review.[49] EOIR assumes jurisdiction of immigration cases once a Notice to Appear (NTA) is filed with the immigration court.[50] A wide array of Department employees have the authority to assemble a NTA, which in and of itself raises concerns about the quality and consistency of NTA issuance. According to recent data calculated by the American Bar Association:

> The number of Notices to Appear (NTA) issued by the Department of Homeland Security (DHS) to initiate removal proceedings grew by 36% in just two years, from 213,887 in FY 2006 to 291,217 in FY 2008. These numbers are expected to increase as DHS focuses on apprehending and removing all criminal noncitizens, such as through the Secure Communities initiative.[51]

In addition, and in response to an overwhelmed immigration court system, ICE published guidance for dismissing select cases before EOIR where a benefit such as a marriage-based green card could be conferred by USCIS.[52] Specifically, the memo advises the

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48. *Id.* at 4 (citations omitted).

49. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, http://www.justice.gov/eoir/ (last visited July 17, 2011).

50. *See* Jurisdiction and Commencement of Proceedings Rule, 8 C.F.R. § 1003.14 (2011) ("(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. . . .").

51. *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Karen T. Grisez, American Bar Association), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011may18_grisezs_t.authcheckdam.pdf.

52. Memorandum from John Morton on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Peti-

ICE Office of Chief Counsel to "dismiss" removal cases before the immigration court involving "adjustment of status" (green card) cases in which the applicant appears eligible for a green card. The purpose of this guidance is to reduce the number of cases pending at the EOIR.[53] The need for operationalizing a policy dismissing cases in which the noncitizen is eligible for an immigration benefit before the United States was underscored by EOIR Director Juan Osuna's recent recitation about the current number of cases pending at EOIR.

> At the end of FY 2010, EOIR's immigration courts had 262,622 proceedings pending, marking an increase of more than 40,000 proceedings pending over

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tions, 2–4 (Aug. 20, 2010), *available at* www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf.

53. *Id.* at 3. The relevant section of that memo states:

> As a matter of prosecutorial discretion and to promote the efficient use of government resources, I hereby issue new ICE policy to govern the handling of removal proceedings involving aliens with applications or petitions pending with USCIS. This policy extends both to the prosecution of removal proceedings by OCCs and to any associated detention decisions by Enforcement and Removal Operations (ERO).
>
> . . .
>
> Where there is an underlying application or petition and ICE determines in the exercise of discretion that a non-detained individual appears eligible for relief from removal, OCC should promptly move to dismiss proceedings without prejudice before EOIR.
>
> . . .
>
> Only removal cases that meet the following criteria will be considered for dismissal:
>
> The alien must be the subject of an application or petition filed with USCIS to include a current priority date, if required, for adjustment of status;
>
> The alien appears eligible for relief as a matter of law and in the exercise of discretion;
>
> The alien must present a completed *Application 10 Register Permanent Residence or Adjust* Status (Form 1-485), if required; and
>
> The alien beneficiary must be statutorily eligible for adjustment of status (a waiver must be available for any ground of inadmissibility).

Id. at 2–3.

> the end of FY 2009. In the first half of FY 2011, that pending caseload grew by an additional 9,400. This caseload is directly tied to annual increases in cases filed in the immigration courts by DHS. In FY 2010, the immigration courts received 325,326 proceedings. By contrast, in FY 2007, proceedings received were 279,430.[54]

III. THE POLITICS OF IMMIGRATION AND DEFERRED ACTION

A. *Legislative Stalemates and Deferred Action*

The 2009–11 legislative debate on immigration helps demonstrate the political context under which deferred action has been spotlighted.[55] Efforts by select members of Congress, attorneys, and pro-immigration advocates to advance broad immigration reforms were unsuccessful despite the promise proffered by the Obama Administration in 2008.[56] In December 2010, the Senate failed to move

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54. *See Statement of Juan P. Osuna*, *supra* note 39, at 2. In response to the swelling court docket and recent Morton Memos, the American Bar Association has further recommended that:

> DHS personnel should be encouraged to reduce the burden on the removal adjudication system by exercising discretion to not serve a Notice to Appear on noncitizens who are prima facie eligible for relief from removal, to concede eligibility for relief from removal after receipt of a clearly meritorious application, to stop litigating a case after key facts develop that make removal unlikely, or to waive appeal in certain appropriate types of cases.

Statement of Karen T. Grisez, *supra* note 51, at 7. It should also be noted, the new Morton Memo on Prosecutorial Discretion and its focus on the role of ICE trial attorneys when appearing before EOIR in removal proceedings has the potential to reduce the docket at EOIR, especially if the memo becomes a tool for the ICE trial attorney to join in motions to terminate or dismiss cases that are not among the priorities identified by ICE.

55. This article does not attempt to analyze "why legislative reform has failed" nor does it suggest that prosecutorial discretion can ever be a substitute for such reforms.

56. *Immigration Policy: Transition Blueprint*, OBAMA-BIDEN TRANSITION PROJECT, 20–21 (2008), *available at* http://www.aila.org/content/fileviewer.aspx?

forward on the Development, Relief, and Education for Alien Minors Act (DREAM Act), a bill that would have provided legal status to eligible young residents who have been in the United States for an extended period of time, finished high school, and plan to enter college; after several years in "conditional" resident status, the DREAM Act would have enabled young people who have completed higher education or service in the military to achieve permanent residence in the United States.[57] To many advocates, the failure of the DREAM Act was symbolic of an Administration with little will and, more importantly, a Congress unwilling to put the policy of regularizing status for arguably the most sympathetic population in the United States, namely, young people with great intellectual promise whose immigration status was beyond their control, before politics.[58] Weeks later, the 112th Congress opened up with a cadre of congressional members at the National Press Club highlighting the benefits of repealing birthright citizenship.[59] That Congress was willing to renounce children and infants, speaks volumes to the political landscape on "the Hill" with respect to the immigration question.[60] Whereas President Obama has made public announcements and

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docid=27611&linkid=188816. For a longer discussion about previous efforts to enact legislative reform, see Shoba Sivaprasad Wadhia, *Policy and Politics of Immigrants' Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 410–18 (2007).

57. *See* Development, Relief, and Education for Alien Minors Act of 2010, S. 3992, 111th Cong. (2010), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN03992:; Development, Relief, and Education for Alien Minors Act of 2010, H.R. 6497, 111th Cong. (2010), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR06497:.

58. *See, e.g.*, Brian Naylor, *Democrats Push DREAM Act; Critics Call It Amnesty*, NPR.ORG (Dec. 6, 2010), http://www.npr.org/2010/12/06/131796206/democrats-push-dream-act-critics-call-it-amnesty.

59. Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, NY TIMES, Jan. 5, 2011, http://www.nytimes.com/2011/01/06/us/06immig.html.

60. *See, e.g.*, Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (1st Sess. 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr140ih/pdf/BILLS-112hr140ih.pdf; Marc Lacey, *Birthright Citizenship Looms as Next Immigration Battle*, NY TIMES, Jan. 4, 2011, http://www.nytimes.com/2011/01/05/us/politics/05babies.html; Washington Post Staff, *DREAM Act delayed in Senate: Prospects of cloture by year's end fading*, WASHINGTON POST, Dec. 9, 2010, http://www.washingtonpost.com/wp-dyn/content/article/ 2010/12/09/AR2010120903504.html.

hosted a handful of stakeholder meetings about the importance of comprehensive immigration reform, the outcome as of this writing has not led to any serious proposal by Congress about reforming immigration holistically, a legislative scheme that in past years has included a statutory update to the family and employment-based immigration system, a legal pathway for noncitizens to enter the United States in the future on the basis of work or a family relationship, and a registration program that enables individuals and other special populations such as high school students and migrant workers currently in the United States without authorization to come before the government and apply for a legal visa.[61]

Meanwhile, staff members of USCIS circulated an internal draft memorandum outlining potential ways in which the agency could reprieve individuals and certain classes of persons who are ineligible for legal immigration status, but who nonetheless exhibit compelling qualities or equities.[62] In discussing deferred action, that memorandum acknowledged that it could be used as a tool to protect certain individuals or groups from the threat of removal.[63]

> USCIS can increase the use of deferred action. Deferred action is an exercise of prosecutorial discretion

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61. For a sampling of President Obama's public discussion about comprehensive immigration reform, see David Jackson, *Obama talks immigration with officials -- but no members of Congress*, USA TODAY, Apr. 19, 2011, http://content.usatoday.com/communities/theoval/post/2011/04/obama-talks-immigration-with-officials----but-no-members-of-congress/1; Julie Mason, *President Obama Pushes Immigration Overhaul*, POLITICO.COM (MAY 10, 2011), http://www.politico.com/news/stories/0511/54696.html;. For an analysis of previous congressional proposals on comprehensive immigration reform; PRESIDENT OBAMA ON COMPREHENSIVE IMMIGRATION REFORM, http://www.whitehouse.gov/photos-and-video/video/president-obama-comprehensive-immigration-reform (last visited July 17, 2011). See Shoba Sivaprasad Wadhia, *Policy and Politics of Immigrants' Rights*, *supra* note 56; Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. OF MD. L. J. ON RACE, RELIGION, GEND. & CLASS 201 (2005), *available at* http://ssrn.com/abstract=1346586.

62. Memorandum from Denise A. Vanison, et al, to Alejandro Mayorkas, on Administrative Alternatives to Comprehensive Immigration Reform (undated) (on file with author), *available at* http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf.

63. *Id.* at 10–11.

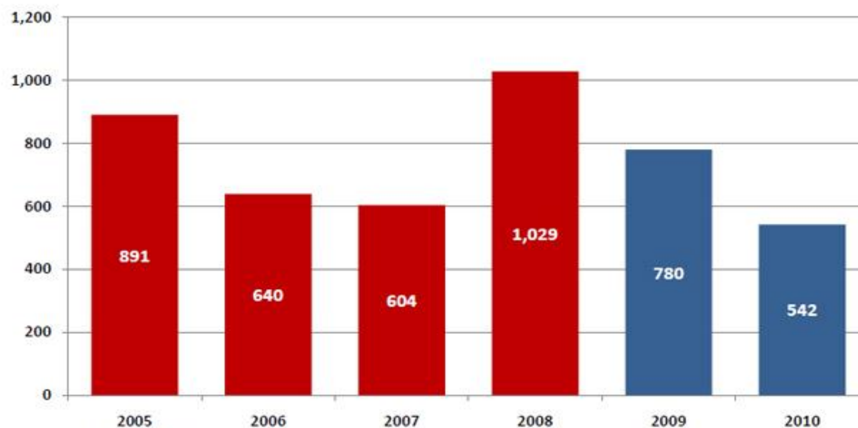
> not to pursue removal from the U.S. of a particular individual for a specific period of time . . . . Were USCIS to increase significantly the use of deferred action, the agency would either require a separate appropriation or independent funding stream. Alternatively, USCIS could design and seek expedited approval of a dedicated deferred action form and require a filing fee.[64]

B. *Congressional Criticism of Deferred Action*

Following the "leak" of the draft USCIS memo, select members of Congress freed themselves from working on a legislative solution and instead criticized the Department for its modest exercise of prosecutorial discretion. Notably, in a congressional hearing dated March 9, 2011, Senator Charles Grassley (R-IA) interrogated DHS Secretary Janet Napolitano about a memorandum drafted by a staff member at USCIS containing, among other things, a discussion about the use of prosecutorial discretion and deferred action in particular.[65] The Secretary indicated that the Department had made roughly 900 deferred action grants, juxtaposing the agency's 395,000 removals during the same time period.[66] Pro-immigration advocates were stunned by the record low number of actual deferred action grants in contrast with the previous Administration.[67] For example, the American Immigration Lawyers Associationwrote to the Secretary: "We are concerned that in your testimony on March 9 before the Senate Judiciary Committee regarding prosecutorial discretion, you highlighted that the number of cases where discretion was favorably exercised was very small, suggesting that your department is discouraging and limiting its exercise."[68] Following the

64. *Id.*
65. *Department of Homeland Security Oversight: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Janet Napolitano, Secretary, U.S. Department of Homeland Security).
66. *Id.*
67. *Id.*
68. Letter from AILA and Immigration Council to Janet Napolitano, DHS Secretary, 1 (Apr. 6, 2011), *available at*

Senate hearing, *La Opinion*, the largest Hispanic newspaper in the United States, reported that DHS granted deferred action to only 542 individuals. The pro-immigration group America's Voice pulled together a chart below based on the data from *La Opinion* and concluded: "According to our calculations, the Bush Administration averaged 771 deferred action grants and 301,418 deportations from 2005-2008, while the Obama Administration averaged 661 deferred action grants and 391,348 deportations its first two years in office . . . ."[69]



The publication of the Morton Memo on Prosecutorial Discretion spurred a new wave of congressional criticism against the agency's use of prosecutorial discretion and deferred action in particular. On June 23, 2011, Congressman Lamar Smith announced his plans to

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http://www.americanimmigrationcouncil.org/sites/default/files/docs/AILA-AIC-Napolitano-4-6-2011.pdf.

69. Dara Lind, *La Opinion: Obama Has Granted a Record Low Number of Deferred Actions to Immigrants*, AMERICA'S VOICE (Apr. 28, 2011), http://americasvoiceonline.org/blog/entry/la_opinion_obama_has_granted_a_record_low_number_of_deferred_actions.

introduce the "HALT (Hinder the Administration's Legalization Temptation) Act" and issued a related "Dear Colleague" letter.[70] The HALT Act was introduced in July 2011 in both the House of Representatives and Senate and, among other provisions, would prevent DHS from granting deferred action as a matter of prosecutorial discretion and "suspend" the handful of discretionary remedies available under the immigration laws for compelling cases.[71] The politics behind the HALT Act are plentiful and illustrated in part by the fact that the bill expires on January 21, 2013, at the end of President Obama's first term.[72] The HALT Act was the centerpiece of a hearing in the House Judiciary's Subcommittee on Immigration Policy and Enforcement on July 26, 2011.[73]

Like with Lamar Smith and congressional members who support the HALT Act, the ICE union criticized the Morton Memo on Prosecutorial Discretion, calling such policies a "law enforcement nightmare" and "just one of many new ICE policies in queue aimed at stopping the enforcement of U.S. immigration laws in the United States . . . . Unable to pass its immigration agenda through legislation, the Administration is now implementing it through agency pol-

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70. "Dear Colleague" letter from Lamar Smith, House Judiciary Comm. Chairman, to members of Congress (June 23, 2011), *available at* http://big.assets.huffingtonpost.com/Smith_DearColleague.pdf.

71. *Id.* at 2–3. *See also* Hinder the Administration's Legalization Temptation Act (HALT Act), H.R. 2497, 112th Cong. (1st Sess. 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr2497ih/pdf/BILLS-112hr2497ih.pdf; Hinder the Administration's Legalization Temptation Act (HALT Act), S. 1380, 112th Cong. (1st Sess. 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1380is/pdf/BILLS-112s1380is.pdf. On a historical note, in 1999, Representative Lamar Smith went on record supporting prosecutorial discretion by co-authoring a letter from select members of Congress to the immigration agency. For a copy of the letter and commentary about Rep. Smith's reverse position on prosecutorial discretion, see Editorial, *The Forgetful Mr. Smith*, NY TIMES, July 12, 2011, http://www.nytimes.com/2011/07/13/opinion/13wed3.html.

72. *See* "Dear Colleague" letter from Lamar Smith, House Judiciary Comm. Chairman, *supra* note 70, at 3; *see also Hearing Information: Hearing on H.R. 2497*, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, http://judiciary.house.gov/hearings/hear_07262011_2.html (last visited July 31, 2011).

73. *Hearing Information: Hearing on H.R. 2497*, *supra* note 72.

icy."[74] The union's president, Chris Cane, testified at the July 26, 2011, hearing which attacked the Morton Memo on Prosecutorial discretion and ICE's lack of guidance and resources to implement the memo.[75]

Adding fuel to the fire, Senator John Cornyn (R-Texas) accused DHS of operating a secret policy of dismissing high priority immigration cases as a matter of prosecutorial discretion after his staff reviewed a series of internal memoranda and emails retrieved by the *Houston Chronicle*.[76] On July 5, 2011, House Judiciary Committee Chairman Lamar Smith (R-Texas) and Homeland Security Subcommittee Chairman Robert Aderholt (R-Ala.) sent a letter to Secretary Janet Napolitano chronicling the release of various draft and official agency memoranda on prosecutorial discretion and expressing concerns that these memos are being used to "circumvent Congress and use executive branch authority to allow illegal immigrants to remain in the United States."[77] On July 13, 2011, and citing to the Morton Memo on Prosecutorial Discretion, Orrin Hatch, former chairman of the Senate Judiciary Committee, joined Sen. Jeff Ses-

74. Press Release, U.S. Immigration and Customs Enforcement, ICE Agent's Union Speaks Out on Director's "Discretionary Memo" Calls on the public to take action, 1 (June 23, 2011), *available at* http://www.iceunion.org/download/286-287-press-release-pd-memo.pdf.

75. *Immigration Legislation: Hearing Before the Subcomm. on Immigration Policy and Enforcement and the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Chris Crane, President, National Immigration and Customs Enforcement Council 118 American Federation of Government Employees), *available at http://judiciary.house.gov/hearings/pdf/Crane07262011.pdf*. Beyond the scope of this article but noteworthy are Crane's remarks about the importance of training, and the ostentatious lack of training or guidance field officers received on the Morton Memo on Prosecutorial Discretion prior to its publication.

76. *See* Susan Carroll, *Report: Feds downplayed ICE case dismissals; Documents show agency had approval to dismiss some deportation cases*, HOUSTON CHRONICLE, June 27, 2011, 5:30 AM, http://www.chron.com/disp/story.mpl/chronicle/7627737.html; Susan Carroll, *Cornyn presses Napolitano over immigration case dismissals*, HOUSTON CHRONICLE, June 28, 2011, 5:30 AM http://www.chron.com/disp/story.mpl/chronicle/7631394.html.

77. Letter from Lamar Smith, House Judiciary Comm. Chairman, and Robert Aderholt, Homeland Security Subcomm. Chairman to Janet Napolitano, DHS Secretary, 1 (July 5, 2011), *available at* http://judiciary.house.gov/news/pdfs/Administrative%20Amnesty.pdf.

sions (R-Ala.) and four more Republican colleagues in urging U.S. Immigration and Customs Enforcement (ICE) to stop trying to "grant administrative amnesty to millions of illegal aliens" and to start enforcing immigration laws.[78]

C. *Congressional Support for Deferred Action*

Deferred action has not been contentious with every Member of Congress. Select Members of Congress have taken positions supporting the executive branch's exercise of prosecutorial discretion. For example on April 13, 2011, 22 U.S. Senators sent a letter to President Obama urging him to grant deferred action to qualifying DREAM Act students who are not a law enforcement priority to DHS.[79] The letter states:

> We would support a grant of deferred action to all young people who meet the rigorous requirements necessary to be eligible . . . under the DREAM Act. . . . We strongly believe that DREAM Act students should not be removed from the United States, because they have great potential to contribute to our country and children should not be punished for their parents' mistakes.[80]

In their letter, the Senators are critical of the Department's lack of a process for applying for deferred action and the fact that many DREAM Act students are unaware of this form of relief.[81] On the

78. Press Release, Sen. Orrin Hatch, Hatch, Senate Colleagues Press U.S. Immigration and Customs Enforcement to Enforce Immigration Laws (July 13, 2011), http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=86f43fd7-bb7c-4d03-8bb8-f83ea8468843.

79. Letter from Harry Reid, Senator, et al., to President Barack Obama, 2 (Apr. 13, 2011), *available at* http://www.scribd.com/doc/53014785/22-Senators-Ltr-Obama-Relief-for-DREAMers-4.

80. *Id.* For an example of a DREAM Act student granted deferred action, see *Michigan Student's Deportation Put On Hold, Warren Student Wants To Graduate, Continue Schooling At University Of Michigan*, CLICKONDETROIT.COM (last updated May 25, 2011, 9:36 AM), http://www.clickondetroit.com/news/28010704/detail.html.

81. Letter from Harry Reid, Senator, et al., to President Barack Obama, *supra* note 79, at 2.

heels of this letter, Senator Charles Schumer, a Democrat from New York and Chair of the Judiciary Committee remarked in another letter to DHS:

> According to a March 2, 2011 memorandum of John Morton, Director of Immigration and Customs Enforcement, ICE only has the funding to remove 400,000 individuals per year. Given that this entire number can be filled by criminal aliens and others posing security threats, it makes eminent sense to focus ICE's enforcement efforts on these criminals and security threats, rather than non-criminal populations. On a daily basis, my office receives requests for assistance in many compelling immigration cases. These cases often involve non-criminal immigrants such as: (1) high-school valedictorians and honor students who did not enter the country through their own volition and yet are being deported solely for the illegal conduct of their parents; (2) bi-national same-sex married couples who are being discriminated against based on their sexual orientation who would otherwise be able to remain in the United States if they were in an opposite-sex marriage; (3) agricultural workers who perform back-breaking labor and are providing for their families; and (4) immigrant parents with U.S. citizen children, whose deportation will only lead to increased costs to the states in foster care and government benefits.[82]

On June 28, 2011, Senator Al Franken (D-MN) indicated that he would be sending his own letter to the Department in support of deferred action for DREAM Act students, remarking, "I'd like to let everyone know that today I'll be sending a letter, my own letter, to the president in support of deferred action . . . . I think it is the least

82. Letter from the Senate Judiciary Subcomm. on Immigration to Janet Napolitano, DHS Secretary (Apr. 14, 2011), *available at* http://arnolaw.blogspot.com/2011/04/letter-from-senate-judiciary.html.

that we can do to stop this injustice from getting any worse."[83] And on July 21, 2011, seventy-five Democratic members from the House of Representatives sent a letter to President Obama critical of Republican efforts to freeze executive branch authority by introducing legislation like the HALT Act.[84] Likewise, Democratic members of the House Subcommittee on Immigration Policy and Enforcement expressed their opposition to the HALT Act at the July 26, 2011, hearing and the importance of preserving the few discretionary remedies available under the immigration laws, like deferred action. Rep. Zoe Lofgren (D-CA) expressed her disbelief that Congress would waste so much time on a bill like the HALT Act and pointed to the unintended human consequences if the legislation were enacted.[85] Meanwhile, Rep. John Conyers (D-MI) focused on the politics of the HALT Act noting that "[The HALT Act] is not an attack on the Presidency, but an attack on the President himself."[86]

D. *Public Activities and Support for Prosecutorial Discretion*

The political context for, and lack of, transparency of deferred action is also illustrated by the public's response to the various agency memoranda and legislative reactions to prosecutorial discretion in the last two years. This section illustrates the activities and positions on prosecutorial discretion by select bar associations, journalists, and immigration advocates since the 2010 publication of *The Role of Prosecutorial Discretion in Immigration Law*. Relying on its

83. *DREAM Act Education for Alien Minors: Hearing on S. 952 Before the Subcomm. on Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 112th Cong. 27 (2011) (statement of Sen. Al Franken).

84. Letter from Democratic members from the House of Representatives to President Barack Obama, 1 (July 21, 2011), http://www.gutierrez.house.gov/images/stories/HALT_Act_letter_complete.pdf.

85. *See The Hinder the Administration's Legalization Temptation Act: Hearing on H.R. 2497 before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 3–4 (2011).

86. *Id.* at 5. For a short analysis of the HALT Act and related politics, see Marshall Fitz, *HALT the Insanity: New Hyperpartisan Bill Tries to Handcuff the President*, CENTER FOR AMERICAN PROGRESS (July 25, 2011), http://www.americanprogress.org/issues/2011/07/halt_act.html.

groundbreaking report on immigration adjudications,[87] the American Bar Association testified before the Senate Judiciary Committee on May 17, 2011, highlighting the importance of prosecutorial discretion:

> Prioritization, 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. There are numerous circumstances in which a respondent is not likely to be removed regardless of the outcome of the legal case. The most obvious cases are those where the respondent is terminally ill or is the parent or spouse of someone who is critically ill, but there are other examples where it is clear from the circumstances at the beginning of the process that the interests in removing the respondent will almost certainly be outweighed on humanitarian or other grounds.[88]

The American Immigration Lawyers Association and its sister group, American Immigration Council, have also published information about prosecutorial discretion. To illustrate, the Immigration Council published a practice advisory for immigration attorneys about the strategies and forms of prosecutorial discretion, as well as an article on the highs and lows of the June 30, 2010, Morton Memo.[89] Similarly, the American Immigration Lawyers Association conducted a nationwide poll of its more than 11,000 members regarding their experiences with prosecutorial discretion requests to

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87. *See* AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, http://www.americanbar.org/groups/public_services/immigration.html (last visited July 18, 2011).

88. *Statement of Karen T. Grisez*, *supra* note 51, at 7.

89. *See Prosecutorial Discretion: How to Advocate for Your Client*, LEGAL ACTION CENTER (June 24, 2011), http://www.legalactioncenter.org/practice-advisories/prosecutorial-discretion-how-advocate-your-client; Wadhia, *Reading the Morton Memo*, *supra* note 40, at 4. *See also Just The Facts*, IMMIGRATION POLICY CENTER, http://www.immigrationpolicy.org/just-facts/executive-action-resource-page (last visited July 18, 2011).

ICE,[90] and received more than 200 responses. AILA sent a follow up letter to DHS remarking:

> Many of these cases involve people who, if deported, would be separated from U.S. citizen and Lawful Permanent Resident immediate family members who depend on their noncitizen relatives for care and support. Several cases involve people who suffer from severe medical conditions; who are victims of domestic violence, trafficking or other serious crimes; or who are serving as valuable witnesses in criminal prosecutions. Many are students whose academic performance shows great promise for their ability to contribute to this nation in the future.[91]

Similarly, the former president of AILA, David Leopold, published an article in Bloomberg Law Reports describing the concept of prosecutorial discretion and authorities of the Executive Branch to grant deferred action in compelling cases.[92] Likewise, attorney Margaret Stock testified about the importance of deferred action at the July 26, 2011, hearing on the HALT Act by showcasing the types of individuals that would be deported without the discretionary relief the HALT Act seeks to "halt."[93] One example provided by Professor Stock in her written testimony included:

> An example of a person who will be harmed immediately by passage of the HALT Act is Fereshteh Sani, a woman whose father and mother were executed by

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90. *Prosecutorial Discretion Survey*, AILA (2011), http://www.surveymonkey.com/s/LMMTBSG.

91. Letter from AILA and Immigration Council to Janet Napolitano, DHS Secretary, *supra* note 68, at 2. 2 (Apr. 6, 2011).

92. David W. Leopold, *What Legal Authority Does President Obama Have to Act on Immigration?*, BLOOMBERG LAW REPORTS, 2 (May 16, 2011), *available at* http://www.aila.org/content/default.aspx?docid=35404.

93. *Executive Immigration Enforcement Limitations: Hearing Before the Subcomm. on Immigration Policy and Enforcement and the H. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Margaret D. Stock, Adjunct Professor, University of Alaska Anchorage), *available at* U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, 3–4 (2011) http://judiciary.house.gov/hearings/pdf/Stock07262011.pdf.

> Iranian government officials in 1988. Fereshteh has been in the United States since 1999, and has graduated from college and medical school here; she is currently a resident in Emergency Medicine at Bellevue Hospital in New York City. She is in the United States on a grant of deferred action, which is scheduled to expire on September 14, 2011.[94]

Like the private bar associations, and following the administrative and legislative roadblocks on immigration during the first two years of the Obama Administration, public policy think-tanks, advocacy groups, and law firms have published affirmative positions on deferred action and prosecutorial discretion more generally. For example, the Migration Policy Institute highlighted the importance of prosecutorial discretion in a 2011 report highlighting actions for the Executive Branch in the absence of legislative reform.[95] Specifically, the MPI report recommends that the Government develop a uniform set of enforcement priorities and, in cases of lesser priority, exercise prosecutorial discretion in the form of deferred action with work authorization.[96] Similarly, the 10,000 membership organization NAFSA: Association of International Educators highlighted the importance of prosecutorial discretion in a May, 2011, press release stating:

> We urge President Obama to exercise his executive authority and act now to direct the Department of Homeland Security to implement such a deferred-action policy. This is a matter of humanitarian necessity, and it would represent the kind of national leadership that is needed to move the one-sided, enforcement-first debate about immigration that has so far

94. *Id.* at 9.

95. Donald M. Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better*, MIGRATION POLICY INSTITUTE, 14–19 (2011), http://www.migrationpolicy.org/pubs/administrativefixes.pdf.

96. *Id.*

> poisoned prospects for what is ultimately needed – comprehensive reform – in a more fruitful direction.[97]

Law firms, law clinics, and advocacy organization have also assembled practical tools for noncitizens potentially eligible for deferred action. In May 2011, Duane Morris, Maggio Kattar, and Pennsylvania State University's Dickinson School of Law published a practitioner's toolkit addressing private bills and deferred action, underscoring the dearth of information about how to go about applying for deferred action and the heightened importance of pursuing these forms of relief.[98] Developed to help immigration judges, lawyers, public officials, and nonprofit groups navigate what has become a last-resort option for those facing deportation, the toolkit includes "Best Practices" from attorneys around the country; a summary of the laws and procedures governing deferred action and private bills; sample letters of support, exhibit lists, and legal briefs; and selected resources.[99] In June, 2011, Asian Law Caucus, Educators for Fair Consideration, DreamActivist.org, and National Immigrant Youth Alliance published a resource manual titled "Education Not Deportation: A Guide for Undocumented Youth in Removal Proceedings."[100] This manual is "intended to aid certain undocumented students and their lawyers to fight effectively throughout a removal (deportation) proceeding."[101] The production of these toolkits underscores the absence of quality information about the deferred action program and procedures.

The growing chorus of immigration attorneys, advocates, and media outlets speaking about the importance of prosecutorial discretion in immigration law is striking and in part responds to their frustration about the stalemate in Congress over immigration. While I

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97. Press Release, NAFSA: Association of International Educators, NAFSA Statement on Immigration Reform and Undocumented Students (May 10, 2011), http://www.nafsa.org/PressRoom/PressRelease.aspx?id=26639.

98. *New toolkit sheds light on lesser known immigration remedies*, PENN STATE LAW (May 17, 2011), http://law.psu.edu/news/immigration_toolkit.

99. *Id.*

100. *Guide for Undocumented Youth in Removal Proceedings*, ASIAN LAW CAUCUS, http://www.asianlawcaucus.org/alc/publications/guide-for-undocumented-youth-in-removal-proceedings/ (last visited July 18, 2011).

101. *Id.* at 6.

disagree with those who label the recent agency memoranda on prosecutorial discretion as a "backdoor amnesty" or alternative for legislation like the DREAM Act, I nevertheless believe that some potential beneficiaries of immigration legislation are likely to carry qualities that resemble the equities listed in the O.I., Meissner Memo, and Morton Memoranda. As such, it should not be surprising that some would-be DREAM Act beneficiaries for example, are also deserving of deferred action.[102]

IV. Analyzing Deferred Action Cases

A. *Previous Empirical Studies*

Leon Wildes is an attorney who represented the former Beatle John Lennon in his immigration case.[103] Believing that Lennon's prosecution by INS was politically motivated, Wildes (on behalf of Lennon) corresponded with INS for more than one year to gain information about INS' deferred action program.[104] Conceding that records pertaining to the deferred action were not specifically exempt from the FOIA, and moreover existed as an identifiable "class or category" of documents, INS provided Wildes with case histories of 1843 deferred action cases granted by INS.[105] Upon examining the 1843 cases, Wildes calculated that deferred action was granted to individuals subject to a spectrum of deportability or excludability grounds, and suggested that equitable factors played are far greater role in the outcome than the actual charge.[106]

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102. For a longer explanation about why prosecutorial discretion cannot serve as a substitute for legislative reforms, see Wadhia, *supra* note 3, at 297–98.

103. *E.g.*, Wadhia, *supra* note 3, at 246-47; Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 42.

104. Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 45; Wildes, *The Nonpriority Program Part* I, *supra* note 2; Wildes, *The Nonpriority Program Part II*, *supra* note 2; Wildes, *The Cultural Lag*, *supra* note 2, at 280. *See generally* Wildes, *The Operations Instructions*, *supra* note 2 (discussing the importance of John Lennon's immigration case as the first to provide the public with knowledge of the Nonpriority Program).

105. Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 48–49.

106. *Id.* at 52–53 & n.35.

In Wildes's study, more than 98% of the deferred action cases granted by INS involved one of the following discernable factors that drove the agency's decision: individuals who were of tender age or elderly age; mentally incompetent; medically infirm; or would be separated from their family members if deported.[107] Separation from family was the greatest category of cases analyzed by Wildes that led to a favorable decision by the agency.[108] Moreover, a U.S. citizen or lawful permanent resident (LPR) family member was involved in more than 80% of the 1,843 cases granted.[109] This data indicates that the presence of a family member with long-term ties to the United States was important, but not always determinative, to whether or not the agency granted deferred action.

Seeking to update his 1979 article on deferred action, Wildes filed FOIA requests to the Central, Western, and Eastern Regional offices of USCIS for all records of cases in which deferred action was granted.[110] Wildes received information from the Central and Western regions, which cumulated to 499 deferred action cases.[111] Wildes received some cases that were denied or discontinued.[112] The data indicated that nearly 89% of the deferred action cases furnished to Wildes were granted.[113] Like his 1979 study, Wildes found that USCIS was granting deferred action based on a strict set of criteria as opposed to arbitrarily.[114] Specifically, the cases granted deferred action fell within seven specific categories: (1) separation of family; (2) medically infirm; (3) tender age; (4) mentally incompetent; (5) potential negative publicity; (6) victims of domestic violence; and (7) elderly age.[115] In both studies, Wildes found that separation from a family member was an overriding factor in deferred

107. *Id.* at 53 & n.36.
108. *Id.* at 53, 58.
109. *Id.* at 60 & n.45.
110. Wildes, *A Possible Remedy*, *supra* note 2, at 825.
111. *Id.* at 826–27.
112. *Id.* at 826 & n.44 ("The calculation assumes that all relevant cases, whether approved, denied, or removed by the two regions, were released and forwarded to [Wildes].").
113. *Id.* at 826.
114. *Id.* at 830.
115. *Id.*

action grants.[116] The second greatest operating factor for cases granted in the 2003 study was medical infirmity, which according to Wildes included "life-threatening" situations such as HIV and cancer.[117] These figures indicate that both in 1976 and in 2003, the agency relied predominantly on humanitarian criteria in granting deferred action.[118]

B. *FOIA Requests to ICE*

I filed my first FOIA request to ICE on October 6, 2009, requesting for all records and policies involving prosecutorial discretion. A reply letter from ICE was sent on November 19, 2009, acknowledging receipt of the request, assigning a control number to the request, and stating that ICE had "queried the appropriate program offices within ICE for responsive records."[119] On November 30, 2009, another letter was sent from ICE stating that the request was "overly broad" and requesting clarification.[120] On December 19, 2009, less than thirty days later, a clarifying letter was sent to ICE.[121] On February 3, 2010, the status of the request was "administratively closed."[122] According to ICE, my request was closed on December 30, 2009, because there was "no response to letter requesting additional information."

I sent a new FOIA request to ICE on March 30, 2010, containing an expanded request for information on prosecutorial discretion and

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116. Wildes, *A Possible Remedy*, *supra* note 2, at 831 & n.64.
117. *Id.* at 831–32.
118. *Id.* at 832.
119. Letter from Catrina M. Pavlik-Keenan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Nov. 19, 2009) (assigning to the request reference number: 2010FOIA1069) (on file with author).
120. Letter from Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Nov. 30, 2009) (on file with author).
121. Letter from author to Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement (Dec. 19, 2009) (on file with author).
122. Letter from U.S. Customs & Immigration Enforcement to author (Feb. 3, 2010) (on file with author).

deferred action.[123] No response from ICE was received. On July 12, 2010, a follow up e-mail was sent to ICE for a status update on the March 30, 2010, request, but no response was received.[124] On November 9, 2010, I followed up with a contact in ICE to inquire about the status of my request and learned that ICE had no record of the request.[125] On November 24, 2010, ICE e-mailed me with a clarifying question about whether I preferred open or closed cases as well as detained and non-detained cases.[126] In January, 2011, I received a yellow package from ICE holding a single compact disc containing a single chart identifying only a handful of active deferred action cases between the years of FY 2003 and 2010.[127] This chart is pasted below and, if complete, indicates that ICE granted less than 500 deferred action cases between 2003 and 2010. I contacted ICE by phone and e-mail in February, 2011, and at the time learned that ICE had mistakenly sent the disc without a letter.[128] ICE electronically sent a formal decision letter on February 9, 2011.[129] The letter itself indicated that a full search of the ICE Office for Enforcement and Removal yielded the single chart below.[130]

123. Letter from author to U.S. Citizenship & Immigration Serv., U.S. Immigration & Customs Enforcement & U.S. Customs & Border Protection (Mar. 30, 2010) (on file with author).
124. E-mail from Nicole Comstock, Research Assistant of author, to U.S. Immigration & Customs Enforcement (July 12, 2010, 11:20 EST) (on file with author).
125. E-mail from Andrew Strait, U.S. Immigration & Customs Enforcement, to author (Nov. 9, 2010, 12:51 EST) (on file with author).
126. E-mail from Ryan McDonald, Paralegal Specialist, U.S. Immigration & Customs Enforcement, to author (Nov. 24, 2010, 11:07 EST) (on file with author).
127. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NO. OF ACTIVE CASES GRANTED DEFERRED ACTION STATUS SINCE CY 2003, (undated) (on file with author).
128. E-mail from Ryan McDonald, Paralegal Specialist, Immigration & Customs Enforcement, to author (Feb. 2011, 12:27 EST) ("Attached is a copy of the ICE response letter that was supposed to be included with the CD.") (on file with author).
129. *Id.*
130. *Id.* Note that the letter itself was dated December 17, 2010.

C. *Chart Provided by ICE: Number of Active Cases Granted Deferred Action Status Since CY 2003*

CY	Detained	Non Detained	Total
2003	0	117	117
2004	0	68	68
2005	0	62	62
2006	0	64	64
2007	0	71	71
2008	0	39	39
2009	2	34	36
2010	1	15	16
Total	3	470	473

As of IIDS November 29, 2010 as provided by the Statistical Tracking Unit.

Data only reflects Deferred Action Granted and Case Status Active (i.e. open cases). Data cannot be reported for Deferred Action Granted, Case Status inactive (i.e. closed cases).

Concerned in part that ICE did not make a complete search, I filed an appeal with ICE on March 29, 2011, hoping to receive more data.[131] As to the adequacy of its search, the appeal letter highlighted the data Wildes was able to retrieve in the late 1970s and early 2000s and also indicated:

> Responsive records [to my FOIA request] exist that were not included in ICE's response. Specifically, records on deferred action are required to be maintained under the Detention and Removal Operations and Procedure Manual § 20.8(c). The Manual pro-

131. Letter from author to Assoc. Gen. Counsel, Dep't of Homeland Sec. (Mar. 29, 2011) (appealing adverse decision in FOIA matter 2011FOIA1845) (on file with author).

> vides that all deferred action considerations be summarized using a Form G-312 and placed in the alien's A-file. Decisions regarding grants and denials of deferred action must also be in writing and signed by an agency official making the determination. Production of these records would be responsive to the original FOIA request, even if redaction were required to protect an individual's privacy interests . . . .[132]

On May 18, 2011, I contacted ICE by telephone and learned that ICE had not received the FOIA appeal. As such, the appeal was entered into ICE's system on May 18, 2011, nearly two months after the original appeal was filed.[133] On May 24, 2011, I communicated for up to an hour with an ICE FOIA officer in charge of appeals to clarify the procedural history of my FOIA request and confirmed that the date of my original appeal letter was filed within sixty days of ICE's original decision letter, so that my appeal would be preserved.[134] Hearing nothing for two months, I called the ICE FOIA office on July 27, 2011 to inquire about the status of my appeal. I was told that I would need to speak with the same ICE FOIA officer and thereafter provided a callback number with the expectation that I would receive a return phone call.[135] In a letter dated September 27, 2011 ICE denied my appeal regarding the adequacy of ICE's search.[136] According to the letter, ICE conducted an additional

132. *Id.*
133. Letter from Susan Mathias, Chief, Gov't Info. Law Div., U.S. Immigration & Customs Enforcement, Office of the Principal Legal Advisor, to author (May 18, 2011) ("On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of 2011FOIA1845 and are assigning it number OPLA11-181 for tracking purposes.") (on file with author).
134. Phone Conversation with Mark Graff, Freedom of Info. Act Officer, U.S. Immigration & Customs Enforcement (May 24, 2011) (discussing 2011FOIA1845).
135. Phone Call to U.S. Immigration & Customs Enforcement, Freedom of Info. Act Office (July 27, 2011) (attempting to discuss 2011FOIA1845 and OPLA11-181).
136. Letter from Catrina M. Pavlik-Kennan, Freedom of Info. Act Dir., U.S. Immigration & Customs Enforcement, to author (Sep. 27, 2011) (regarding matter number OPLA-181, 2011FOIAFOIA14736) (on file with author).

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search on remand of the Office of the Principal Legal Advisor (OPLA) and found that no records were responsive.[137]

D. *FOIA Requests to USCIS*

My initial FOIA request to USCIS headquarters was made on October 6, 2009.[138] A letter was sent from USCIS on October 9, 2009, which acknowledged receipt of my request and assigned it a control number.[139] On October 28, 2009, a second letter was sent from USCIS, requesting additional information about the records sought.[140] More specifically, USCIS required the inquiry be made regarding particular individuals with their consent. On February 9, 2010, the FOIA request was closed.[141]

I made a second and more detailed FOIA request on March 30, 2010. USCIS sent a response on April 1, 2010, assigning the request a control number.[142] As of August 31, 2010, my FOIA request was listed on the USCIS website as 65 out of 219 requests pending in Track 2. After nearly one year without a response, I discussed my request with the Office of Citizenship and Immigration Services' Ombudsman on February 25, 2011; the office, which had initiated a study of deferred action processing, reviewed and inquired with USCIS about the status of the FOIA request.[143] On March 11, 2011, I received an e-mail from a USCIS FOIA officer stating "[we have] received most of the records responsive to your request and are contacting an additional program office to determine if additional rec-

137. *Id.*
138. Letter from author to U.S. Citizenship & Immigration Serv. (Oct. 6, 2009) (on file with author).
139. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Oct. 9, 2009) (assigning FOIA request control number: NRC2009057166) (on file with author).
140. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Oct. 27, 2009) (concerning control number NRC2009057166) (on file with author).
141. *Id.*
142. Letter from T. Diane Cejka, Dir., U.S. Citizenship & Immigration Serv., to author (Apr. 1, 2010) (on file with author).
143. E-mail from Gary Merson, Office of the U.S. Citizenship & Immigration Serv. Ombudsman, to author (Feb. 25, 2011, 18:41 EST) (on file with author).

ords exist on this subject."[144] Three months later, in a letter dated June 17, 2011, USCIS responded to my FOIA request with three compact discs, which together contained a cover letter, a 270-page PDF document containing data, and several spreadsheets listing statistical data.[145] A subsequent conversation with the FOIA officer responsible for implementing the FOIA request indicated that deferred action records from FY 2003 through FY 2010 were requested from every USCIS regional service center and field office.[146] Because USCIS does not formally track information about deferred action, the data I received was variable depending on the office and location. It is neither possible to conclude that the records I received were complete, nor is it possible to analyze the entirety of what I received, because there is great disparity between how the data on deferred action is collected and recorded by each office, if at all. The legible data I received on deferred action came in one of three variations: (1) spreadsheet or chart; (2) Form G-312s Deferred Action Case Summary; and/or (3) written request or memorandum by the applicant or attorney seeking deferred action.[147] To manage the data and create a meaningful qualitative analysis, I did not incorporate data that was unclear or cases where deferred action appeared to serve as a pre-adjudication form of relief – i.e., those who filed applications for relief as a victim of trafficking, crime, or abuse (a.k.a., prospective U or T visa holders).[148]

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144. E-mail from Tembra Greenwood, Nat'l Records Ctr., Freedom of Info. Act Div., to author (Mar. 11, 2011, 13:48 EST) (referring to NRC2010021400) (on file with the author). The email also estimated the author's FOIA request would be completed in approximately three months. *Id.*

145. Letter from Jill A. Eggleston, Dir., Freedom of Info. Act Operations, U.S. Customs & Immigration Serv., to author (June 17, 2011) (on file with author); *see infra* note 161.

146. Phone Conversation with Tembra Greenwood, Nat'l Records Ctr., Freedom of Info. Act Div. (June 28, 2011).

147. Eggleston, *supra* note 145.

148. For an overview of how deferred action serves as important form of relief for abuse victims who are eligible and awaiting trafficking related visas, see Letter from organizations to Reps. Lamar Smith, John Conyers, Elton Gallegly, & Zoe Lofgren (July 25, 2011) (on file with author).

More than 100 cases involved Haitian citizens who entered the United States after the 2010 earthquake.[149] Much of the data on cases involving Haitians applying for deferred action after the earthquake lacked information about the factual information and/or outcome. About fifty of these cases included some information, mostly in the form of copies of deferred action request letters submitted, and involved individuals who: entered the United States as B-2 visitor; were transported to the United States; had at least one family member already living in the United States; had their home destroyed during the earthquake; and/or entered the United States with minor children.[150] In some cases, the applicant was forced to separate from a spouse or child in Haiti.[151] Below is a sampling of the case summaries provided in some of the USCIS logs:

- Thirteen-year-old girl came to the United States with her seventeen-year-old sister; house destroyed by earthquake; living with United States Citizen (USC) aunt and legal guardian in the United States; attending school in the United States.[152]
- Entered United States on B-2 visa with two daughters, one a USC; owned warehouse in Haiti that was destroyed by the earthquake; many customers killed in earthquake; living with brother in United States.[153]
- Entered United States with twelve-year-old USC son as evacuees after earthquake in Haiti; home and business destroyed by quake; son was injured in earthquake.[154]

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149. Eggleston, *supra* note 145.
150. *Id.*
151. *Id.*
152. Letter from [name removed] to Dep't of Homeland Sec. (July 7, 2010) (on file with author).
153. Affidavit in Support of Deferred Action Status for [name removed] (June 22, 2010) (on file with author).
154. Letter from [name removed] to A. Castro, Acting Field Office Dir., Dep't of Homeland Sec. (June 30, 2010) (on file with author).

- Entered with twelve-year-old daughter; left Haiti to escape from man who had sexually abused his daughter; the criminal escaped from jail when it was damaged in earthquake and told subject he was going to abuse daughter again.[155]
- Infant USC daughter; family home destroyed in earthquake; wife and one child entered the United States as evacuees; children have health problems as a result of the quake; wife persecuted by Haitian gang members.[156]
- Transported to United States with three minor children as evacuees following earthquake; one child is a USC; home severely damaged; husband remains in Haiti working and trying to rebuild home.[157]
- Transported to United States with three minor children as evacuees following earthquake; infant child is a USC; family home and business destroyed in quake; subject is diabetic and requires insulin shots twice daily.[158]

In July 2011, the DHS Ombudsman recognized the influx in post-earthquake cases from Haiti: "Over the past year, stakeholders expressed concerns to the Ombudsman's Office regarding the delayed processing of numerous deferred action requests submitted by Haitian nationals following the earthquake in January 2010."[159]

155. Letter from [name removed] to Dep't of Homeland Sec. (July 10, 2010) (on file with author).
156. Affidavit in Support of Deferred Action Status for [name removed] (June 21, 2010) (on file with author).
157. Affidavit in Support of Deferred Action Status for [name removed] (June 25, 2010) (on file with author).
158. Letter from [name removed] to A. Castro, Acting Field Office Dir., Dep't of Homeland Sec. (June 30, 2010).
159. January Contreras, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, OFFICE OF THE U.S. CITIZENSHIP & IMMIGRATION SERV. OMBUDSMAN, 6 (2011), http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf.

The remaining qualitative data within the 270-page PDF document included 118 identifiable deferred action cases. It was difficult to label a case as tender or elder age because much of the data lacked identifiers. However, when a field included the word "minor," "infant," or a specific age (e.g., eighty-nine-year-old), the case was calculated as involving tender or elder age for purposes of this analysis. It should also be mentioned that some of the cases approved, pending, or unknown contained little to no factual information and, as a consequence, were not identified as bearing any of the "positive" factors listed above.[160] The outcomes for many of these cases were unknown because the field was blank or there simply was not a field in the log maintained by a particular office. Many of the cases also had outcomes that were marked as "pending." Of the 118 cases, fifty-nine (59/118 or fifty percent) were pending or unknown; forty-eight (48/118 or 40.7%) were granted; and eleven (11/118 or 9.3%) were denied.[161]

Among the 107 cases approved, pending, or unknown, fifty (50/107 or 46.7%) involved a serious medical condition, nineteen (19/107 or 17.8%) involved cases in which the applicant had USC family members, twenty-two (22/107 or 21.5%) involved persons who had resided in the United States for more than five years, and thirty-two (32/107 or 29.9%) cases involved persons with a tender or elder age.[162] Many of these cases (29/107 or 27.1%) involved more than one "positive" factor.[163] For example, many of the cases (10/107 or 9.3%) involved both a serious medical condition and USC family members.[164] Likewise, many of the cases (21/107 or 19.6%) involved both tender or elder age and a serious medical condition.[165]

Among the forty-eight granted cases, twenty-four (24/48 or 50%) involved a serious medical condition; ten (10/48 or 20.8%) involved

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160. *See supra* Part IV.A.
161. Freedom of Info. Act Request Responses & Logs (June 17, 2011) (providing dozens of documents including letters to the agency for deferred action, agency responses, and regional offices' case logs) (on file with author).
162. *Id.*
163. *Id.*; *see supra* Part IV.A.
164. Freedom of Info. Act Request Responses & Logs, *supra* note 161.
165. *Id.*

cases in which the applicant had USC family members; four (4/48 or 8.3%) involved persons who had resided in the United States for more than five years; and thirteen (13/48 or 27.1%) cases involved persons with a tender or elder age.[166] Many of these cases (12/48 or 25%) involved more than one "positive" factor.[167] For example, four (4/48 or 8.3%) of the cases involved both a serious medical condition and USC family members. Likewise, ten (10/48 or 20.8%) of the cases involved both tender or elder age and a serious medical condition.[168]

Below is a sampling of approved cases involving a serious medical condition, tender or elder age, and/or the presence of United States Citizen family members:

- Eighty-nine-year-old man suffering from Parkinson's disease, dementia, Alzheimer's disease, glaucoma, hypertension, and hypotension
- Twenty-two-year-old with Downs Syndrome unable to care for self; daughter of an LPR
- Entered U.S. as an EWI; --------- was in an automobile accident that rendered him in a quadriplegic in a vegetative state that requires continuous care and supervision; Mother has Temporary Protected Status, living in FL.
- Cerebral palsy victim, Korean orphan with USC sponsors
- Father of eight-year-old child receiving extensive neurological treatment
- Father of eleven-year-old USC daughter with severe heart problems
- Mother of eleven-year-old USC daughter with severe heart problems
- Mother of U.S. national child with progressive muscular dystrophy

166. *Id.*
167. *Id.*; *see supra* Part IV.A.
168. Freedom of Info. Act Request Responses & Logs, *supra* note 161.

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- Forty-seven-year-old schizophrenic B-2 overstay; son of LPR parents; USC siblings [169]

E. *Survey Monkey*

As a supplement to my FOIA requests, I circulated an informal survey to immigration attorneys and advocates using Survey Monkey.[170] Specifically, my survey was sent by e-mail to the following listservs: National Immigration Project, Detention Watch Network, Immigration Professors, and other immigration advocates on May 22, 2011, May 31, 2011, and June 17, 2011.[171] Most of the questions included in the survey were "multiple choice" and limited to a series of possible answers. The survey included the following questions:

1. Have you ever applied for deferred action or prosecutorial discretion to USCIS or ICE?
2. Which agency did you apply to?
3. What type of action did you request?
4. In what geographic region did your request take place?
5. What was the result of your request?
6. What was the sex of your client?
7. What factors did your client have in their favor?

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169. *Id.*
170. DEFERRED ACTION & PROS. DISCRETION, https://www.surveymonkey.com/s/5DYY68K (last visited July 18, 2011).
171. The body of the e-mail indicated:

> I am continuing to research the agency's use of prosecutorial discretion and deferred action in particular since FY 2003. This research builds upon writing projects that are available here: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1035598. At the moment, I have pending FOIA requests with the DHS sub-agencies and have otherwise been informally collecting information from advocates about their experiences. If you have applied for deferred action with DHS on or after FY 2003, PLEASE CONSIDER TAKING THIS 5 MINUTE SURVEY (one survey for each case): http://www.surveymonkey.com/s/5DYY68K.

E-mail from author to Immigration listservs (May 22, 2011; May 31, 2011; June 17, 2011) (on file with author).

- Tender age
- Elderly
- Medical condition
- Psychological condition
- DREAM Act eligible
- Widow of USC
- Military service
- Involvement in community
- Has children who are USCs
- Has other family members who are USCs
- Has little or no family in native country
- Has resided in the United States for over ten years
- Has resided in the Unites States since childhood
- Strong showing of community support
- Media coverage of the case

8. What negative factors negative factors did your client have working against them?
- Criminal history
- Medical condition
- Psychological condition
- History of drug abuse
- Has ties to a gang
- Has only resided in the United States for a short time
- Has little or no family in the United States
- Could be easily removed to native country (or other country)
- Has ties to a foreign organization at odds with the U.S. government.[172]

9. Other Comments

The survey yielded seventy-two responses, fifty-eight of which were deferred action cases.[173] Despite the small sample size, the surveys are revealing about the primary factors that drive deferred

172. *Id.*
173. Survey Monkey Results, Deferred Action & Pros. Discretion (on file with author).

action requests. Among the fifty-eight deferred action cases, nine were denied, thirty-five were granted, seven were pending, one was unknown, and six lacked a response from the agency.[174] Notably, twenty-four of the thirty-five granted cases involved more than one positive factor.[175] Below are a few case examples where a deferred action grant involved more than one positive factor:

- Case # 1 - Psychological condition
  Involvement in community
  Has children who are USCs
  Has other family members who are USCs
  Has little or no family in native country
- Case # 2 - Medical Condition
  Has children who are USCs
  Has other family members who are USCs
  Has resided in the United States for over ten years
  Strong showing of community support
  Media coverage of the case
- Case # 3 - Medical Condition
  Psychological condition
  Has children who are USCs
  Has resided in the United States for over ten years
- Case #4 - Medical Condition
  Psychological condition
  Has children who are USCs
  Has other family members who are USCs
- Case #5 - Tender Age
  Has children who are USCs
  Has little or no family in native country
  Has resided in the United States for over ten years
  Strong showing of community support.[176]

174. *Id.*
175. *Id.*; *see supra* Part IV.A.
176. Survey Monkey Results, *supra* note 173.

Notably, the positive factors indicated for the nine cases denied were largely similar to the cases granted.[177] Moreover, only two of the nine cases involved criminal history, insofar as such a history might have caused a negative decision.[178] In fact, six of the nine cases denied included more than one of the positive factors reflected in the granted cases.[179] This raises a concern that cases involving similarly relevant facts resulted in a different outcome, which intersects with the forthcoming discussion about the importance of transparency. The foregoing analysis of deferred action cases obtained by USCIS and through Survey Monkey indicate that five equitable factors influence deferred action grants: (1) serious medical condition; (2) tender or elder age; (3) long term residence in the United States; (4) presence of USC children in the United States; and/or (5) other USC family members in the United States.[180]

While the grant rate for deferred action cases might cause alarm for those who challenge the deferred action program as an abuse of executive branch authority, it should be clear that regardless of outcome, the number of deferred action cases considered by ICE and USCIS are quite low. These numbers suggest that the real concern lies in the fact that many non-citizens who meet the common criteria utilized by the agency in assessing deferred action lack access or knowledge about deferred action, the process for applying, and basic eligibility requirements. Even doubling the number of legible deferred action grants produced by USCIS and ICE between 2003 and 2010 (118 plus 946) yields less than 1,100 cases, or less than 130 cases annually! One can appreciate this exceptionally low number when comparing it to the unauthorized immigrant population (10.8 million[181]); number of persons removed in 2010 (387,000[182]); or the

177. *Id.*

178. *Id.*

179. *Id.*; *supra* Part IV.A.

180. Survey Monkey Results, *supra* note 173; *see supra* Part IV.A.

181. Michael Hoefer et al., U.S. Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, 1 (2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

182. U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010 OFFICE OF IMMIGRATION STATISTICS 2 (2011),

File: Wadhia - Vol. 10, Iss. 1, V2 Created on: 4/17/2012 1:01:00 PM Last Printed: 4/17/2012 1:01:00 PM

number of persons placed in removal proceedings in 2010 (approx. 300,000[183]).

The next section challenges the agency's lack of transparency about the deferred action program and offers specific recommendations for rulemaking and greater transparency. The goals behind these recommendations are not geared primarily towards escalating the grant rate to unmanageable levels, but rather to ensuring that immigrants bearing equities similar to the ones already utilized by the agency in assessing deferred action requests are given equal consideration.

V. THE DEFERRED ACTION PROGRAM LACKS TRANSPARENCY

From the earliest days, when prosecutorial discretion was revealed in 1975, up to the present, the immigration agency has lacked transparency about both the various forms of prosecutorial discretion and deferred action in particular.[184] Whereas the agency has continued to include its authority to exercise prosecutorial discretion in various memoranda and manuals, it has been less willing to offer statistics on the individuals granted discretionary relief under prosecutorial discretion, or the method by which one should go about applying for such relief.[185] The data above also shows that attorneys who are fortunate enough to figure out the deferred action process and make a formal request are not always guaranteed a response by the Department.

The agency's lack of transparency about deferred action is also evidenced by my experience in requesting information about de-

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http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

183. *Statement of Juan P. Osuna*, *supra* note 39, at 2. Note that while the actual testimony suggests that 325,326 proceedings were receiving by EOIR in FY 2010, I have reduced the number to accommodate those proceedings which are unrelated to formal removal proceedings such as bond proceedings and motions proceedings.

184. *See* Wildes, *The Litigative Use of the FOIA*, *supra* note 2, at 42-43.

185. The most revealing information about deferred action is included in the memoranda and is limited to informing the public and authorization officials that deferred action is a form of prosecutorial discretion. See e.g. Meissner Memo, *supra* note 19.

ferred action cases from ICE, CBP, and USCIS.[186] Seeking to update Wildes's studies, I filed multiple FOIA requests to the DHS sub-agencies (ICE, CBP, and USCIS) beginning in October 2009, inquiring first about all records and policies pertaining to prosecutorial discretion decisions, and later narrowing the request to deferred action cases.[187] The intermittent letters by the DHS sub-agencies seeking clarification and/or closing the request altogether sheds light on the difficulty in obtaining basic information about prosecutorial discretion generally and deferred action in particular.[188]

Notably, USCIS conducted a complete search to produce a 270-page PDF document in addition to statistical charts about deferred action.[189] However, the data itself was variable and incomplete because the agency does not have a clear tracking mechanism for deferred action cases. Moreover, not only did the data I receive come more than one year after my initial request, I had the assistance of the DHS Ombudsman, who agreed to help move my FOIA request; like the deferred action process itself, my experience illustrates how an accidental phone call with a government official can influence outcomes more readily than merit and the following of vague procedures.[190]

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186. *See supra* Part IV.B.

187. Letter to Sub-agencies, *supra* note 121; Letter from author to U.S. Immigration & Customs Enforcement (Oct. 6, 2009) (on file with author).

188. See *supra* Part IV.B for my procedural history in obtaining information from USCIS and ICE. Note that my FOIA request with CBP was ultimately closed without any data. My initial request was made to CBP on October 6, 2009. On October 26, 2009, an email reply was sent from Ada Symister of CBP's Office of International Trade, requesting clarification. A reply to Ms. Symister was sent on November 4, 2009. On November 9, 2009 an additional e-mail was sent from Elissa Kay of CBP's Office of International Trade seeking further clarification on the information sought in the FOIA request. A response was sent to Ms. Kay on November 11, 2009. There was no additional response from CBP. On March 30, 2010 I made a second, more detailed FOIA request to CBP. On April 29, 2010 CBP responded to the request stating that the information sought is under the purview of USCIS and that the request should be forwarded there.

189. Freedom of Info. Act Request Responses & Logs, *supra* note 161.

190. According to the DHS Ombudsman, USCIS Headquarters has recently begun tracking deferred action requests in local offices. *See* Contreras, *supra* note 159, at 5.

In the case of ICE, the result of a single chart detailing active cases in which deferred action was granted was thin on detail about the facts involved in each case, the process by which deferred action was considered, the evidence presented to meet eligibility for deferred action, and the conditions under which each case was granted. Even if I were to concede that the data provided by ICE constitutes the universe of active deferred action cases granted between 2003 and 2010, this raises questions about ICE's recordkeeping regarding inactive cases, the number of applications filed and received by ICE, the number of cases denied by ICE, the number of cases initiated as a deferred action requested and treated as something else (i.e., stay of removal), and so on. Tracking this data is important both for the agency and the public.[191]

In the case of CBP, I can only speculate that CBP lacks a specific policy about how it executes prosecutorial discretion generally and deferred action particularly.[192] My FOIA experience also suggests that CBP lacks data about prosecutorial discretion grants or denials. Together, these limitations give CBP the lowest transparency marks within DHS.[193] The next section explores the normative benefits of

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191. Notably, the Secretary of DHS testified on June 28 about her willingness to share data about deferred action cases with the Senate Judiciary Committee. In response to a question posed by Senator Charles Grassley (R-IA) she noted:

> Senator, we've had an awful lot of correspondence with the committee on various issues. But I think the point of the question is would we agree to some oversight of how the deferred action process is being administered? And the answer is we want to be very transparent about how we are exercising the authorities the statutes give us.

DREAM Act Education for Alien Minors: Hearing on S. 952 Before the Subcomm. on Immigration, Refugees & Border Security of the S. Comm. on the Judiciary, 112th Cong. (2011) (statement of Janet Napolitano, Sec'y of Dep't of Homeland Sec.), *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3 baeba604d881.

192. *See supra* note 148.

193. My research is consistent with recent findings by the DHS Ombudsman with regards to transparency and the deferred action program within USCIS:

> Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request. There is no formal national procedure for handling deferred action requests. When experiencing a change in the type or

transparency generally and codifying a regulation about deferred action in particular.

A. *Why Transparency Matters*

Transparency about deferred action matters and is premised first on the acceptance that an officer or agency's decision about deferred action is an adjudicatory function that demands the same kind of analysis that would be given to other immigration benefits that fall within the formal adjudicatory framework. There is no shortage of literature scrutinizing an administrative process against a set of normative values.[194] Administrative law scholar Roger Cramton has

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> number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods. Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

Contreras, *supra* note 161, at 1.

194. *See, e.g.*, Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 263-64 (2002) [hereinafter Benson, *Breaking Bureaucratic Borders*]; Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 40 (2006-2007); Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1963) [hereinafter Cramton, *Administrative Procedure Reform*]; Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 80 (1983) (arguing for a "precision calculus" framework for interpreting adjudicative rules, which leads to more transparency and accessibility); *Family*, *supra* note 19, at 598 (examining the problem of diverting individuals away from immigration administrative adjudication); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313-14 (1986); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1322 (1990); Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349, 419-21

identified "accuracy," "efficiency," and "acceptability" as goals for evaluating administrative designs. Immigration law scholar Steven Legomsky has also explored "consistency" in asylum adjudications along with the criteria identified by Cramton.[195] Administrative and immigration law scholar Lenni Benson has examined transparency as a separate process value.[196] For purposes of this article, I analyze the values of equal justice, accuracy, consistency, efficiency, and acceptability in the deferred action context. I chose these criteria because I believe that the lack of transparency in deferred action undermines these values and underscores why transparency is so important. I concede that many of the values analyzed below are overlapping in that one bears relationship to another.

B. *Equal Justice*[197]

Transparency can promote a fair process and more equitable outcomes. One of the most important benefits of transparency is perhaps the least obvious: the reduction to the number of requests for deferred action that are never made because the individual who may qualify is unaware of the process. To my knowledge, no public memoranda from DHS have authorized employees to automatically consider cases for deferred action before they enter the system, if at all. The Morton Memo on Prosecutorial Discretion takes a step in the right direction by indicating that it is "preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion."[198]

There is also a fairness component to the practical uncertainty faced by non-citizens. It is possible that a potential beneficiary of deferred action is aware of the process but is unable to decide

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(1972) (discussing the inconsistencies broad discretionary power imposes on administrative decisions in an immigration context).

195. Cramton, *Administrative Procedure Reform*, *supra* note 194, at 111–12; Legomsky, *supra* note 194, at 1313.

196. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 262–63.

197. While Cramton intentionally analyzes accuracy, efficiency, and acceptability as an alternative to "fairness" or "due process," I think it is appropriate to mention how the current deferred action program undermines these latter values.

198. *Morton Memo on Prosecutorial Discretion*, *supra* note 4, at 5.

whether he should hire an attorney and apply for it. Moreover, an applicant for deferred action who never hears back from the agency is unable to plan his affairs because he is unaware about the outcome of his case. Even where the individual has been granted deferred action and given a legitimate basis for work authorization, a U.S. employer might be unsure about whether to hire the individual because of the secrecy or in-limbo nature of deferred action. All of these scenarios have a fairness component that should be considered when thinking about the protections and greater certainty of other discretionary remedies.

Finally, and less clear, is the subject of due process, which at the very least requires that the interests at stake bear some relationship to the procedures.[199] In deferred action cases, the interest at stake for the non-citizen is significant. If deferred action is denied or never considered, the consequences could include arrest, detention, deportation, or a combination of the three. The deferred action program also lacks notice. As it stands, many people who apply for deferred action have hired a lawyer who is familiar with the process.[200] Whereas these interests lie at the top of the "hierarchy" of actions that deprive the individual of liberty, the scenario is complicated by the fact that most individuals applying for or eligible to apply for deferred action do not have a formally recognizable immigration status.[201] On the other hand, many such individuals have resided in the United States for a meaningful number of years. The Supreme Court has more than once concluded that "[o]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or per-

199. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). There, the Supreme Court distinguished the need for a preliminary hearing in administering disability benefits from welfare benefits on the basis that a welfare recipient warrants a hearing because he could be deprived of the "very means by which to live while he waits." *Id.* at 340.

200. On the other hand, the government might view that greater notice will increase the incentives to utilize deferred action as a delay tactic. *See* Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1170 (1984).

201. *Id.* at 1150.

manent."[202] Furthermore, the Court compared deportation to "banishment or exile."[203]

C. *Efficiency*

Efficiency refers to the time and expense invested in a particular process. Professor Cramton explains efficiency "emphasizes the time, effort, and expense of elaborate procedures. The work of the world must go on, and endless nitpicking, while it may produce a more nearly ideal solution, imposes huge costs and impairs other important values."[204] On the one hand, one might think that the current deferred action design is superbly efficient because it lacks the costs associated with an application form or process, lacks review by an administrative or judicial appellate body, lacks recordkeeping or reporting by the Department, and so on. On the other hand, the lack of transparency about the deferred action program has resulted in congressional inquiries about the Department's recordkeeping, research by the DHS Ombudsman on how to improve deferred action processes, and lengthy FOIAs between the author and the Department. Similarly, the Department's review of voluminous submissions by attorneys fortunate enough to know about deferred action and the ensuing correspondence that takes place between Department employees and attorneys because of the lack of guidance or process conceivably results in great costs to the government. In short, the lack of transparency about deferred action has resulted in enormous monetary expenses and personal time for the Department.

D. *Accuracy*

Accuracy means that once an adjudicator interprets relevant factors, the law that is applied to the factors is correct and the conclusion is consistent with the sources of law. To Professor Benson,

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202. Zadvydas v. Davis, 533 U.S. 678, 679 (2001).
203. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . [W]e will not assume that Congress meant to trench on [the individual's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.").
204. Cramton, *Administrative Procedure Reform*, *supra* note 194, at 112.

"[a]ccuracy ensures the law is being carried out, and not undermined through error or fraud."[205] Practically, it is difficult to measure the accuracy of the current deferred action program because the government does not maintain basic information about the process and its decisions. Moreover, the deferred action program undervalues the accuracy objective, because it prevents potentially eligible individuals from applying for deferred action and immunizes officers from liability when a deferred action is denied or disregarded altogether. If a person is denied deferred action but has facts similar to a family member who was granted deferred action in a neighboring region, it can be identified as inaccurate. Similarly, if the same person never applies for deferred action because she does not have a lawyer and is otherwise unaware of the program, accuracy is also disregarded. When a person has the opportunity to consult with published criteria after being denied deferred action, he is able to understand the reasons for this denial and, if appropriate, enable the agency to catch errors.[206]

E. *Consistency*

To Professor Benson, "[c]onsistency, not only of outcome, but also of treatment along the way, is required to maintain fairness among and between participants, and thus, is necessary to foster respect for and trust in the system."[207] Americans also value consistency because it treats similarly situated people equally. In sharp contrast, decisions about deferred action are uneven and in some cases unknown to attorneys and advocates who file applications.[208] Transparency about the deferred action process promotes consistency by directing potential applicants to a similar procedure at the front

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205. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263.

206. E-mail from Stephen Legomsky to author (July 16, 2011, 19:41 EST) (on file with author).

207. Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263.

208. *See, e.g.*, Contreras, *supra* note 159, at 5 ("USCIS does not have a nationwide process for acknowledging the receipt of deferred action requests, but many USCIS offices have implemented a local method for logging submissions and acknowledging their receipt. Other offices do not issue a written acknowledgement of receipt for deferred action requests."); Wadhia, *supra* note 36; Survey Monkey, *supra* note 170.

end, and ensuring more consistent outcomes at the back end.[209] The importance of transparency and consistency in deferred action cases was also highlighted by DHS' own Ombudsman in 2007 when he remarked:

> [M]inimal measures, including tracking requests for deferred action and regular review by USCIS headquarters of the requests and the determinations made, would help to ensure that there is no geographic disparity in approvals or denials of deferred action requests and that like cases are decided in like manner.
>
> . . . .
>
> If implemented, this recommendation would make USCIS more efficient by tracking requests for deferred action and helping to ensure consistency in adjudications.[210]

Consistency is also enhanced when officers are held accountable for their actions. My own belief is that a more transparent process for deferred action can have a disciplinary effect on the adjudicator and, as a consequence, advance the quality and consistency of decisions on deferred action. A similar argument has been set forth by Professor Legomsky in his writings about the benefits of agency review when he remarks:

> I believe that the mere prospect of review can have a sobering effect on administrative officials. Most of us do not like to be embarrassed, especially in our work. When we know that someone might be scruti-

209. Legomsky contends that the arguments supporting an agency's head to review adjudicative decisions for the purpose of promoting consistency fall short, since there are other alternatives that are no less consistent. *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STANFORD L. REV. 413, 458 (2007) [hereinafter Legomsky, *Learning to Live with Unequal Justice*]; *see also* Legomsky, *supra* note 194.

210. Recommendation from Prakash Kharti, Ombudsman, U.S. Customs & Immigration Serv., to Dr. Emilio T. Gonzalez, Dir., U.S. Customs & Immigrtion Serv., 3–4 (Apr. 6, 2007), http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf.

> nizing our work and testing our reasons, we have an extra incentive to approach our decisions carefully. . . .[211]

F. *Acceptability*

Acceptability is not so much focused on whether a particular process is in fact fair or acceptable, but rather on whether the procedure is perceived to be fair by members of the public and parties to the process.[212] Here, my specific recommendation for promulgating a rule on deferred action subsumes the "so what" of transparency in that rulemaking itself ensures that members of the public are provided with an opportunity to provide input before a rule is made final. More predictable rules and procedures about deferred action also promote acceptability because non-citizens and attorneys can make reliable plans based on an articulated set of criteria proffered by the agency and, over time, a body of case law to indicate how these criteria are applied to individual cases.[213]

From the agency's perspective, transparency about deferred action and publication of a regulation may be more trouble than it is worth. "Transparent rules tend to spotlight a value choice. Opponents of that choice will attack the agency's action, forcing the agency to expend its own resources for defense. Rules having low transparency thus become more attractive, since they conceal value choices."[214] The agency might argue that transparency by the Department about prosecutorial discretion and deferred action in particular could result in a storm of objections by restrictionists and other members of the public who equate deferred action to an "amnesty" that received no support by Congress.[215] In response to any concern that a published rule on deferred action is akin to a "backdoor legalization" program, I would opine that a legislative scheme is distin-

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211. *See, e.g.*, Legomsky, *Learning to Live with Unequal Justice*, *supra* note 206, 458; Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*, 76 WASH. U. L.Q. 243, 245 (1998).

212. *See, e.g.*, Legomsky, *supra* note 194, at 1313.

213. Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 426–28.

214. Diver, *supra* note 194, at 106.

215. *See, e.g.*, Wadhia, *supra* note 36, at 6 & n.22.

guishable and more generous in both its application and its benefits. For example, the published rule proposed in this article would be limited to non-citizens who possess specific qualities and criteria and enable the individual to be legally present in the country and apply for work authorization.[216] In contrast, a legalization program includes the benefits of temporary residence, work authorization, permission to travel, and a path to green card status and eventual citizenship.[217]

The concern that a published rule on deferred action may attract future illegal migration is a legitimate one, but this concern can be addressed by catering the rule to people who meet specific qualifying criteria and, if appropriate, setting an annual numerical cap. Since the agency already employs specific criteria for considering deferred action cases, spelling out the criteria in a published rule would not necessarily create a new or objectionable policy for the Department, but would advance the goals of equal justice, accuracy, consistency, efficiency, and acceptability. Achieving these values requires transparency about how deferred action works as well as a newly codified regulation subject to the "notice and comment" requirement of the Administrative Procedures Act (APA).[218]

Nevertheless, the immigration agency has previously held reservations about promulgating rules under the APA. The best illustration of this was in 1979, when the former INS proposed a rule that would have explained the various criteria utilized by officers in determining the discretionary component of "adjustment of status" and other immigration remedies involving a discretionary component.[219]

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216. *See infra* Part VI.

217. *See, e.g.*, Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (2011); Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007).

218. *See generally* 5 U.S.C. § 553 (2011).

219. *See* Factors To Be Considered in the Exercise of Administrative Discretion, 44 Fed. Reg. 36,187, 36,191 (June 21, 1979) (proposing 8 C.F.R. 245.8); s*ee also* Diver, *supra* note 194, at 94; *Prosecutorial Discretion*, *supra* note 3, at 284-86 ("Several provisions of these proposed regulations would have required a favorable exercise of discretion in the absence of adverse factors. For example, with regard to the exercise of discretion under the former 212(c) waiver, the rule identified the following factors for consideration in the exercise of discretion: 'alien is likely to continue type of activity which gave rise to the grounds of excludability;

In most cases, to qualify for adjustment of status, the non-citizen must generally have a qualifying relationship with a U.S. employer or family member, be admissible to the United States, and have a visa immediately available to him or her.[220] In addition to meeting these statutory criteria, the applicant must qualify for adjustment as a matter of discretion. The discretionary component has not been defined in the statute or the regulations, but at one time was articulated in the former INS O.I. as requiring "substantial equities."[221] The published rules would have given clarity to the discretion exercised in adjustment of status and other cases but was instead repealed in 1981 because the INS feared that:

> [l]isting some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion . . . . The INS also argued that the rules would "eliminate discretionary powers by converting discretionary powers into a body of law."[222]

INS' fear of litigation is not merely theoretical, but underscored by a relating memorandum to then INS Commissioner Lionel J. Castillo who remarked:

> [T]he proposals embodied in this draft would subject the Service to a constant barrage of spurious appeal [sic] by Immigration attorneys on the basis of semantics proposed to be injected into the regulations. They subvert Government to the vagaries of attorney dilatory tactics and would appear to tie our hands

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alien has a history of criminal, immoral, narcotic, or subversive activity; act giving rise to grounds of excludability was relatively recent; no unusual hardship would accrue to alien or family members if the waiver is denied.'") (citations omitted).

220. INA § 245, 8 U.S.C. § 1255 (2006).

221. IMMIGRATION & NATURALIZATION SERV., OPERATIONS INSTRUCTIONS, O.I. § 245.5d(5), *available at* http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-60138/0-0-0-60293.html; *see also* Diver, *supra* note 194, at 93.

222. Wadhia, *supra* note 3, at 284–85 & n.238.

> completely in the cobwebs of endless liturgical [sic] dialogue.[223]

The agency's desire for flexibility and fear of litigation are not new, and have historically served as a basis for less transparency.[224] But the argument from an agency that regulatory language providing factors to assess discretionary adjudication would limit its flexibility is unpersuasive. First, the Department has the ability to craft a rule that both lists criteria and adopts a discretionary component. In fact, there are many humanitarian-like remedies that operate in this way. For example, cancellation of removal is a remedy codified in the statute in 1996 that is available to eligible non-LPRs and LPRs who meet specific statutory requirements, such as continuous physical presence and residence in the United States for a specified time period, or hardship to a qualifying family member who is either a green card holder or USC, among other requirements.[225] Similarly, the O.I., Meissner Memo, and Morton Memo on Prosecutorial Discretion all include a listing of factors that should be considered by immigration officers, agents, or attorneys, but qualifies that list of relevant factors as illustrative. More important, the factors used by the agency to make decisions about deferred action are identifiable and operate as a "benefit" for those non-citizens fortunate enough to have a knowledgeable attorney who can apply for it.

VI. CONCLUSION AND RECOMMENDATIONS

A. *Recognize Deferred Action as a Rule*

Deferred action should be published as a rule in the Federal Register.[226] The regulation should be subject to a 120-day public notice

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223. Diver, *supra* note 194, at 95 (citing to Memorandum from [name and position deleted], INS, to Lionel Castillo, Commissioner, INS (September 12, 1978), at 1.).

224. *See, e.g.*, Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263–64.

225. INA § 240A, 8 U.S.C. § 1229b (2006).

226. *See* Wadhia, *Prosecutorial Discretion*, *supra* note 3, at 286; *See also* AILA's comments on the Department of Homeland Security's implementation of Executive Order 13563, "Improving Regulation and Regulatory Review." Special

and comment period. The regulatory language as proposed must recognize both the humanitarian and economical bases for deferred action. The advantages of rulemaking promotes the values that are so interconnected with principles of administrative law, including but not limited to transparency, consistency, acceptability, and accountability. As described by Professor Legomsky:

> [R]ulemaking has tremendous advantages over adjudication as a vehicle for policy formation. These advantages include broader public input, notice to Congress, avoidance of adjudicative hearings to resolve issues of legislative fact, avoidance of litigating the same issues repeatedly, more enforceable rules, clearer advance notice of allowable and prohibited conduct, fairer applicability of the rules to similarly situated individuals at different points in time, and the opportunity for affected individuals to make policy submissions before the rule is adopted.[227]

In addition to advancing various process values, rulemaking would assist with narrowing the various factors used by adjudicators to determine whether deferred action should be granted. An analysis

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thanks to the AILA Interagency Liaison Committee. AILA Doc. No. 11041463 ("Guidance on deferred action was contained in the now withdrawn INS Operating Instructions. Though the relief is still available, there are currently no regulations that would facilitate a more meaningful and consistent application of prosecutorial discretion in context of deferred action. We ask that such regulations be promulgated.").

227. Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 459; *see also id.* at 423 & n.67 ("Inconsistent procedures and inconsistent employment criteria for adjudicators were among the problems that inspired the Administrative Procedure Act"). For an insightful description, *see* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 65-68 (1996). These problems were also the focus of a superb consultants' report prepared for the Administrative Conference of the United States. Paul R. Verkuil et al., *Report For Recommendation 92-7: The Federal Administrative Judiciary*, *in* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 777 (1992). *See also* Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310) (recommending many of the reforms urged by the consultants' report).

of the data on deferred action cases indicate that decisions are based on distinguishable criteria and that a single regulation would only bolster the application of this criteria in like cases, and stave the inevitable abuse of discretion that stems from a system where cases are decided by different regional officers and without accountability. The benefit of using rules to guide discretionary decisions is not a new argument and has been affirmed by scholars in various other immigration contexts.[228]

Rulemaking is also cost-effective. I believe the costs associated with rulemaking would be recovered by enabling immigration adjudicators to follow a clear rule. Clearer rules on deferred action could also remove the costs associated with documenting every rationale and factor in a particular A-file, gaining approval from a supervisor before granting deferred action, or ICE attorneys having to review every NTA for sufficiency under the prosecutorial discretion guidelines. Interestingly enough, the internal checks and balances created by the Morton Memo on Prosecutorial Discretion, however important, are a costly endeavor that could be streamlined by crafting a rule limited to deferred action cases. I also believe that implementation of a regulation would not particularly increase litigious costs but, to the contrary, infuse a level of internal quality control and incentive for immigration adjudicators to apply the rule faithfully.[229]

The proposed rule should include information about the scope of deferred action, namely that it is a temporary benefit available to eligible non-citizens who meet specific criteria and who warrant deferred action as a matter of discretion. The agency should create a form for deferred action requests, and attach a nominal fee for processing the form. An applicant who is unable to pay a filing fee should be eligible to fill out a fee-waiver form. The application should be filed to the Vermont Service Center or another regional Service Center. By maintaining all applications at a specific service center, it will be easier for DHS to keep statistics and also adjudicate related requests for work authorization. The rule should be discre-

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228. *See, e.g.*, Sofaer, *supra* note 194, at 421; Verkuil, *supra* note 200, at 1205–06.

229. Diver, *supra* note 194, at 95; Legomsky, *Learning to Live with Unequal Justice*, *supra* note 209, at 463.

tionary and place the burden on the non-citizen to present substantial equities that may include: continuous residence in the United States for at least ten years; presence of a USC or LPR child, spouse, or parent in the United States; serious mental health condition or physical disability; and/or tender or elderly age.

While my proposal provides concrete guidelines, it offers flexibility for the Department to consider equally compelling factors not listed. That said, my goal is not to "codify" previous memoranda like the Morton Memo on Prosecutorial Discretion, but instead to create a discreet remedy in the form of deferred action that is based on an identifiable set of factors that (as illustrated by the data) the agency has relied upon for more than thirty years. The Department will and should continue to follow the current memoranda on prosecutorial discretion when making prosecutorial decisions. Deferred action is merely one slice of the scores of decisions that currently serve as an exercise of prosecutorial discretion.

Those who are denied deferred action should receive a written decision with reasons for the denial. Written decisions promote accuracy, consistency, and acceptability by allowing the applicant to be heard. While written decisions would likely add costs onto the agency, these costs could be offset by the fees that accompany the new deferred action form and the current costs associated with the internal checks and reviews that accompany deferred action processing.

Those who are successful in obtaining a deferred action grant should be granted temporary residence for a renewable three-year period, work authorization, and permission to travel for good cause. A grant of deferred action should not lead to permanent residency, but neither should it prohibit a grantee from applying for a more permanent legal benefit if she is otherwise eligible. The period during which an individual is in deferred action status should be recognized as a lawful status as is currently the case.[230] If the newly pro-

230. *See* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, Lori Scialabba, Associate Director Refugee, Asylum and International Operations Directorate, Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)

posed regulation on deferred action needs alteration, the Department should make adjustments to the regulation "relying on exceptions, time extensions, variances, and waivers."[231]

B. *Publicize Information About Deferred Action*

The Department of Homeland Security should train immigration employees about the new rule. Moreover, DHS should create a system whereby every case that is brought to the Department's attention is automatically considered for deferred action. Alternatively, individuals who are facing removal before EOIR or DHS should be notified about their right to apply for deferred action before USCIS. Information about deferred action should be posted on the relevant DHS websites. This information should include a step-by-step process about how to apply for deferred action, basic eligibility requirements, and related benefits. If a policy is implemented whereby DHS automatically considered cases for deferred action, then such policy should be posted on the various DHS websites and also accompanied by a "Fact Sheet" in user-friendly English.[232] Even if the procedures themselves are not codified as regulations, they should be published in the Federal Register.

Finally, DHS must publish the facts of individual cases as well as decisions about deferred action and keep statistics about the cases in which deferred action is considered, denied, and/or granted. Such statistics must be made part of the annual statistics published by

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of the Act, 42 (May 6, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/ revision_redesign_AFM.PDF

231. *Raising the Agency's Grades – Protecting the Economy, Assuring Regulatory Quality and Improving Assessments of Regulatory Need*, *Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2011) (citing Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004) (statement of Robert L. Glicksman)), http://judiciary.house.gov/hearings/pdf/Glicksman03292011.pdf.

232. As noted before, the Morton Memo on Prosecutorial Discretion takes a step forward by asking ICE employees to initiate decision on prosecutorial discretion without waiting for an affirmative request by an attorney. Note however that the language does not create a mandate or "automatic" process nor does it imply that in all cases deferred action (which is but a sliver in the universe of ways in which prosecutorial discretion can be exercised) will be considered as the remedy.

DHS and also posted on the various websites. DHS must publish the training officers receive on deferred action. Cumulatively, publishing information about the deferred action process, related decisions, statistics, and training programs will advance transparency and acceptability, while also providing the public with tools for measuring efficiency, accuracy, and consistency in deferred action cases.[233]

VII. APPENDIX: TABLE OF ABBREVIATIONS

Administrative Procedures Act – APA
American Immigration Council – Immigration Council
American Immigration Lawyers Association – AILA
Board of Immigration Appeals – BIA or Board
Civil Rights and Civil Liberties – CRCL
Customs and Border Protection – CBP
Deferred Action – DA
Department of Homeland Security – DHS or Department
Department of Justice – DOJ or Justice
Doris Meissner, Exercising Prosecutorial Discretion – Meissner Memo
Executive Office for Immigration Review – EOIR
Immigration and Customs Enforcement – ICE
Immigration and Nationality Act – INA or the Act
Immigration and Naturalization Service – INS
John Morton, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens – Morton Memo on Civil Enforcement Priorities
John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens – Morton Memo on Prosecutorial Discretion
Notice to Appear – NTA
Office of the Principal Legal Adviser – OPLA
Operations Instruction – O.I.
Prosecutorial Discretion – PD

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233. *See, e.g.*, Benson, *Breaking Bureaucratic Borders*, *supra* note 194, at 263–64.

United States Citizen – USC
United States Citizenship and Immigration Services – USCIS

VII. POSTSCRIPT

This article was completed in July 2011. Subsequently, on August 18, 2011, the White House "announced" a policy whereby an interagency working group consisting of officials from DOJ and DHS would review 300,000 cases pending removal and as a matter of prosecutorial discretion administratively close cases that are deemed "low priority."[234] Without spelling out a legal vehicle or process, the announcement also suggested that individuals whose cases were successfully closed would be eligible for work authorization.[235] Thereafter, ICE issued a series of documents in November 2011 to implement the August 18th announcement.[236] Together, these documents identified the Morton Memo on Prosecutorial Discretion as the "cornerstone" for what officers should follow in making

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234. Cecilia Munoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, THE WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources; *see also* Shoba Sivaprasad Wadhia, *Sivaprasad Wadhia on the White House's Review of Removal Cases*, IMMIGRATIONPROF BLOG (Sept. 4, 2011), http://lawprofessors.typepad.com /immigration /2011/09/shoba-sivaprasad-wadhia-on-the-white-houses-review-of-removal-cases.html.

235. Wadhia, *supra* note 234.

236. *See* Memorandum from Peter Vincent, Principle Legal Advisor, U.S. Immigration and Customs Enforcement, on Case-by-Case Review of Incoming and Certain Pending Cases (Nov. 17, 2011), *available at* http://www.ice.gov/doclib /foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf.; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), *available at* http://www.ice.gov/doclib/foia/dro_policy_memos /guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf; U.S. DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, NEXT STEPS IN THE IMPLEMENTATION OF THE PROSECUTORIAL DISCRETION MEMORANDUM AND THE AUGUST 18TH ANNOUNCEMENT ON IMMIGRATION ENFORCEMENT PRIORITIES (2011), *available at* http://www.ice.gov/ doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf.

prosecutorial discretion decisions; furnished an additional set of substantive criteria officers should use to making short term decisions about prosecutorial discretion; explained that every ICE officer authorized to exercise such discretion would be trained by January 13, 2012; launched a short-term process for reviewing select cases entering the immigration court or pending removal for prosecutorial discretion in the form of administrative closure; and initiated a special review of cases pending removal at the Denver and Baltimore immigration courts. A detailed analysis of these initiatives is beyond the scope of this article. While there remain a number of outstanding and unresolved questions about these protocols[237], the author acknowledges that the steps the Administration has taken improves the process and application of prosecutorial discretion in immigration matters.[238]

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237. For example, many of these protocols sunset in January 2012; appear to be limited to non-detained cases; fail to address a specific procedure for individuals who lack counsel; appear to limit the immediately available forms of prosecutorial discretion to remedies that provide no independent basis for work authorization; seem to widen the list of "negative" factors ICE officers should consider in the short term as a basis for denying prosecutorial discretion; and provide no guarantee or process for reviewing cases that result in a denial or creating a public record that includes a listing of cases considered, denied or granted prosecutorial discretion.

238. For an analysis of the November 2011 documents and a related letter by the American Bar Association, *see* ALEXSA ALONZO & MARY KENNEY, DHS REVIEW OF LOW PRIORITY CASES FOR PROSECUTORIAL DISCRETION (2011), *available at* http://www.legalactioncenter.org/sites/default/files/DHS_Review_of_Low_Priority_Cases_9-1-11.pdf; Letter from Thomas M. Susman, Director of ABA Governmental Affairs Office, to John Morton, Director of Immigration and Customs Enforcement (Dec. 15, 2011), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscreetion_l.authcheckdam.pdf