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713.743.2075 713.743.2085 FAX
WWW.LAW.UH.EDU/LAWCENTER/PROGRAMS/IHELG

MICHAEL A. OLIVAS
William B. Bates
Distinguished Chair in Law
Director, IHELG
molivas@uh.edu
713.743.2078

DEBORAH Y. JONES
Program Manager
dyjones@uh.edu

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

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Erin B. Corcoran
Professor of Law/Director of Social Justice Institute
University of New Hampshire School of Law, Two White Street
Concord, NH 03301
http://www.law.unh.edu
erin.corcoran@law.unh.edu

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

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

I. INTRODUCTION

There are approximately eleven million noncitizens in the United States without valid immigration status.[2] Many of these individuals have compelling circumstances, including close family ties and possible future available immigration relief provided by Congress through comprehensive immigration reform, warranting humanitarian consideration.[3] There are not sufficient resources available to pursue every noncitizen for every immigration violation, particularly for those whose removal is not a high priority for the Department of Homeland Security (DHS).[4] And even with relief on the horizon for a subset of individuals currently in the United States by Congress without valid immigration status, many other individuals will continue to remain a low priority to deport from the United States.[5]

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[1] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (internal citations omitted).

[2] JEFFERY S. PASSEL AND D'VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, PEW RESEARCH CENTER (Feb. 1, 2011), http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/ (estimating that as of March 2010, the unauthorized immigrant population in the United States is 11.2 million).

[3] MARC R. ROSENBLUM & RUTH WASEM, CONG. RESEARCH SERV., R43097, COMPREHENSIVE IMMIGRATION REFORM IN THE 113TH CONGRESS: MAJOR PROVISIONS IN SENATE PASSED S744 (2013) (summarizing Senate bill, S. 744).

[4] *See* Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000). [hereinafter Memo from Doris Meissner] (the memo instructs INS officers to consider a variety of factors to determine whether a case warrants an favorable exercise of discretion including immigration status (is the person a lawful permanent resident), length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimately removing the alien, likelihood of achieving enforcement goal by other means, whether the alien is eligible or likely to become eligible for other relief, effect of action on future admissibility, honorable U.S. military service, community attention, and available resources).

[5] MIGRATION POLICY INSTITUTE, ISSUE BRIEF NO. 4, SIDE BY SIDE COMPARISON OF 2013 SENATE IMMIGRATION BILL WITH 2006 AND 2007 SENATE LEGISLATION (Apr. 2013).

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

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

The criticism is divided generally into two camps. One set of criticism stems from the concern that the prosecutors at the Department of Homeland Security (DHS), Immigration and Custom Enforcement (ICE) trial attorneys,[11] do not use this discretionary power enough[12] in individual cases and the exercise of the discretion is not transparent and potentially arbitrary.[13] These advocates point to compelling cases of

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[6] *See infra* Part II.B.

[7] *See infra* Part III.A.

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

[9] Memo from Doris Meissner, *supra* note 4, at 1.

[10] *See* Michael Sant'Ambrigio, *The Extra-Legislative Veto*, GEO. L. J. at 4 (forthcoming 2013) *available at*, http://ssrn.com/abstract=2200531 (supporting the executive branch's use of enforcement policies to adapt general laws to individual cases, dynamic regulatory environments, and social and political change).

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

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

[13] *Id*., at 48-51 (discussing lack of transparency in decision-making process by immigration officials on whether or not to grant deferred action to an individual).

individuals in which ICE trial attorneys refused to consider the individual circumstances and the impact of removal on the family and community.[14]

The second set of criticisms questions the constitutionality of the executive branch's use of prosecutorial discretion to minimize the effects of what it deems to be bad law, particularly to provide relief to large classes of immigrants pursuant to DHS's prosecutorial discretion authority.[15] This set of criticisms has been reinvigorated by the President's recent decision to provide temporary relief from removal to a group of immigrants who came to this country as children and have no current immigration status (the DREAMers[16]), but want to go to college or join the military, through announcing in June 2012, Deferred Action for Childhood Arrivals (DACA).[17] After the DACA

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

[15] *See e.g.*, Robert J. Delahunty and John C. Yoo, Dream On: *The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781, 785 (2013) (providing an argument for DACA violating the Take Care Clause).

[16] This group of individuals are referred to as "DREAMers" because they are beneficiaries of immigration relief as contemplated by legislation that has been introduced multiple times in Congress entitled the "Development, Relief, and Education for Alien Minors Act" or the "DREAM Act." Since 2001, there have been a least 25 bills introduced to provide some path to legal residency for certain unauthorized immigrants who have completed qualified higher education or military service and have requisite years of continuous presence in the United States. *See* Elisha Barron, Recent Development, the Development, Relief, and Education for Alien Minors (DREAM Act), 48 HARV. J. ON LEGIS. 623, 632-37 (2011) (summarizing the failed attempts to enact various versions of the DREAM Act from 20001-2011). While each DREAM Act bill differs slightly, most versions contemplate enabling certain unauthorized noncitizen students to obtain legal permanent resident (LPR) status through a two-stage process. First, the individual obtains a conditional status after demonstrating at least 5 years of residence in the United States and a high school diploma, its equivalent or admission into an institution of higher learning. Second, the individual upon completion of two years bachelor's degree or higher degree program or two years of military service can apply for legal permanent resident status. ADNORRA BRUNO, CONG. RESEARCH SERV., RL33863, UNAUTHORIZED ALIEN STUDENTS: ISSUES AND "DREAM ACT" LEGISLATION, 3 (2012). (summarizing California's attempt to provide in state tuition to unauthorized immigrants residing in the state). For example, in the 111th Congress (2009-2010) alone these DREAM Act bills were introduced: Development, Relief, and Education of Alien Minors (DREAM) Act, S. 729, 111th Cong. (2009); Development, Relief, and Education of Alien Minors (DREAM) Act, S. 3827, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education of Alien Minors (DREAM) Act, S. 3962, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education of Alien Minors (DREAM) Act, S. 3963, 111th Cong. (2010) (introduced in the U.S. Senate); Development, Relief, and Education of Alien Minors (DREAM) Act S. 3992, 111th Cong. (2010) (U.S. Senate voted 59-40, to table a motion to proceed to bill to clear the way for the House-approved DREAM Act amendment to H.R. 5281, a comprehensive immigration bill); Removal and Clarification Act, H.R. 5281, 111th Cong. (2010) (containing DREAM Act language) (The House of Representatives approved the bill by voice vote but it died in the U.S. Senate, when the Senate failed to invoke cloture on a vote of 55-41 (60 votes required to obtain cloture)); Development, Relief, and Education of Alien Minors (DREAM) Act, H.R. 1751, 111th Cong. (2010); H.R. 6497 (the Development, Relief, and Education of Alien Minors (DREAM) Act); H.R. 6327 (the Citizenship and Service Act). In the 112th Congress (2011-2012): S. 952(the Development, Relief, and Education of Alien Minors (DREAM) Act); H.R. 1842 (the Development, Relief, and Education of Alien Minors (DREAM) Act); H.R. 3823 (the Adjusted Residency for Military Service (ARMS) Act); and S. 1258 (the Comprehensive Immigration Act of 2011) (referred to Senate Committee on the Judiciary).

[17] *See* Memorandum from Janet Napolitano, Sec'y U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r U.S. Customs & Border Prot., *et al.* (June 15, 2012) [hereinafter Memo from Janet Napolitano]. Relying on the Department of Homeland Security's existing prosecutorial authority, on June

announcement criticism was abundant. Within in the legal academy, scholars began to debate the constitutionality of the President's action, [18] while the U.S. Congress called into question the limits that President has in exercising prosecutorial discretion in the immigration arena[19] and ICE officers along with the State of Mississippi sued DHS under several legal theories including that the Immigration and Nationality Act (INA)[20] explicitly prohibits immigration officers from exercising any discretion when arresting, detaining or placing an unauthorized immigrant in removal proceedings.[21]

Generally speaking, criminal prosecutors possess broad latitude in deciding whether to prosecute or not. "They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional obligation responsibility to 'take Care that the Laws be faithfully executed.'"[22] Similarly, in civil,

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15, 2012, the Homeland Security's Secretary, Janet Napolitano, implemented the DACA directive by issuing an agency wide memo calling on all departments within the Department of Homeland Security (DHS) to stop initiating deportation proceedings against DREAMers living in the United States. *See* Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, to Directors, Special Agents, Chief Counsel, 4 (June 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discre4tion-memo.pdf. [hereinafter Memo from John Morton]

[18] Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013) (arguing that the Obama administration instituted DACA program because of the lack of congressional action and political expediency surrounding the 2012 presidential election); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Power*s 6, 11-15 (Roger Williams U. L., Working Paper No. 133, 2013), *available at* http://ssrn.com/abstract=2215255; Robert J. Delahunty and John C. Yoo, Dream On: *The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEXAS L. REV. 781, 785 (2013) (providing an argument for DACA violating the Take Care Clause).

[19] *See* Letter from Chuck Grassley, U.S. Senator, et al. to Barack H. Obama, President of the United States, (June 19, 2012) (on file with the author); Letter from Lamar Smith, Chair, House Judiciary Committee to John Morton, Director, U.S. Department of Homeland Security, Immigration and Customs Enforcement (July 3, 2012) (describing the new policy as an amnesty, an overreach of executive branch authority and a magnet for fraud). In these letters member of Congress argued the new directive was unconstitutional because it usurped legislative authority, violated the President's duty under the Take Care clause and violated administrative law. [hereinafter *Congressional Memos Against DACA*].*See* Congressional Memos Against DACA, *supra* note 14. *But see* Letter from Harry Reid, et. al., to President Barack Obama, 2 (Apr. 13, 2011), *available at* http://wwwscribd.como/doc/53014785/22-Senators-Ltr-Obama-Relief-For-DREAMers-4 (Members of the Senate arguing that the President does have the authority to grant deferred action to this class of individuals and urging the President to exercise such authority); *see* also Department of Homeland Security Appropriations Act, 2013, H.R. 5855, as passed by the House, § 581(using the "power of the purse" (U.S. Const., art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.") the House of Representatives passed a bill stating, "[n]one of the funds made available in this Act may be used to finalize, implement, administer, or enforce the 'Morton Memos.'") The Morton memos, which are described in detail *infra* at Part II.C.2., were issued by Assistant Secretary of Immigration and Customs Enforcement to all agents, officers and attorneys at ICE and described their authority to exercise prosecutorial discretion as well as factors that should be considered in making that assessment.

[20] 8 U.S.C. § 1101 et. seq.

[21] Am. Compl. ¶ 68, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Oct. 10, 2012).

[22] United States v. Armstrong, 517 U.S. 456. 464 (1996); Pozni v. Fessenden, 258 U.S. 254, 262 (1922)("The Attorney General is the head of the Department of Justice. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed.")

administrative law the Supreme Court has recognized "that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special providence of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[23] Indeed, the Court in *Heckler* held "the agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[24]

While the President's DACA directive was motivated in part by Congress's failure to act, it also motivated by the failure to exercise favorable discretion in even the most sympathetic cases. In some instances ICE or Custom and Border Protection (CBP) agents sought removal of individuals eligible for deferred action pursuant to interagency memorandum. [25] Yet unlike criminal law where only the prosecutor can bring charges, others besides ICE trial attorneys may bring charges and ICE trial attorneys do not have the authority to dismiss charges by others. Rather, the ICE attorney must seek removal unless the judge dismisses the cases or the charging officer withdrawals the NTA. In addition to ICE prosecutors, border patrol agents, interior enforcement agents, and hearing benefits officers[26] all have the authority to initiate the removal of an individual he or she has determined is not in valid immigration status. There is no differentiation in immigration between the discretion to apprehend and the discretion to seek deportation. Once any of the eligible DHS agents, officers or adjudicators[27] has initiated the removal process by issuing a Notice to Appear (NTA), the immigration court commences proceedings.[28] An ICE trial attorney then represents the government regardless if the attorney made or agreed with the initial determination to place the noncitizen in a removal proceeding.[29]

Despite functioning like a prosecutor, an immigration prosecutor does not have distinct power like a criminal prosecutor does – the immigration prosecutor is just another person responsible for enforcing immigration laws. And while there are several memorandums that have been issued over time, by several different administrations as the agency's policy has evolved,[30] there is no single definitive guidance document for

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[23] Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[24] *Id.* at 831 (1985) (holding that the Federal Drug Administration's decision not to pursue an enforcement action was presumptively unreviewable, as such actions are "committed to agency discretion by law" under § 701(a)(2) of the Administrative Procedure Act). *See also* United States v. Batchelder, 422 U.S. 114, 123-24 (1979); Newman v. United States, 382 F.2d 479,480 (D.C. Cir. 1967) (noting that the executive branch's decision on whether to institute criminal proceeds and what to charge is immune from judicial review); Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) (noting that prosecutorial discretion in immigration context is a traditionally not subject to judicial review).

[25] *See* Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, to Directors, Special Agents, Chief Counsel, 4 (June 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discre4tion-memo.pdf. [hereinafter Memo from John Morton]

[26] 8 C.F.R. § 239.1 (2013) (listing 41 different categories of employees at DHS who have the authority to file a Notice to Appear and commence removal proceedings against a noncitizen).

[27] 8 C.F.R. § 235.6 (a)(1).

[28] INA § 239.1

[29] 8 C.F.R. § 1003.4 (2013).

[30] *See infra* Part II.B.2.

agents and the discretion is not limited to immigration prosecutors. Generally in the adversarial legal system lawyers must zealously represent their client before the tribunal[31] --- the singular exception is the criminal prosecutor, who is not just advocate but is required to seek justice.[32] While ICE trial attorneys are trained to support granting relief in cases where the evidence and law support a grant of relief,[33] immigration prosecutors, i.e. ICE trial attorneys, do not see their role as separate from DHS agents and adjudicators, and as such do not see it as their role to seek justice.[34] The number of cases where immigration judges are granting relief to an immigrant after he or she has been placed in removal proceedings is at an all time high.[35]

Redefining the role of the ICE trial attorneys to be one more akin to criminal prosecutors, with a concomitant obligation to seek justice, will ameliorate many of the causes that may have led to the President granting deferred action on a class wide basis to 1.7 million[36] individuals. This Article contributes to the ongoing scholarship and dialogue calling for heightened ethical obligations, guidelines and principles for attorneys appearing before the Executive Office for Immigration Review (EOIR), that meet the challenges of practicing immigration law, while promoting efficiency and fairness in an effort to restore confidence to a system subject to much condemnation.[37] Specifically, this

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[31] Elizabeth Keyes, *Raising the Bar: The Case for Zealous Advocacy as the Guiding Principle in Immigration Defense, forthcoming*, *available at* http://works.bepress.com/elizabeth_keyes/4 (2014)(discussing the long tradition in the legal profession of zealous advocacy).

[32] ABA Standards, Standard 3-1.1(b).

[33] Former INS Counsel David Martin notes that achieving justice is a part of the training that DOJ and DHS attorneys receive. He comments that "[s]uccessive general counsel and principal legal advisors in DHS and its predecessor agencies have made this clear and have reemphasized it in various ways at chief counsel conferences, meetings with field attorneys in their home locations, guidance memoranda, etc. As INS General Counsel, he recalls that he "often emphasized in such settings that attorneys were expected to ask serious questions in immigration court to probe a person's narrative and also to clarify details, but at the end of that process, if persuaded of the account (and its legal merit), the attorney should indicate that the government supports or would have no objection to the grant of relief (asylum, cancellation, etc.)." Email from David Martin, Sept. 7, 2013 to Immigration Professor List serve (on file with author).

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

[35] In 2013, there were 192,736 new filings by DHS for removal orders. TRAC Immigration, *available at* http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php Immigration judges granted relief for 90,272 cases (highest number since 1998) and granted removal for 82,384 (lowest number since 1998). TRAC Immigration, *available at* http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_leave.php; http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_stay.php.

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

[37] Keyes, *supra* note 31 (arguing that immigration lawyers must adopt zealous advocacy as a guiding principle, as done by criminal defenders in criminal setting, when representing noncitizens because

Article addresses structural problems within DHS that contribute to the flawed application of immigration prosecutorial discretion on a case-by-case basis. The Article concludes that prosecutorial discretion as applied on a case-by-case basis, would be a more effective tool to advance broad executive branch immigration priorities and policies if DHS took more specific steps to professionalize the role of the ICE trial attorney's office.

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

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

A. Prosecutorial Discretion in Immigration is the Prerogative of the Executive Branch

Immigration jurisprudence has historically been fickle about the strength and scope of any inherent authority of the executive branch to make decisions determining the classes of individuals that may enter and remain in the United States.[38] The Supreme Court of the United States has ruled that immigration and the right to regulate which individuals are allowed to enter the United States is a power of the sovereign, signaling that the President has the authority to regulate entry into the United States.[39] Yet, the Court has also stated "over no other area is the legislative power more 'complete' than immigration.[40] It is Congress that enacts laws determining who can enter the United

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immigrants are also seeking protection from the full weight of the state and the stakes in immigration proceedings are extraordinarily high).

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

[39] Harisiades v. Shaughnessy, 342 U.S. 580, 586–87 (1952) (finding a noncitizen remaining in the United States is a "matter of permission and tolerance"; it is not a right); *see also* Cox & Rodríguez, *supra* note 38, at 460 (arguing that the "continued inattention to the scope of the President's power over immigration law has given rise to doctrinal confusion.").

[40] Cox & Rodríguez, *supra* note 38, at 461 fn. 6 (citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).

States, under what conditions, and for how long.[41] Congress also establishes who can be removed from the United States based on acts they commit after entry.[42] The Court, applying the plenary power doctrine, has refused to overturn or invalidate immigration statutes, holding that immigration is a matter "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of . . . government . . . exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[43] The Court's refusal to intervene in congressional decisions about who should be allowed to remain in the United States, signals that immigration decisions are generally exclusively legislative[44] unless Congress explicitly delegates authority to the executive branch.[45] Nonetheless the executive branch has historically exercised prosecutorial discretion in the immigration arena relying on both congressionally delegated power and inherent constitutional authority.

Prior to the passage of the INA in 1920, much of immigration law was viewed as a function of foreign affairs, governed by treaty obligations and therefore driven by the executive branch.[46] However after initial passage of the INA, Congress became more engaged in shaping immigration policy and regulation.[47] Yet, as Professors Cox and Rodríguez recount in their article, *The President and Immigration Law*, even after passage of the INA there were several instances in which the executive branch relied in part on its inherent authority to admit individuals into the United States on a temporary basis.[48]

Most notably was the Bracero Program initiated in World War II, which was ultimately operated with congressional consent and through a bilateral agreement with Mexico. The Bracero Program authorized employment for temporary agricultural workers from Mexico and approximately four to five million Mexican workers were employed under this program.[49] Ultimately, Congress approved the Bracero program in 1943[50] and in 1951 subsequently authorized and extended the program until 1953.[51] In the Bracero Program President Franklin D. Roosevelt relied on the Ninth Proviso of the

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

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

[43] *Harisiades*, 342 U.S. at 588–89.

[44] *See, e.g.*, Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 201 (1993) ("Congress. . . .has plenary power over immigration matters."); INS v. Chadha, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens under Art. 1 §8, cl.4, is not open for question); Boutilier v. INS, 387 U.S. 118, 123 (1967) (The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'").

[45] *See* WILLIAM J. NOVACK, THE LEGAL ORIGINS OF THE MODERN AMERICAN STATE IN LOOKING BACK AT LAW'S CENTURY 249 (Austin Sarat et al. eds., 2002); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725-29 (2002).

[46] Cox & Rodríguez, *supra* note 38, at 483.

[47] *Id*.

[48] *Id*. at 485.

[49] T. ALEXANDER ALEINIKOFF, ET. AL, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 417 (6th Ed. 2008)

[50] Act of Apr. 29, 1943, Pub. L. No. 45, 57 Stat. 70.

[51] Act of July 12, 1951, Pub. L. No. 78, 65 Stat. 119.

Immigration Act of 1917[52] to initiate the program and then shortly after sought and received explicit congressional approval through legislation authorizing the program. In addition to arguing the existence of congressional delegated authority, the administration relied on a bilateral agreement with the Mexican government.[53]

There are also historic examples in which the executive branch's decision to admit groups of individuals in response to refugee crises and mass influx into Florida was grounded in both explicit delegated authority and implicit executive branch authority.[54] In particular, the executive branch responses to mass influx as a result of refugee influxes relied primarily on "the parole power and the power to exclude aliens to prevent harm to the United States, both delegated by the INA, and inherent executive authority over foreign affairs."[55] Ultimately through these executive branch actions thousands of Haitians and Cubans were resettled in the United States.[56] In addition, many of these refugees fleeing conflict were interdicted on the high seas and detained.[57] Specifically, the President relied on section 212(f) of the INA, which provides delegated authority to the President to suspend or restrict entry to any noncitizen or class of noncitizens if her entry could cause harm to the United States.[58] In addition, the Office of Legal Counsel in advising the President concluded that the "President's inherent constitutional power to protect the Nation and to conduct foreign relations,"[59] also provided authority for the President's interdiction program.[60]

In these Caribbean crises, the executive branch also relied on the parole authority delegated by Congress pursuant to section 212(d)(5) of the INA. The parole authority provides that the executive branch "may only on a case-by-case basis for urgent humanitarian reasons or significant public benefit"[61] allow a noncitizen who is otherwise not eligible for admission to the United States to enter the U.S. on a temporary basis. Typically, this authority is used to permit an individual needing medical attention entry into the United States or to allow for family visitation in compelling circumstances.[62] The executive branch also argued that this discrete authority provided a legal basis for paroling thousands of the Haitians and Cubans into the United States.[63]

Prosecutorial discretion has its historical underpinnings in the executive branch's authority, both implicit and explicit, to determine when individuals who have no valid immigration status can remain in the United States. Prosecutorial discretion in the

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[52] Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 878; Cox & Rodríguez, *supra* note 38, at fn 94 (discussing whether or not the Ninth Proviso indeed provided congressional authority at admit large class of immigrants and concluding that the Ninth Proviso was designed to provide authority for temporary admission of individual applicants for humanitarian reasons).
[53] Cox & Rodríguez, *supra* note 38, at 490.
[54] *See id.* at 492.
[55] *Id*. at 497.
[56] *Id*.
[57] *Id.* at 497-98.
[58] Immigration and Nationality Act, 8 U.S.C. § 1182 (f) (2010).
[59] *See* Proposed Interdiction of Haitian Flag Vessels, 5 Op. Off. Legal Counsel 242, 244 (1981).
[60] The U.S. Supreme Court agreed the President's interdiction program pursuant to an executive order did not violate the INA or the Article 33 of the United Nations Convention Relating to the Status of Refugees. *Sale* at 187 (1993).
[61] Immigration and Nationality Act, 8 U.S.C. § 1182 (d)(5)(A) (2010).
[62] *See* Cox & Rodríguez, *supra* note 38, at 502.
[63] *Id*.

immigration system includes enforcement discretion[64] and prosecutorial decisions to not pursue deportation or "defer action" on individual cases.[65] Deferred action is a tool used by the executive branch to provide discrete relief to certain individuals with compelling personal circumstances that warrant compassion and a grant of humanitarian relief [66] and has long been recognized as a mechanism for DHS to exercise prosecutorial discretion.[67]

Prosecutorial discretion including deferred action is exercised either or humanitarian reasons or because limited resources preclude prosecution of every individual who does not have valid immigration status. Moreover, the INA has expanded the types of actions that render a noncitizen deportable.[68] Often times the expansion of these offenses occurs in direct response to actual or perceived threat by an individual immigrant or groups of immigrants.[69] Yet, the result can overreach and unintentionally preclude individuals from admission to the United States.[70]

It was not until the 1970s, however, that the public became aware of a Nonpriority Program long utilized by the Immigration and Naturalization Service (INS).[71] The Nonpriority Program was initiated to "defer action in deportation cases in situations in which, because of humanitarian reasons, expulsion of aliens would not be appropriate."[72] In determining who might qualify for deferred action, INS gave consideration to age, length of presence in the United States, the need for physical or mental treatment that might only be available in the United States, the potential effect of deportation on the immigrant's family status, and whether the immigrant had engaged in any criminal or immoral conduct.[73]

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[64] Reno v. Am-Arab Anti-Discrim. Comm., 525 U.S. 471 (1999).
[65] Memo from Doris Meissner, *supra* note 4, at 1.
[66] This authority is similar to parole authority and the authority in the Ninth Proviso of the Immigration Act of 1917 *See* INA §212(d)(5); U.S.C § 1182(d)(5)(2012) (providing that the Attorney General may "only on a case-by-case basis" parole noncitizens into the United States for "urgent humanitarian reasons or significant public benefit"); *see also*, Cox & Rodríguez, *supra* note 38, at fn. 94.
[67] 8 C.F.R. § 274a.12(c)(14); Wadhia, *Role of Prosecutorial Discretion*, *supra* note 14, at 263.
[68] Memo from Doris Meissner, *supra* note 4, at 1.
[69] *See e.g.* Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race and Other Deep Divides*, 21 SOUTHERN ILLINOIS UNIV. L. REV. 101 (1996); Bill Ong Hing, *Immigration Policies: Messages of Exclusions to African Americans*, 37 HOWARD L.J. 237 (1994).
[70] In 2005 Congress passed the REAL ID Act, a post 9-11 antiterrorism legislation, which among many things expanded the definition of material support of terrorism. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 1, 119 Stat. 231, 303-23 (2005). Any noncitizen that provided material support to terrorism is barred admission into the United States. While sensible on its face REAL ID had unintended foreign policy consequences. Caught up in this expansion were Chins, an ethnic and religious minority in Burma, targeted by the military junta ruling at the time. After the passage of REAL ID ethnic Chins fleeing known persecution were denied asylum by immigration judges because they had provided food to members other Chin National Front, an armed force resisting the illegitimate military junta in Burma. *See generally* Michele L. Lombardo, Annigje J. Buwalda, and Patricia Base Lyman, *Terrorism, Material Support, the Inherent Right to Self-Defense, and the U.S. Obligation to Protect Legitimate Asylum Seekers in a Post 9/11, Post-Patriot Act World*, 4 REGENT J. INT'L L. 261 (2006) (disusing the implication of the REAL ID Act on asylum seekers in the United States and arguing the expanded definition of material support as applied violates U.S. international obligations to protect refugees fleeing persecution).
[71] *See* Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN. DIEGO L. REV. 99 (Dec. 1979).
[72] *Id.* at 100.
[73] *See* Nicholas v. INS, 590 F. 2d 802, 806-07 (9th Cir. 1979) (quoting Immigration and Naturalization Service, United States Department of Justice, Operations Instructions, Regulations, and Interpretations,

In 1975 John Lennon, pursuant to a Freedom of Information Act request, made public the Operations Instructions. The Instructions outlined the Nonpriority Program, as part of his attempt to invoke Nonpriority status as a remedy against his pending deportation.[74] When the INS was required to release information about the Nonpriority Program, they "steadfastly maintained that Nonpriority status was merely an intra-agency guideline, which conferred no substantive rights," rather, it was essentially an exercise of prosecutorial discretion.[75]

B. Legal Authority for Prosecutorial Discretion in Immigration

Recently, the U.S. Supreme Court in *Arizona v. United States*[76] upheld use prosecutorial discretion in immigration law, noting that "[a] principal feature of the removal system is the broad authority entrusted to immigration officials," and that "[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."[77] The use of prosecutorial discretion in these instances may reflect "immediate human concerns" and the "equities of . . . individual case[s]," including ties to the community, children possessing U.S. citizenship and "policy choices that bear on . . . international relations."[78] This rationale builds on the Court's reasoning in *Matthews v. Diaz*:[79] "the relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our relations with foreign powers . . .such decisions are frequently of a character more appropriate to either the Legislature or Executive branches than to the Judiciary."[80]

In addition, the Supreme Court has declined to invalidate the government's decision to commence removal against individuals who are without valid immigrant status and for whom the government may have targeted for investigation based constitutionally protected grounds, such as membership in a political group.[81] In *Reno v. AADC*,[82] the Supreme Court held "that the Immigration and Naturalization Service ("INS") may constitutionally single out aliens for investigation and deportation based on their membership in disfavored political groups, as long as it offers as a pretext some

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103.1(a)(1)(ii) (1952, as revised 1979)). "In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority. . . When determining whether a case should be recommended for nonpriority category, consideration should include the following: (1) Advanced or tender age; (2) Many years' presence in the United States; (3) Physical or mental condition requiring care or treatment in the States; (4) Family situation in the United States – the effect of expulsion; (5) Criminal, Immoral, or Subversive activities or affiliations – recent conduct." INS, Operations Instructions 103.1(a)(1)(ii)(as amended 1975).

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

[75] Wildes, *supra* note 71, at 101.

[76] 132 S. Ct. at 2492, 2495.

[77] *Id*. at 2498.

[78] *Arizona*, 132 S. Ct. at 2499.

[79] 426 U.S. 67 (1976).

[80] *Id*. at 81.

[81] Reno v. American-Arab Anti-Discrimination Committee ("AADC"), 525 U.S. 471 (1999).

[82] *Id.*

other technical basis for deportation."[83] Therefore, where the courts will in narrow circumstances review prosecutorial discretion decisions made by prosecutors based on impermissible grounds including selective prosecution,[84] this type of prosecutorial misconduct in immigration is not subject to judicial review or sanction.[85]

C. Modern Exercise of Prosecutorial Discretion in Immigration Context

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

Following Lennon's public disclosure of the Nonpriority status, courts began to scrutinize the bounds and application of the INS's discretionary program. In 1976, the Fifth Circuit held that the "decision to grant or withhold Nonpriority status . . . lies within the particular discretion of the INS," and "decline[d] to hold that the [INS] has no power to create and employ such a category for its own administrative convenience."[86] The *Yoon* court also noted that an immigration judge had no obligation to notify an immigrant in deportation proceedings of the possibility of Nonpriority status.[87] In spite of the Fifth Circuit's interpretation, however, the Eighth Circuit saw fit to delay two deportation cases to allow the immigrants to apply for Nonpriority status.[88] These cases highlight the circuits' varying treatments of the exercise of prosecutorial discretion, culminating in the 9th Circuit's 1979 decision *Nicholas v. INS*.[89] *Nicholas* was significant for its holding that the Nonpriority Program was not merely an administrative convenience, but rather was a "substantive rule."[90] Defined as such, courts were allowed to analyze and interpret the exercise of prosecutorial discretion and review whether the benefit was properly withheld or conferred.[91] The Ninth Circuit's ruling ran contrary to the INS's position that the Nonpriority Program was only an "intra-agency guideline."

To cement the INS's position regarding its prosecutorial discretion, in the wake of the *Nicholas* decision, the Operations Instructions were revised "to affirmatively state that grants of deferred action status were an administrative choice by the agency and in no way an 'entitlement' to the noncitizen."[92] The next significant alteration to the

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[83] David Cole, *Damage Control: A Comment on Professor Neuman's Reading of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 347, 347-48 (2000).
[84] *See* U.S. v. Armstrong, 517 U.S. 456 (1996) (holding that in order to file selective-prosecution claims based on race, defendants must show that the government failed to prosecute similarly situated suspects of other races). Selective prosecution is the exception to the rule that generally courts will not review prosecutor's decisions subject to discretion. *See Newman* v. United States, 382 F.2d at 480 (noting that the executive branch's decision on whether to institute criminal proceeds and what to charge is immune from judicial review).
[85] *AADC* 525 U.S. at 471.
[86] Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976).
[87] *Id.* at 1212-13.
[88] David v. INS, 548 F.2d 219 (8th Cir. 1977); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976).
[89] 590 F.2d 802 (9th Cir. 1979).
[90] *Id.*
[91] *Id.*
[92] *See* Wadhia, *Role of Prosecutorial Discretion*, *supra* note 14, at 250 (citing Leon Wildes, *The Deferred Action Program of the Bureau of Citizenship and Immigration Services: A Possible Remedy for Impossible Immigration Cases*, 41 SAN DIEGO L. REV. 819 (2004)).

Operations Instructions came in 1996, following passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA):

> The IIRAIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief. Consequently, the IIRAIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases.[93]

Since the passage of IIRAIRA, the INS (ultimately DHS, following restructuring in 2002[94]) has issued a number of internal memoranda addressing guidelines for and application of prosecutorial discretion.[95]

2. Prosecutorial Discretion is Rooted in Internal Agency Guidance

One of the first comprehensive reviews came in 2000, when Bo Cooper, INS General Counsel, wrote a memorandum outlining the use of prosecutorial discretion in the INS.[96] The document was "intended to be the first step in the INS' examination of its use of prosecutorial discretion."[97] The memorandum reviewed the history of prosecutorial discretion and its application in the immigration context, noting "the administrative enforcement discretion generally deferred to by courts extends far more broadly to a wide variety of INS decisions than the strictly 'prosecutorial' decision to institute removal proceedings."[98] In exploring the limits on prosecutorial discretion, the memorandum stated:

> First, in order to be a nonreviewable exercise of prosecutorial discretion, the decision must be a decision to enforce, or not to enforce, the law. An enforcement decision must be distinguished from an affirmative act of approval, or grant of a benefit, under statute or other applicable law that sets guidelines for determining when the approval should be given. [*Heckler v.*] *Chaney*, 470 U.S. [821, 831 (1985)]. An enforcement decision is an exercise – or nonexercise [sic] – of an agency's coercive power over an individual's liberty or property. *Id.* at 832. The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions.[99]

It was further noted that certain INS decisions that might be classified as exercises of prosecutorial discretion, could be reviewed for abuse of discretion, would be subject to

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[93] *See* Wadhia, *Role of Prosecutorial Discretion*, *supra* note 14, at 252-53 (citing Letter from Robert Raben, Assistant Attorney General, to Rep. Barney Frank, U.S. H.R., on Use of Prosecutorial Discretion to Avoid Harsh Consequences of IIRAIRA (Jan. 19, 2000)).
[94] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.
[95] KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERVICE, R42924 PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES (JAN. 17, 2013).
[96] *See* Memorandum from Bo Cooper, INS Gen. Counsel on INS Use of Prosecutorial Discretion to the Comm'r (2000). [hereinafter Memo from Bo Cooper]
[97] *Id.*
[98] *Id.*
[99] *Id.* (emphasis and citations in original).

constitutional considerations, and could be limited by statutes passed by Congress.[100] The paper's conclusion was that:

> The INS has broad prosecutorial discretion in its law enforcement activities, although that discretion is not unlimited. This authority includes the prosecutorial discretion not to place a removable alien in proceedings, but the INS does not have prosecutorial discretion to admit an inadmissible alien into the United States. The INS does not have prosecutorial discretion to provide any benefit under the INA to an alien who is not eligible to receive it.[101]

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

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

> Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process – from planning investigations to enforcing final orders – subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.[102]

The memorandum outlined a number of factors to be considered in the favorable exercise of prosecutorial discretion at any stage of a case: immigration status, length of residence in the United States, criminal history, humanitarian concerns, immigration history, likelihood of ultimate removal, likelihood of using other means, effect on the community, cooperation with law enforcement, honorable United States military service, community attention, and availability of INS resources.[103] These categories were consistent with the original Nonpriority Program used by the INS in the 1970s and before. In addition to outlining the legal basis for prosecutorial discretion, Meissner's memorandum offered more practical guidelines to those who would be exercising this discretion in the immigration context.

After the INS was restructured into ICE, CBP, and U.S. Citizenship and Immigration Services (USCIS) in 2002,[104] William J. Howard, Principal Legal Advisor, issued a memorandum to chief counsel regarding the continued use of prosecutorial discretion across the several immigration branches of the DHS.[105] In particular, Howard

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[100] *Id.*
[101] *Id.*
[102] *See* Memo from Doris Meissner, *supra* note 4.
[103] *Id.*
[104] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.
[105] *See* Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, on Prosecutorial Discretion, to OPLA Chief Counsel, (Oct. 24, 2005).

highlighted that the volume of immigration cases coming through ICE, CBP, and USCIS was extreme, and that, "[l]itigating with maximum efficiency requires that we exercise careful yet quick judgments on questions involving prosecutorial discretion."[106] Howard stressed the need for Office of Principal Legal Advisor (OPLA) attorneys to become familiar with the principles of prosecutorial discretion and consider certain situations in which the favorable exercise of prosecutorial discretion would be advised; for example, when to exercise that discretion instead of seeking an alien's removal, or when not to pursue an appeal.[107] In 2007, the issue was revisited in a memorandum by Assistant Secretary Julie Meyers, noting specifically the need for field agents to "use discretion in identifying and responding to meritorious health related cases and caregiver issues," by exercising discretion, when appropriate, against taking nursing mothers into custody.[108]

ICE revisited the general precepts of prosecutorial discretion and its favorable exercise in 2011.[109] Citing many prior internal treatises on the subject, Director John Morton noted the limitations on ICE's resources and the potential for maximizing those resources through the use of prosecutorial discretion. Noting that prosecutorial discretion could be used at many stages of an investigation, Morton outlined several situations in which a favorable exercise of prosecutorial discretion would be a preferred outcome. The memorandum also included a "not exhaustive" list of factors to consider in favorably exercising prosecutorial discretion; that list was considerably longer and more detailed than the general categories of factors in Meissner's 2000 memorandum.[110] For example pregnant and nursing women, victims of domestic violence, trafficking or other serious crimes and individuals present in the United States since childhood were included as individuals who should be given prompt particular care and consideration.[111] In addition, the memo identifies negative factors that should also prompt particular care and consideration including individuals who pose a national security threat, individuals with serious or lengthy criminal histories, known gang members and others that pose a clear danger to public safety and those individuals who have an "egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud."[112] Ultimately, Morton's treatment of the subject reinforced the position that DHS's immigration branches should continue to use prosecutorial discretion, as appropriate, as a necessary tool for handling immigration cases.

Many of the INS and DHS memoranda about prosecutorial discretion address its general use, setting forth the legal grounds for its exercise and stressing the need for prosecutorial discretion as a tool to efficiently handle immigration cases. In 2012, a memorandum regarding prosecutorial discretion issued by Secretary of Homeland Security Janet Napolitano called for the use of prosecutorial discretion in a specific

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[106] *Id.*
[107] *Id.*
[108] *See* Memorandum from Julie L. Meyers, Assistant Sec'y of Homeland Sec. for Immigration & Customs Enforcement, on Prosecutorial and Custody Discretion, to Directors and Special Agents, (Nov. 7, 2007). [hereinafter Memo from Julie L. Myers]
[109] Memo from John Morton, Director, *supra* note 17, at 4.
[110] *Id.*
[111] *Id.* at 5.
[112] *Id.*

context.[113] Building on the rights of ICE, CBP, and USCIS to exercise prosecutorial discretion generally, Napolitano's memorandum set forth particular criteria by which a certain class of individuals should benefit from a favorable exercise of prosecutorial discretion.

Yet, in all these memorandums prosecutorial discretion is understood as a tool – the same tool – for agents, investigators, adjudicators and prosecutors. There are no distinct roles or protocols for the various actors in the immigration system. The criteria to grant a favorable exercise of discretion and not apprehend an individual are the same for the decision on whether or not to initiate removal proceedings against an immigrant. ICE trial attorneys are not seen as administrators of justice, with unique ethical duties inherent in that of a criminal prosecutor; rather, they are enforcers – another extension of immigration police power.

III. Critics Cite Underuse and Overbroad Application as Fundamental Flaws to Prosecutorial Discretion in Immigration Law

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

One of the main critiques of prosecutorial discretion in the immigration context is that it is not used consistently[114] or enough.[115] Advocates point to compelling cases of individuals in which ICE attorneys refused to consider the individual circumstances and the impact of removal on the family and community.[116] A related concern is that while there is guidance to the field from DHS national headquarters, how prosecutorial discretion is to be used, at the local level its usage varies significantly.[117] Therefore, an

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[113] *See* Memo from Janet Napolitano, *supra* note 17.

[114] Data from a December 13, 2013, study shows the variance in the use of prosecutorial discretion to close cases by immigration court location. For example, 29% of cases closed in Seattle, Washington by prosecutorial discretion (Of the 6,112 cases closed, 1,821 were pursuant to prosecutorial discretion). In comparison, in San Antonio prosecutorial discretion accounted for 3.9% of case closures (Of the 9,396 cases closed, 368 were closed with prosecutorial discretion). TRAC Immigration, Immigration Court Cases Closed Based on Prosecutorial Discretion, *available at* http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html

[115] Data from a December 13, 2013, study indicates that only 6.6% of cases before immigration courts were closed through the exercise of prosecutorial discretion. TRAC Immigration, Immigration Court Cases Closed Based on Prosecutorial Discretion, *available at* http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html. Contrast that with criminal law where prosecutors use their prosecutorial discretion to plea bargain and charge bargain between 90 to 95 percent of criminal cases. Bureau of Just. Stat., Compendium of Federal Justice Statistics, 59 (2004). *See also*, Wadhia, *Sharing Secrets*, *supra* note 12, at 28 (citing the American Bar Association's testimony before the Senate Judiciary Committee on May 17, 2011 where the ABA stated "[p]riortization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system. Unfortunately, it has not been widely utilized in the immigration context.") (citation omitted).

[116] Wadhia, *Sharing Secrets*, *supra* note 12, at 40-44.

[117] Data from a December 13, 2013, study shows the variance in the use of prosecutorial discretion to close cases by immigration court location. For example, 29% of cases closed in Seattle, Washington by prosecutorial discretion (Of the 6,112 cases closed, 1,821 were pursuant to prosecutorial discretion). In comparison, in San Antonio prosecutorial discretion accounted for 3.9% of case closures (Of the 9,396 cases closed, 368 were closed with prosecutorial discretion). TRAC Immigration, Immigration Court

immigrant's ability to avail herself of this relief is more dependent on the jurisdiction she resides in than the merits of the situation.[118]

Another recurring criticism about immigration officers concerning the exercise of discretion is the lack of transparency about how the decisions are made.[119] Advocates argue that without knowing the criteria for when an immigration officer or attorney decides to exercise prosecutorial discretion, they have no guarantee that the decisions being made are not arbitrary. Publically available guidance is needed so that attorneys know what is needed to prevail on a request to not pursue action that could result in the removal of their client. In addition, if DHS departs from this guidance, the immigrant placed in removal proceedings then should have judicial recourse.[120]

Similarly, there exists a common critique about deferred action, one example of prosecutorial discretion in immigration law. In fact, Professor Wadhia in a recent article, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, argues that the deferred action authority derived from the INS operating instruction is a substantive, not procedural rule, and should be subject to informal rulemaking pursuant to the Administrative Procedure Act (APA).[121] Professor Wadhia contends that deferred action generally is quasi-legislative, should be codified into regulations and subject to judicial review like any other legislative rule.[122] Her solution appears to conclude that deferred action is distinct from prosecutorial discretion generally and should be treated like a legislative or binding rule.[123]

Cases Closed Based on Prosecutorial Discretion, *available at* http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html

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

[119] *See* Wadhia, *Sharing Secrets*, *supra* note 12, at 48-51 (discussing lack of transparency in decision-making process by immigration officials on whether or not to grant deferred action to an individual).

[120] *Id*.

[121] *See* Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 14, at 282-286 (2010) (arguing for clear administrative guidelines for the deferred action with publicly available criteria that has been subject to notice and comment rulemaking pursuant to section 553 of the APA).

[122] *See* Wadhia, *Sharing Secrets*, *supra* note 12, at 61-63.

[123] While Professor Wadhia has argued that deferred action should subject to the rules of administrative law – subject to informal rulemaking pursuant to section 553 of the APA and judicial review under section 706 of the APA, she also posits that President Obama's DACA initiative, granting deferred action for a subset of individuals, is a legitimate act prosecutorial of prosecutorial discretion and is within his executive branch powers and therefore is immune from judicial review and congressional intervention. *See* Shoba Sivaprasad Wadhia, In Defense of DACA, Deferred Action, and the DREAM Act, 91 TEX. L. REV. 59 (2013). In Professor Wadhia's most recent article, she disagrees with DHS's view that the exercise of prosecutorial discretion does not confer any legal right or enforceable benefit, shielding it from judicial review. *See* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 43-44 (2013) [hereinafter *The Immigration Prosecutor and Judge*]. Notably courts have held that deferred action is a general statement of policy and not subject to APA's notice and comment requirements. In these cases courts have held that the decision to grant or refuse to grant deferred action to an otherwise removable immigrant is a valid exercise of prosecutorial discretion and not subject to judicial review. Alcaraz v. INS, 384 F.3d 1150, 1160-61 (9th Cir. 2004) (holding section § 242(g) of INA precludes the court of reviewing claim on behalf of a noncitizen challenging any decision by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders). In addition, the Supreme Court in *Heckler v. Chaney* held that prosecutorial discretion is an inherent executive branch function and that exercises of

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

> The theoretical difference between legislative and nonlegislative rules is clear. A legislative rule is essentially an administrative statute – an exercise of previously delegated power, new law that completes an incomplete legislative design. Legislative rules frequently proscribe, modify, or abolish duties, rights, or exemptions. In contrast nonlegislative rules do not exercise delegated lawmaking power and thus are not administrative statutes. Instead, the provide guidance to the public and to agency staff and decisionmakers. They are not legally binding on members of the public. Interpretive rules and policy statements serve distinct functions. An interpretative rule clarifies or explains the meaning of words used in a statute, a previous agency rule, or a judicial or agency adjudicative decision. A policy statement, on the other hand, indicates how an agency hopes or intends to exercise discretionary power in the course of performing some other administrative function.[124]

However, prosecutorial discretion as outlined by former INS Commissioners and other DHS officials, looks much more like policy statements about enforcement priorities than an effort to fill missing gaps in the INA. The only way deferred action should be subject to notice and comment rulemaking would be if it is understood to be a modification or exemption to the INA. If that were the case, deferred action would either be an immigration benefit or approval, and therefore not a function of prosecutorial discretion.[125] Yet, deferred action is an essential component of prosecutorial discretion in immigration law and the more politically palatable solution to increasing its use on a case-by-case basis is to modify the role of ICE trial attorneys to that more similar to criminal prosecutors.

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prosecutorial discretion are agency actions "committed to agency discretion" and exempt from judicial review under § 702(a)(2) of the APA. *Heckler* at 837-38. Professor Wadhia counters and argues that individuals should be able to challenge "prosecutorial denials" when an agency takes an enforcement action against an individual pursuant to § 706 of the APA because the agency action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* Wadhia, *Immigration Prosecutor and Judge*, *supra* note 123, at 58. This line of argument assumes that a person who is not in valid immigration status has a legal right or basis in the law to not have charges brought against them because the agency has the authority to not prosecute violations of the INA. Professor Wadhia cites to dicta in Heckler where the Supreme makes a distinction between the role of the courts when a when an agency decides to not enforce versus taking enforcement action. The Court reasoned that there is a role for a court to review what process agency provided when an individual's liberty or property interests are implicated. *Id.* at 58 (citing Heckler at 832). I would argue the role court has when agency does take action is to review the procedure the agency provided and to make sure an individual constitutional due process rights were met. *See generally*, Mathews v. Eldridge, 424 U.S. 319 (1976).

[124] 1985 Duke L.J. 381, 383 (1985).

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

Certainly judicial review should be available[126] when ICE trial attorneys act egregiously and are motivated by impermissible reasons in denying a favorable exercise of prosecutorial discretion. However, if prosecutorial discretion is to remain a solidly executive branch prerogative to counter legislation painted with too broad a brush (a defect of almost all legislation) and a mechanism to prioritize individuals for deportation, such as violent repeat criminal offenders, it generally should be shielded from judicial review. What is necessary, is not judicial intervention but internal and cultural changes at the ICE trial attorney office that will professionalize the role of the immigration prosecutors and demand higher ethical standards akin to that of U.S. federal prosecutors.[127]

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

When the President announced his DACA directive as a valid exercise of prosecutorial discretion, critics countered that DACA is decidedly different from the historical use of prosecutorial discretion, in both the immigration and criminal law contexts, because it departs from the prosecutorial discretion framework of assessing the exercise of discretion on a case-by-case basis.[128] It is this departure from precedent that critics argue makes the DACA directive constitutionally suspect. Specifically, Congress has not delegated open-ended immigration authority to a President to immunize large classes of individuals from removal nor does the President have inherent authority for this action. The President and immigration advocates[129] assert that his decision to grant deferred action to a class of 1.7 million[130] individuals is an example of a well-established

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[126] This may be an aspirational goal given the Court's ruling in *Reno v. AADC*, 525 U.S. 471 (1999). The majority held "that the Immigration and Naturalization Service ("INS") may constitutionally single out aliens for investigation and deportation based on their membership in disfavored political groups, as long as it offers as a pretext some other technical basis for deportation." David Cole, *Damage Control: A Comment on Professor Neuman's Reading of* Reno v. AADC, 14 Geo. Immigr. L.J. 347, 347-48 (2000). Therefore, where the courts will in narrow circumstances review prosecutorial discretion decisions made on impermissible grounds including selective prosecution, this type of prosecutorial misconduct in immigration is not subject to judicial review or sanction. *See* U.S. v. Armstrong, 517 U.S. 456 (1996) (holding that in order to file selective-prosecution claims based on race, defendants must show that the government failed to prosecute similarly situated suspects of other races).

[127] *See infra* Part V.

[128] *See* Margulies, *supra* note 18, at 11-15 (arguing that prosecutorial discretion cannot support the DACA directive).

[129] *See* Memo from Janet Napolitano, *supra* note 17; Letter from Immigration Law Professors to President Obama, Executive Authority to Grant Administrative Relief to DREAM Act Beneficiaries (May 28, 2012) (on file with author); Letter to Interested Parties from Cheryl Little, *Summary Regarding Executive Branch Authority to Grant DREAMers Temporary Relief* (May 18, 2012) (on file with author).

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

"back end" authority of prosecutorial discretion on a case-by-case basis.[131] Individually assessed DREAMers meet the DHS criteria for a favorable exercise of prosecutorial discretion.[132] Specifically, they are in "pursuit of education in the United States" and "have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degree at a legitimate institution of higher education in the United States."[133] In addition to these specific criteria they also have other general equities that DHS considers when deciding whether to exercise prosecutorial discretion. They are not criminals, they are not an enforcement priority, they do not have any criminal history, and they have strong family and community ties.[134]

In this section, I outline the arguments that have surfaced around the President's directive and organized the section into the types of individuals leveling their critisims. First, I summarize some of the prominennt academics in the legal academy arguments around the constitutionality of the initiative. Second, I discuss reactions of members of Congress to the President's initiative. I conclude with a summary of the litigation brought by DHS border patrol agents challenging its application.

1. The Legal Academy

One line of argument against the President's the DACA directive is that it is not based in any express or delegated statutory authority. For example, Margulies argues in his recent article, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers,* "the INA is comprehensive legislation, in scope resembling the provisions of the labor management legislation the Court cited in *Youngstown* itself."[135] Congress has created a complex framework in which under various conditions non-citizens can be granted affirmative relief even if they are in the United Status with valid immigration status.[136] Congress also created broad categories defining who is ineligible for immigration relief and lacks a legal basis to remain in the United States.[137] The President cannot side step or override this comprehensive statutory structure, to grant broad relief to 1.7 million immigrants residing in the United States without any valid immigration status because the action supersedes any delegated authority to the executive branch.[138] In the INA Congress explicitly authorized the President to provide temporary relief in emergency circumstances on a

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Biometrics; 1,047,357 responses related to Application for Employment Authorization Document Worksheet, Form I-765WS, USCIS; and 1,761,300 responses to required Passport-Style Photographs).

[131] Professors Adam Cox and Cristina Rodríguez make a compelling argument that the President's power to decide "which and how many noncitizens should live in the United States operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit. *See* Cox &. Rodríguez, *supra* note 38, at 464 (2009).

[132] *See* Memo from John Morton, *supra* note 17, at 4.

[133] *Id.*

[134] *Id.*

[135] *See* Margulies, *supra* note 18, 11-15 (arguing that prosecutorial discretion cannot support the DACA directive).

[136] *See, e.g.* victims of domestic violence (8 U.S.C. § 1229b(2)); and refugees (8 U.S.C. § 1101(a)(42)).

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

[138] *See* Margulies, *supra* note 18, at 11-15(arguing that prosecutorial discretion cannot support the DACA directive).

case-by-case basis for individuals fleeing war or natural disaster.[139] Professor Margulies, however, does not think the President is without authority to grant this relief; rather the power to do so is not grounded in the authority Congress has delegated to him. Instead Professor Margulies posits that stewardship argument provides the necessary authority to insulate the President from constitutionally attacks.[140]

Others critics of the President's broad DACA directive have argued the President's action is outside of the scope of prosecutorial discretion afforded to immigration cases. For example, in concluding that the President had violated the Take Care Clause of the Constitution, Professors Delhunty and Yoo in their recent article, *Dream On: The Obama's Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, argue "the Obama Administration has provided no adequate excuse or justification for its nonenforcement decision."[141] The authors conclude that the President's directive violates the "take care" clause of the Constitution[142] (imposing a duty for the President to take due care while enforcing the laws).

2. The Legislative Branch

In response, both House and Senate Republicans sent letters to the Department of Homeland Security and President Obama questioning the legal authority to proscribe this new directive.[143] In these letters, member of Congress argued the new directive was unconstitutional because it usurped legislative authority, violated the President's duty under the "Take Care clause"[144] and violated administrative law. In addition, the House of Representatives using the "power of the purse"[145] passed a bill that stated, "None of the funds made available in this Act may be used to finalize, implement, administer, or enforce the 'Morton Memos.'"[146] The Morton memos, which are described in detail below, were issued by Assistant Secretary of Immigration and Customs Enforcement to all agents, officers and attorneys at ICE and described their authority to exercise prosecutorial discretion as well as factors that should be considered in making that assessment.

3. The Judiciary

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[139] *See* Margulies, *supra* note 18, at 11-15(arguing that prosecutorial discretion cannot support the DACA directive).
[140] *Id.*
[141] Delahunty and Yoo, *supra* note 15, at 785 (2013) (providing an argument for DACA violating the Take Care Clause).
[142] *Id.* at 781.
[143] See Congressional Memos Against DACA, *supra* note 18. *But see* Letter from Harry Reid, et. al., to President Barack Obama, 2 (Apr. 13, 2011), *available at* http://wwwscribd.como/doc/53014785/22-Senators-Ltr-Obama-Relief-For-DREAMers-4 (Members of the Senate arguing that the President does have the authority to grant deferred action to this class of individuals and urging the President to exercise such authority).
[38] See U.S. Const., art. II, § 3.
[145] *See* U.S. Const., art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . .").
[146] *See* Department of Homeland Security Appropriations Act, 2013, H.R. 5855, as passed by the House, § 581.

In a recent federal lawsuit several Immigration and Customs Enforcement Officers and the State of Mississippi challenged the DACA directive.[147] In the complaint the plaintiffs argue the directive:

> commands ICE officers to violate their oaths to uphold and support federal law, violates the Administrative Procedure Act, unconstitutionally usurps and encroaches upon the legislative powers of Congress, as defined in Article I of the United States Constitution, and violates the obligation of the executive branch to faithfully execute the law, as required by Article II, Section 3, of the United States Constitution.[148]

While it ultimately deferred ruling on a petition for preliminary injunction, on April 23, 2013 the Court did find that Plaintiffs had a substantial likelihood of prevailing on the merits.[149] In its order the Court did not address the two constitutional arguments advanced by the plaintiffs: executive branch usurpation of legislative powers and the violation of the Take Care Clause.[150] The Court did however discuss the statutory arguments. The plaintiffs contended that the executive has no discretion to decide whether or not to place an unauthorized immigrant in removal proceedings when they encounter such an individual.[151] The crux of this argument concerns whether 8 U.S.C § 1225 (INA §235), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[152] does not allow for prosecutorial discretion before an immigrant is placed in removal proceedings[153]

The plaintiffs argued that three provisos within 8 U.S.C. §1225 (INA § 235) require immigration officers to arrest and detain any individual they come in contact with that is "an applicant for admission." The plaintiffs further contended that immigration officers have no discretion to decide whether or not to place the individual in removal proceedings. The complaint argues:

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

[147] Am. Compl., Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Oct. 10, 2012).
[148] *Id.*
[149] Memorandum Opinion and Order, Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 1744422 (N.D. Tex. April 23, 2013).
[150] *Id.*; *see also* Delahunty and Yoo, *supra* note 15 (providing an argument for DACA violating the Take Care Clause). *But see* Shoba Sivaprasad Wadhia, In Defense of DACA, Deferred Action, and the DREAM Act, TEXAS L. REV. SEE ALSO 59 (2013) (addressing Professor Delahunty and Yoo's arguments, and countering with an explanation as to why DACA is constitutional).
[151] Am. Compl., Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. Oct. 10, 2012).
[152] Pub. L. No. 104-208; 110 Stat. 3009-546 (1996).
[153] *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L. J. ONLINE 167 (2012).

> clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding [in immigration court]."[154]

Recently, the Court dismissed the case for lack of subject matter jurisdiction, holding that the Collective Bargaining Agreement and Civil Reform Act ("CSRA") provides a comprehensive and exclusive scheme for resolving disputes brought by federal employees.[155] The ICE agents were precluded from seeking relief in federal district court. In the order the Court opined that there was merit to the underlying claim even though there was no subject matter jurisdiction. While this case was dismissed on procedural grounds, the question still remains: Does the INA legally mandate that immigration enforcement officers place a removable noncitizen in removal proceedings or does it provide discretion? If this issue has a proper vehicle for judicial resolution, a court may find valid but non-constitutional grounds for enjoining the DACA directive.[156] If this type of claim were to prevail there could be no discretion in an arrest, decision to detain or issue a Notice to Appear (NTA).

Professor David Martin, former INS General Counsel, in his most recent article, *A Defense of Immigration-Enforcement Discretion: the Legal and Policy Flaws in Kris Kobach's Latest Crusade*, provides a compelling argument for why the plaintiffs misinterpreted the statute on its face as well as ignored the legislative history of INA § 235. In 1996, Congress added a new provision to § 235 of the INA, § 235(a)(1), which applies to all persons present in the United States who were not inspected or admitted as applicants for admission.[157] Professor Martin points out that prior to 1996, immigrants physically residing in the United States who had not entered lawfully and were inspected at a point of entry were considered as entering the United States and subject to deportation proceedings instead of exclusion proceedings.[158] This distinction was crucial because an immigrant in a deportation proceeding did not have the same burden of proof as an immigrant in exclusion proceedings, which made deportation proceedings more favorable for an immigrant. This distinction had some anomalous results. For example a person with no visa who snuck across the border would be accorded more process than a person attempting to make a lawful entry with a travel document whose admissibility was questioned.[159] The 1996 amendment sought to eliminate this absurd result by specifying that any person who was had not been admitted or inspected was an applicant for admission. Professor Martin then notes that not all DACA eligible immigrants were entrants without inspection (EWI). Upwards of half of them were admitted or paroled and then overstayed their status.[160] The plaintiff's argument of having no prosecutorial discretion would then apply to EWI, and not overstays. But Professor Martin goes further

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[154] Am. Compl., *supra* note 151, at ¶ 68.
[155] Order, Crane v. Napolitano, No. 3:12-CV-03247-O (N.D. Tex. July 31, 2013).
[156] Ann R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 491, 519 (2011) ("[T]he doctrine of constitutional avoidance and "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" may cause the Court to favor noncitizens when interpreting immigration statutes.").
[157] David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L. J. ONLINE, 167 (2012).
[158] *Id*. at 171-72.
[159] *Id*. at 171.
[160] *Id*.

to argue that the plain language and legislative history of INA § 235 does not statutorily bar prosecutorial discretion for EWIs.[161]

So while the *Crane* litigation has been dismissed, a court has yet to rule on the merits of the argument about whether the INA provides immigration officers with prosecutorial discretion. Given this controversy, Congress could seek to clarify this question or given the congressional discontent with the DACA directive could seek to further limit the use of prosecutorial discretion by DHS.

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

A. Use of Prosecutorial Discretion in Federal Criminal Law

The American legal tradition of prosecutorial discretion has its roots in English criminal law,[162] the U.S. Constitution[163] and the ethical duty of prosecutors to "seek justice."[164] The phrase "prosecutorial discretion" was first used, in *Poe v. Ullman*.[165] As

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[161] Professor Martin discusses a complicated issue that arose during the drafting of the 1996 amendments and how individual who had been paroled into the United States should be categorized immediately after their parole status lapsed if they were actively trying to depart from the United States. *Id.* at 174-77. His discussion of Board of Immigration case *Matter of Badalmenti* and its impact on the legislative drafting process is significant but beyond the scope of this article. Ultimately this case was the reason Congress provided broad discretion on when in the immigration process to charge an EWI with inadmissibility regardless of the holding in *Badalmenti*. *Id*. at 177.

[162] Historically, private citizens brought criminal prosecutions, generally on behalf of the Crown. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 547 (2005). The *nolle prosequi* was a procedural power granted to the English Attorney General to dismiss pending cases and was often exercised at the discretion of the Crown, and was not reviewable by the court. BLACK'S LAW DICTIONARY 1074 (8th ed. 2004) ("not to wish to prosecute"). *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL L. REV. 1, 16 (Fall 2009) (citing Abraham S. Goldstein, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 12 (1981)). "[W]hen the Attorney General issued a *nolle*, the court would terminate the prosecution without any inquiry." Id. (citing Goldstein). Even if brought by a private citizen, criminal prosecutions were ultimately considered the province of the Crown. "By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society . . . . For that reason, all proceedings, "*ad vindictam et poenam*" are called in the law, the pleas or suits of the Crown . . . . All indictments and informations, granted by the King's Bench, are the King's suits, and under his controul [sic]; informations filed by this Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure. Wilkes v. The King, 97 Eng. Rep. 123, 125 (K.B. 1768). As the American colonies were settled, the *nolle prosequi* was adopted as a part of early American criminal law. *See* Kraus, *supra* at 16. Governors of the colonies or district attorneys "could direct and end official prosecutions." Prakash, *supra* (citing Oliver W. Hammonds, *The Attorney General in the American Colonies*, in 2 Anglo-American Legal History Series 1, 5, 7, 9, 11, 16, 20 (1939)).

[163] *Armstrong*, 517 U.S. at 464 (confirming the authority of the executive to exercise prosecutorial discretion in the criminal context stems from the Take Care Clause); *see also* Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, Congressional Research Service R42924 (Jan. 17, 2013).

[164] *See* Model Rules of Prof'l Conduct, r. 3.8, cmt. 1 (2004); Model Code of Prof'l Responsibility EC 7-13(1983) ("The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict."); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1281 (1997).

the notion has evolved, courts justified its use by relying on a mixture of separation of powers,[166] the Take Care clause,[167] and the duties of a prosecutor as an appointee of the President.[168] Hence judicial review of a prosecutor's exercise of discretion[169] is limited to "vindictive" or unconstitutional uses of power, which the Supreme Court has held are "both reviewable and impermissible."[170]

Prosecutorial discretion covers a wide range of decisions made in criminal cases, ranging from whether to bring charges, to whether to dismiss a case or to plea bargain with the defendant.[171] Prosecutorial discretion allows prosecutors to prioritize cases where resources are scarce, caseloads are heavy, in instances where the evidence available is not sufficient to secure a conviction[172] and when there are compelling humanitarian reasons to not pursue prosecution.[173] Today, the criminal justice system cannot function without prosecutorial discretion.[174]

The United States Attorneys' Manual, *Principles of Federal Prosecution* spans nearly 40 pages, outline the use of prosecutorial discretion in the criminal context and offers guidance to United States Attorneys on the exercise of prosecutorial discretion at nearly every stage of a criminal proceeding, from initiating prosecution to sentencing.[175] The *Principles of Federal Prosecution* is "cast in general terms with a view to providing guidance rather than mandating results."[176] Central to the guidelines regarding prosecutorial discretion is the notion that "[t]he manner in which Federal Prosecutors exercise their decision-making authority has far-reaching implications, both in terms of

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[165] Poe v. Ullman, 367 U.S. 497, 530 (1961) (referring to a prosecutor's right to enforce statutes); Krauss, *supra* note 162, at 16 (Fall 2009) (citing Abraham S. Goldstein, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 12 (1981)).

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

[167] U.S. Const., Art. II §3.

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

[169] *See, e.g.*, Confiscation Cases, 74 U.S. 454 (1969); Newman v. United States. 382 F.2d 479, 480 (D.C. Cir. 1967).

[170] *Heckler*, 470 U.S. at 842 (1985).

[171] *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

[172] *See* U.S. Attorneys' Manual, Title 9, Chapters 9-27.000 *et seq*.

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

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

[175] *See id.* Title 9, Chapters 9-27.000 *et seq*.

[176] *Id.* at Preface.

justice and effectiveness in law enforcement and in terms of the consequences for individual citizens."[177]

1. Prosecutors Have a Duty to Seek Justice

Embedded in the guidance of the manual is the notion that prosecutorial discretion in criminal law is anchored to the prosecutor's professional and ethical duty "to seek justice."[178] This duty can be traced to a mid-1800s essay that was the basis for the American Bar Association's first code of ethics.[179] In part, this duty beseeches a prosecutor to not prosecute a person who she believes to be innocent.[180] The Supreme Court has invoked this professional canon in admonishing overzealous prosecutors.[181] This unique role "places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other."[182] In addition, prosecutors are viewed as not solely advocates and are required to seek justice.[183] Prosecutors also may not seek waivers to important pretrial rights from unrepresented defendants.[184] Moreover, prosecutors have an independent ethical obligation to disclose exculpatory evidence about the defendant during the trial and in the sentencing phase if the evidence mitigates the defendant's culpability.[185]

Generally speaking criminal prosecutors are confronted with the decision to exercise discretion in two situations.[186] First, the prosecutor must believe that the individual suspected of committing a crime indeed is guilty of the act.[187] This is where the duty to seek justice is most often invoked and easily understood. If the United States' justice system is grounded in the rule of law, then an innocent person should not be

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[177] *Id.*

[178] *See* Model Rules of Prof'l Conduct, r. 3.8, cmt. 1 (2004); Model Code of Prof'l Responsibility EC 7-13(1983) ("The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict."); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1281 (1997).

[179] *See* G *See* Bruce Green, *Why Should Prosecutors "Seek Justice,"* 26 FORDHAM URB. L.J. 607, 608, fn. 10 (1998-99) (citing to Hon. George Sharwswood, AN ESSAY ON THE PROFESSIONAL ETHICS (F.B. Rothman 5th ed. 1993)(1854).

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

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

[182] *See* Green, *supra* note 179, at 615 (citing the ABA Standards Standard 3-1.1(b) ("The prosecutor is an administer of justice, an advocate, and an officer of the court.").

[183] *See* MODEL RULES OF PROF'L CONDUCT, R. 3.8, cmt. 1 (2004).

[184] *See* MODEL RULES, Rule 3.8(c). *See, e.g.* Hood v. State, 546 N.E.2d 847, 849-50 (Ind. App. Dist. 1989) ("Here, not only did the State plea bargain with an uncounseled defendant, it also made the uncounseled defendant's waiver of his right to counsel as a condition of the plea agreement.")

[185] MODEL RULES Rule 3.8(d).

[186] *See* Green, *supra* note 179, at 634.

[187] *Berger*, 295 U.S. at 88.

convicted or jailed for a crime she did not commit.[188] While due process is the constitutional embodiment of this value, the prosecutor's duty to seek justice is the ethical guarantee. Second, a prosecutor can exercise discretion even where the prosecutor believes a person did violate a criminal statute. In this instance, a prosecutor may choose not to pursue a conviction or argue for leniency.[189] The reasons are multifold. The prosecutor may not have the required resources to charge and put on trial every person who has committed a criminal act and therefore must prioritize who to pursue.[190] Or the prosecutor may wants to provide leniency or immunity for one individual in order to pursue another known criminal.[191] Finally, a prosecutor may decide that the punishment for the crime is too harsh or there are compelling circumstances that warrant not charging an individual.[192]

Professor Bruce Green notes that the responsibility to seek justice is most often advanced by two theories: the prosecutor's power and the prosecutor's professional role as representing the sovereign.[193] First, prosecutors have an immense amount of power and there is imbalance of power between prosecutor and criminal defendants and their attorneys. Prosecutors have more resources than their adversaries -- they are equipped with more funding and personnel. Their adversaries are marginalized, powerless and often indigent.[194] In addition, prosecutors have broad powers as extensions of the sovereign including power to apply for search warrants and arrest warrants, power to conduct wiretaps, and the power to grant immunity from prosecution.[195] They also make decisions on behalf of the government, not just for a client.[196]

Second, Green asserts "the duty to seek justice is the prosecutor's professional role" which "make prosecutors different from other government lawyers and from lawyers for even the most powerful private clients."[197] It is this role of representing the sovereign and not just serving as a lawyer for the sovereign, distinguishes a prosecutor and thereby creates this affirmative obligation to carry out the sovereign's overarching objective in criminal law to "do justice." Green argues in addition to enforcing the criminal code and avoiding punishing the innocent the sovereign has two other primary objectives:

> One is to treat individuals with proportionality, that is, to ensure that individuals are not punished more harshly than deserved. The other is to

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[188] Hurd v. People, 25 Mich. 404, 415-16 (1872) (stating "[a]nd however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.").
[189] *See* Vorenberg, supra note 171, at 1527.
[190] *See* Charles Breitel, *Controls in Criminal Law Enforcement, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 134-14 (1960).
[191] *See* R. Michael Cassidy, Character and Context: *What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 653-54 (2006). Cassidy discusses that virtue is something acquired by practice and training, assumes that the person will do the right thing most of time, requires practical wisdom, which is acquired through deliberation, judgment and decision.
[192] *See* Vorenberg, *supra* note 171, at 1551.
[193] *See* Green, *supra* note 179, at 635.
[194] *Id.* at 626.
[195] *Id.* at 626 (quoting N.Y.S. Bar Association Comm. on Professional Ethics, Formal Op. 683 at 3 (1996)).
[196] *Id.* at 627-28.
[197] *Id.* at 633.

> treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated the same way. Sometimes these various objectives are in tension. It is the prosecutor's task, in carrying out the sovereign's objectives, to resolve whatever tension exists among them in the context of individual cases.[198]

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

2. Charging Decisions

Prosecutors are also permitted to decline to prosecute a case even supported by the legal evidence when the punishment is disproportionate or harsh.[199] In making that determination prosecutors can consider "insignificance of wrongdoing, the defendant's prior exemplary conduct, or the defendant's frail condition."[200] The Principle of Federal Prosecution instruct prosecutors to decline to prosecute cases where (1) no substantial Federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists adequate non-criminal alternative to prosecution.[201] In deciding whether or not there is a federal interest federal prosecutors are instructed to consider federal enforcement priorities as well the nature and seriousness of the offense. The manual instructs prosecutors not to waste federal resources on "inconsequential cases or cases in which the violation is only technical."[202] Prosecutors are to also consider the person's personal circumstances including age, mental or physical impairment or other compelling factors unique to the accused.[203]

Federal criminal prosecutors are required to document their decision not to prosecute and articulate the reasons for exercising a favorable grant of discretion.[204] While police officers apprehend an individual based on probable cause that the individual committed a crime, it is ultimately up to the prosecutor to decide whether or not to try the individual.

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

The ethical mandate for prosecutors to "seek justice" in deciding when to exercise a favorable grant of discretion is not a panacea for abuse of power or arbitrary decision-making. There are legitimate concerns about the use of prosecutorial discretion in criminal law. If prosecutorial discretion in the criminal law has value for the immigration system it is paramount that DHS understands the challenges criminal prosecutors face in fulfilling their ethical obligation to seek justice when designing an effective model for ICE trial attorneys. Critiques lament that prosecutorial discretion is a law enforcement

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[198] *See id*. at 634.
[199] ABA Standards Standard 3-3.9(b) (iii).
[200] *See* Green, *supra* note 179, at 616.
[201] U.S. Attorney Manual, 9-27.220, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230.
[202] *Id*. at 9-27.230.
[203] *Id*.
[204] U.S. Attorney Manual, 9-27-220, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230.

tool subject to little oversight or limitation by the legislative and judicial branches of government.[205] In addition, prosecutors will decline to prosecute a case due to lack of sufficient admissible evidence, compelling life circumstances of the accused, other larger systemic office/agency priorities or simply a lack of resources. Related is the criticism that the prosecutors are making case-by-case determinations, these decisions are often subject to personality, whims, and preferences of the prosecutor that have little if nothing to do with the defendant and the alleged conduct.[206] Yet, this criticism is not ontological but normative. It is not the existence of the awesome power to decide whether or not to prosecute that is problematic; but rather that an individual prosecutor did exercise (or did not exercise) this power in an appropriate way given the particular circumstances.[207]

While there are some outer limits on discretion -- both external limits[208] and self-imposed limitations[209] -- there are no formal regulations binding on federal prosecutors.[210] In addition, prosecutorial discretion suffers from regional disparity and as a result there is a lack of prosecutorial consistency throughout the country. In the federal system, the U.S. Attorneys' Offices are primarily responsible for the prosecution of federal law offenders.[211] These decisions are serious not only for the U.S. government but for the victims and their families, criminal investigators as well as the defendants, and their families and communities.[212] Yet, the decisions to prosecute on similar facts will vary depending on the office. Congress expressed concern about the lack of consistency among the Attorney General offices across the country.[213] This resulted in then Attorney General Civiletti issuing the Principle of Prosecution in 1980. Professor James Vorenberg argued this memo pushed discretion up the chain of command in offices but did not create consistency among various offices.[214]

The most compelling and sophisticated criticism about prosecutorial discretion is the fact that there is no concrete guidance or judicial explanation on what it means to

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[205] *See* Moses v. Kennedy, 219 F. Supp. 763, 754-65 (D.D.C. 1963) ("The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.", aff'd per curiam sub. nom. Moses v. Katzenbach, 342 F.Sup.2d 931 (D.C. Cir. 1965); Vorenberg, *supra* note 171, at 1539.

[206] *See* Vorenberg, *supra* note 171, at 1534; Michael Edmund O'Neil, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (Fall 2004)

[207] *See* Green, *supra* note 179, at 619-21.

[208] External limitations include judicial review of a plea agreement, judicial doctrine against retaliatory prosecutions, and the criminal code. *See* Vorenberg, *supra* note 171, at 1537-43 (discussing external limitations on prosecutorial discretion).

[209] Internal limitations can range from formally adopted regulations to informal customs and in between office memorandum and public or internal statements. *See id*. at 1543-45.

[210] *See* United State Dep't of Justice Internal Memorandum, Subject: Materials Related to Prosecutorial Discretion (Jan. 18, 1977); *see also* Fred C. Zacharias, *Structuring Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) (arguing that the noncompetitive "do justice" approach is inadequate because the professional codes do not exempt prosecutors from the requirements of zealous advocacy).

[211] *See* Michael O'Neil, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004).

[212] *Id*. at 1442.

[213] *See* Vorenberg, *supra* note 171, at 1543-44 (discussing the findings of the congressional committee investigating use of prosecutorial discretion in U.S. Attorney offices and Congress subsequent demand for guidelines and policies to cure the regional disparity).

[214] *Id*. at 1545.

"seek justice." This mandate is amorphous. In trying to create a workable architecture for this duty, Professor Michael Cassidy argues that virtue – "in particular Aristotelian virtues of courage, fairness, honesty, and prudence"[215] -- should inform what it means to seek justice and he also contends that prosecutors as individuals must possess virtue to be successful.[216] He recommends that to ensure that prosecutors are able to fulfill their ethical mandate to seek justice, prosecutor offices should be selective about whom they hire and should proactively create positive role models and mentors for young attorneys.[217] Ultimately, Cassidy concludes: "Finally, my analysis leads me to one cautiously optimistic observation about the professional life of prosecutors. As elastic and amorphous as the 'seek justice' obligation may seem, it can be a source of professional aspiration and satisfaction for virtuous prosecutors who take it seriously."[218]

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

Congress in recent years has criminalized non-violent minor immigration violations and strippped immigration judges almost all authority to exercise favorable discretion in cases where the equities may merit suspending deportation.[219] Moreover, the federal judiciary is extremely limited in what immigration deicsions it can take on appeal. The draconinan laws coupled with court stripping provisions increase the stakes for an immigrant facing removal. As a result, there is growing recognition by the Supreme Court that immigration, while may not be solely a creature of criminal law, bears more a resemblance to criminal law than civil law, where historically immigration law situtated.

The consequences of losing a case before an immigration judge are dire.[220] Immigrants in removal proceedings often face consequences akin to a criminal conviction; however, immigration proceedings are civil in nature.[221] Moreover,

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[215] R. Michael Cassidy, Character and Context: *What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 636 (2006).

[216] *Id.* Cassidy discusses that virtue is something acquired by practice and training, assumes that the person will do the right thing most of time, requires practical wisdom, which is acquired through deliberation, judgment and decision. In addition, he concludes that the rules of professional responsibility do not provide enough guidance to prosecutors who are faced with external political pressures, internal pressures, daunting workloads and underfunded and understaffed offices, and usually don't have all the information needed to make an informed decision. *Id*. at 652-53.

[217] *Id*. at 693-95.

[218] *Id*. at 695.

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

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

[221] *See generally* W. David Ball, *The Civil Case at the Heart of Criminal Procedure*: In re Winship, *Stigma, and Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011) (discussing the case law distinguishing criminal and civil law and arguing for an alternative litmus test including whether some sort of stigma is imposed and whether or not someone is deprived of liberty to determine when and what constitutional-guaranteed procedural protections should attach to a given procedure).

immigration laws are complex, constantly changing, and often inaccessible.[222] Justice Stevens, in delivering the opinion for the United States Supreme Court in *Padilla v. Kentucky*[223] concluded, "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."[224]

The Supreme Court held in *Padilla* that deportation is not just a mere collateral consequence of a criminal plea,[225] and therefore while the petitioner was not entitled to government counsel, he could bring an ineffective assitance of counsel claim, to challenge his criminal conviction, for the failure of him criminal defense attorney to inform him of the immigration consequences of his plea.[226] In *Padilla*, the petitioner was a lawful permanent resident of the United States for over 40 years[227] who pled guilty to a drug charge that made his deportation "presumptively mandatory."[228] Prior to accepting the plea, Padilla's attorney did not inform him that deportation was a possibility; in fact, his attorney assured him that the charge would have no bearing on his immigration status.[229] Padilla argued ineffective assistance of counsel; however, the Supreme Court of Kentucky held that the Sixth Amendment did not protect a criminal defendant from unreliable advice about deportation because the immigration issue was not within the sentencing authority of the state court and, thus, was a collateral consequence.[230] The Supreme Court of the United States disagreed, stating that deportation has been long recognized as a severe penalty and that "although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process."[231] As a result, the court held that "advice concerning deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel"[232] and that *Strickland v. Washington*[233] applied to Padilla's claim.[234]

Padilla has laid some important groundwork about what is at stake for immigrants faced with deportation charges. First, the case firmly establishes that the severity of deportation and its frequent ties to criminal prosecution require some level of protection in the context of plea arrangements.[235] Justice Stevens's recount of the increasing

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

[223] 130 S. Ct. 1473 (2010).

[224]*Id.* at 1480.

[225]*Id.* at 1482.

[226]*Id.* at 1483.

[227] *Id*. at 1477.

[228]*Id.* at 1483.

[229]*Id.*

[230]*Id.* at 1478.

[231]*Id.* at 1481 (internal citations omitted).

[232] *Id.* at 1482.

[233]*See* Strickland v. Washington, 466 U.S. 668 (1984) (establishing reasonably effective assistance as a constitutional requirement and devising a two-prong test to be used when analyzing whether defense counsel's performance fell below an objective standard of reasonableness).

[234]*Padilla*, 130 S. Ct. at 1482.

[235]*Id.* at 1478–79. In fact, this decision has spurred scholars to renew arguments for government-funded counsel in immigration proceedings. *See, e.g.*, Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO

strictness of mandatory deportation regulations and the rapid decline in the amount of authority provided to judges to set aside deportation after weighing other competing concerns demonstrates that individuals facing deportation need adequate representation.[236] No longer is discretionary relief prominent; as Justice Stevens states, "changes to our immigration law have drastically raised the stakes . . . the importance of accurate legal advice for noncitizens accused of crimes has never been more important."[237]

Padilla also underscores the severe consequences in losing an immigration case.[238] Justice Stevens focuses on the severity of deportation and the need for legal advice when deportation is a consequence of the commission of a crime, yet there are a significant number of individuals who face removal from the country who did not commit crimes.[239] These individuals must navigate the complex and unforgiving immigration system without any procedural safeguards—not knowing that one small mistake may render it impermissible for them to remain in the United States. This Supreme Court decision has been used to advance arguments for why immigrants facing removal should be afforded a government funded counsel in the "civil immigration proceeding."[240] This decision also underscores the need to import other trappings of the criminal justice system, and requiring prosecutors to seek justice into immigration law.

L. REV. 585, 603 (2011) (arguing that the *Padilla v. Kentucky* decision calls in question the current assumptions on what cases trigger Sixth Amendment protection and could allow courts to revisit the scope of the Sixth Amendment without overturning *Scott v. Illinois*, 440 U.S. 367 (1979)).

[236]*Padilla*, 130 S. Ct. at 1478–79.

[237]*Id.* at 1480.

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

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

[240]*See e.g.* Alice Chapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 589 (2011) (arguing that the Sixth Amendment right to government-funded counsel should be extended to immigrants in removal proceedings in light of the Supreme Court of the United States' holding in Padilla v. Kentucky, 130 S. Ct. 1473 (2010)).

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

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

One of the major differences between the historical development of prosecutorial development in immigration law and criminal law, is that in immigration it is not just the prosecutors, i.e., the government lawyers representing the state's interest, that have been accorded discretion;[241] instead of other executive branch agents such a immigration enforcement officers and border patrol agents have been accorded this awesome power to decide who to deport. Currently, almost any immigration officer has the authority to issue a Notice to Appear (NTA).[242] In criminal law the corollary would be that a police or parole officer, a detective or a police chief could indict a suspected criminal and a trial would commence. While an Immigration and Customs (ICE) trial attorney – "immigration prosecutor"—represents the government in the hearing and is an immigrant's adversary, there is no requirement that the immigration prosecutor decide to go forward with a trial for the proceedings to commence and confer jurisdiction to the Immigration Court.[243] While almost any immigration officer can initiate a removal proceeding, once the NTA has been filed with the immigration court, jurisdiction over the hearing is vested solely with the immigration court[244] or the charging agent who can withdraw the NTA.[245] Therefore, even if the ICE trial attorney agrees with the noncitizen, and moves to dismiss the proceedings, the decision rests with the immigration judge.[246]

In October 2013, the Center for Immigrants' Rights at Penn State's Dickinson School of Law prepare a report for the American Bar Association Commission on Immigration entitled *To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion*.[247] In gathering information for this report the authors surveyed immigration attorneys, filed Freedom of Information Act (FOIA) requests and interviewed attorneys, advocates and scholars.[248] The authors discovered

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[241] The Center for Immigrants' Rights at Penn State's Dickinson School of Law, To File or Not to File a Notice to Appear: Improving the Government's Use of Prosecutorial Discretion at 51-52 (2013) (citing an email from Judge Bruce Einhorn lamenting about "one of the great regulatory flaws" in immigration system is allowing non-attorneys to file NTAs and how this differs greatly from federal district court cases in which a U.S. Attorney or Assistant U.S. Attorney is required to sign off on all complaints and subsequent pleadings and is therefore "accountable for the filing and substance of the documents." (internal citations omitted), *available at* https://law.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf.
[242] 8 C.F.R. §§ 1003.14, 239.1 (2013).
[243] 8 C.F.R. § 239.1 (2013) (listing 41 different categories of employees at DHS who have the authority to file a Notice to Appear and commence removal proceedings against a noncitizen).
[244] 8 C.F.R. § 1003.4 (2013).
[245] 8 C.F.R. § 239.1 (2013).
[246] 8 C.F.R. § 239.2 (c) (2013); Matter of Avetisyan, 25 I&N 688 (BIA 2012); Brian M. O'Leary, Chief Immigration Judge, U.S. Department of Justice, Executive Office for Immigration Review, on Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure (Mar. 7, 2013), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf.
[247] https://law.psu.edu/sites/default/files/documents/pdfs/NTAReportFinal.pdf.
[248] *Id*. at 4.

that the individuals placed in removal proceedings were not the types of cases that DHS has identified as high-priority cases for deportation.[249] In addition, DHS filed NTAs against a significant number of noncitizens who were ultimately granted some type of relief by the Executive Office for Immigration Review (EOIR).[250] This report ultimately concluded "DHS may not be consistently exercising favorable prosecutorial discretion in issuing and filing NTAs in appropriate cases as prescribed in various memoranda. As the survey results show, instead of focusing their limited enforcements resources exclusively on high priority individuals, DHS has initiated removal proceedings against low priority individuals without sufficiently considering the equities."[251] A very pragmatic step towards increasing consistency in charging decisions would be to further limit who at DHS has the authority to issue NTAs. The authors of this report recommend that DHS should establish a permanent program requiring approval of a DHS lawyer prior to the filing of any NTA by a DHS officer.[252]

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

As with criminal prosecutors, ICE attorneys are resource deficient. They do not have the funding and personnel to try every noncitizen on their docket. ICE attorneys are authorized to exercise discretion[253] and grant requests from a noncitizen's attorney to administratively close the case[254] or defer action. Like criminal prosecutors ICE attorneys are responsible for charging the noncitizen with removability. If DHS adopts the recommendation to limit the NTA issuing authority to ICE attorneys, they would serve as the gatekeeper to determine if removal hearings are appropriate.[255] ICE attorneys like criminal prosecutors would have the full authority decline to charge an immigrant as well as the authority to terminate the adjudication later on for resource or humanitarian reasons.

In addition, ICE Trial Attorneys should be required to file a memo accompanying each NTA. The memo would articulate in writing the reasons that this particular

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[249] *Id*. at 5.
[250] *Id.*
[251] *Id.* at 45-46.
[252] *Id.* at 56.
[253] Memoradum from Peter Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, on a Case-By-Case Review of Incoming and Certain Pending Cases to all Chief Counsel and Office of the Principal Legal Advisor, at 2 (Nov. 17, 2011), available at http://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf
[254] Administrative closure is a procedure in which the Immigration Judge or Board of Immigration Appeals moves a case from its docket as a matter of "administrative convenience." A joint motion from the ICE attorney and the Respondent initiates the process. *See* Matter of Avetisyan, 25 I. & N. Dec. 688, 690 (BIA 2012).
[255] *See* Memorandum from John Morton, *supra* note 17.

immigrant's deportation is a departmental priority. Currently, the existence of internal agency guidance is not being fully operationalized at local levels.[256] This documenting requirement would expand on the already existing requirement for DHS officer, agent or attorney to provide written documentation when they decide to exercise discretion favorably.[257] Currently, if the prosecutorial discretion is exercised the DHS employee must provide the legal and factual basis for the decision and this must be placed in the immigrants file.[258] By requiring the ICE Trial Attorney to articulate his or rationale for the each decision on whether or not to commence removal proceedings requires the attorney to be familiar regularly with the factors to consider when choosing whether or not to exercise discretion. It also provides a mechanism to determine if prosecutorial discretion is being applied consistently around the country by ICE Trial Attorneys.

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

On June 17, John Morton issued comprehensive guidance on prosecutorial discretion. The first memo articulated comprehensive instructions to ICE agents, officers and attorneys about exercising discretion at all stages of the immigration enforcement process.[259] The second memo addressed victims, witnesses and plaintiffs in civil rights actions.[260] Yet, despite this high level guidance, an overwhelming number of ICE trial attorneys did not change their practices based on the directives.[261] Recently, the American Immigration Council surveyed 252 cases representing all the ICE Field Offices and Offices of Chief Counsel that were active after the Morton memos were issued.[262] The study concluded that the in majority of offices ICE agents, trial attorneys and supervisors admitted that they had not implemented the memoranda and there had been no changes in policy or practice.[263] Many trial attorney indicated that they had not received further guidance or training on how to execute the June 17, 2011 Morton memos. The Obama Administration has clearly expressed a preference for using prosecutorial discretion to administratively close cases, grant deferred action, and to forgo placing individuals in removal proceedings when the noncitizens are not an enforcement priority and do not threatened public safety or national security.[264] The administration's stance, however, has not changed the entrenched culture among ICE trial

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[256] *Id*. at 60.
[257] *See* Memo from Doris Meissner, *supra* note 4, at 11-12.
[258] *Id*.
[259] *See* Memo from John Morton *supra* note 17.
[260] See Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs, to Field Office Directors, Special Agents in Charge and Chief Counsel (June 17, 2011), *available at* https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.
[261] AMERICAN IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION (Nov. 2011), *available at* http://www.aila.org/content/default.aspx?docid=37615.
[262] *Id.* at 4.
[263] *Id*. at 4.
[264] *Id*.

attorneys that their primary responsibility is to deport.[265] There needs to be cultural change among ICE attorneys that their primary responsibility is to seek justice.

While there are several memorandums including the recent Morton memos memorializing how prosecutorial discretion should be understood and applied, there is not a central prosecutor handbook or manual akin to the U.S. Attorney Manual. The Meissner Memo references the U.S. Attorney Manual as the framework for prosecutorial discretion in immigration.[266] The Executive Office for Immigration Review has recently completed the Immigration Court Practice Manual,[267] which it updates regularly.[268] ICE should also have a manual similar to the U.S. Attorney Manual and the EOIR Immigration Court Practice Manual.

The Manual should include specific instructions ICE Trial Attorneys that they are duty bound to seek justice, not just deportation. And in seeking justice the ICE attorney has an affirmative obligation to make sure that a person who is eligible for affirmative relief to removal is not denied that relief. One of the principal roles that ICE Trial attorneys have, besides making sure that noncitizens with no legal authority to remain in the United States are removed, is to combat fraud. When a noncitizen is placed in removal proceedings there are affirmative defenses that will allow certain, particularly vulnerable individuals, to remain in the United States even if they overstayed their visa or entered illegally. Such affirmative defenses include asylum, temporary protected status, and cancellation of removal. In these circumstances ICE attorneys can work with the noncitizen to support the application or can actively oppose it and try and convince the immigration judge to deny this relief.

One the primary arguments advanced by ICE attorneys when opposing such applications is that the applicant is lying and the application is fraudulent. If the application is fraudulent then the noncitizen will be denied relief and often prosecuted for

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[265] *See* Am. Bar Ass'n Comm'n on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 1-25 to 1-29 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (noting "insufficient use of prosecutorial discretion" as systemic issue); Chi. Appleseed Fund for Justice, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts 16–18 (2009), available at http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf (noting tendency of ICE attorneys to adhere to "deport-in-all-cases culture"); Chi. Appleseed Fund for Justice, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System 39–48 (2012), *available at* http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf (observing persistence of ICE's "deport at all costs" approach in immigration court); ICE Seeks to Deport the Wrong People, TRAC Immigration (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/ (reporting between one-third and one-quarter of ICE's deportation requests are rejected by immigration courts). Yet, there is one phenomenal exception to this "deport at all costs" mentality. *See* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COL. L. REV. *Sidebar* 180 (Nov. 2013) (documenting the herculean efforts of ICE trial attorneys in Charlotte, North Carolina, closing all deportation cases against noncitizens who were arrested unlawfully by local police officers in North Carolina).

[266] Memo from Doris Meissner *supra* note 4, at 4-5.

[267] U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL, *available at*, http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_1-27-14.pdf.

[268] Updates for the Immigration Court Practice Manual are available online at, http://www.justice.gov/eoir/vll/OCIJPracManual/current_updates.html.

committing fraud. However, ICE attorneys regularly assume that the application is fraudulent and work to oppose most applications for relief.[269] In addition, the immigrant, not the ICE prosecutor has the burden of proof in removal proceedings to establish he or she is eligible for immigration and relief and should be deported. In criminal law the state carries the high burden of proving the criminal defendant is guilty beyond a reasonable doubt. As a result unlike criminal prosecutors, who are duty bound to make their own professional assessment about the guilt of an individual before pursuing charges and to not rely on any defense counsel making the case, ICE attorneys have no professional ethical requirement to make such an assessment before seeking removal of a noncitizen.

Despite this disparity in ethical obligations, ICE attorneys and criminal prosecutors' power and professional roles are quite similar. The two recognized justifications for prosecutors' duty to seek justice equally apply in the immigration context: the prosecutor's power and the prosecutor's professional role as representative of the sovereign.[270] The power that ICE attorneys have in immigration cases is well established.[271] As with criminal prosecutors, their adversaries are marginalized, powerless and often indigent.[272] The consequences of pursuing a case are similar in a criminal trial and removal hearing.[273] Like criminal prosecutors, ICE attorneys have vast powers as extension of the sovereign. ICE attorneys' roles are more akin to criminal prosecutors than lawyers representing the government in civil proceedings[274] and thus they should share the same ethical obligation and duties. ICE trial attorneys should be bound by the same ethical canon as federal criminal prosecutors –they should have "a duty to seek justice."

DHS should memorialize this duty in an ICE Prosecutor Manual. In addition, when DHS is hiring ICE Trial Attorneys they should look for individuals that possess the virtues that make successful prosecutors, which include justice, courage, honesty and

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[269] In my experience as an immigration practitioner the largest hurdle I faced with my cases was convincing opposing counsel that the case was not a fraud. The single biggest reason for opposing a case was that the applicant was lying and trying to "beat the system."

[270] *See* Green, *supra* note 179 at 612.

[271] *See* Wadhia, *The Role of Prosecutorial Discretion*, *supra* note 14, at 274.

[272] Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 644, 646-52 (2012) (discussing the stakes for immigrants, barriers to accessing competent representation and challenges for pro se litigants in removal proceedings).

[273] *Id*. at 646-49 (discussing how the Supreme Court decision in Padilla v. Kentucky, 130 U.S. 1473 (2010), provides support for the argument that the consequences of removal are akin to a criminal conviction).

[274] Most government agency lawyers view the agency as their client and tend to view their ethical obligations like lawyers who have private clients. *See, e.g.* ABA Standing Comm. on Ethics and Prof. Responsibility, Formal Op. 94-387 (Sept. 26, 1994) (stating that government lawyers do not have an ethical obligation to review from filing a suit that is time-barred or to inform opposing counsel that the statute of limitation has lapsed). That is not to say that government lawyers don't have any additional responsibilities and that they should not be held to a higher standard. In fact, Judge Mikva remarking on the ethical duties for lawyers in the Federal Energy Regulatory Commission argued that the standard articulated by the Supreme Court in Berger v. United States, 295 U.S. 78 (1935), stating that the obligation of a representative of the sovereign is to no just to win a case but to see that justice is done should apply to all government lawyers. Freeport-McMoRAN Oil & Gas Co. v. F.E.R.C., 962 F.2d, 45, 47 (D.C. Cir. 1992).

prudence.[275] DHS should provide regular trainings to new and experienced ICE Trial Attorneys on "how seeking justice means seeking a 'just' result and not necessarily the most harsh result,"[276] and "seeking justice" is a virtue that is acquired through practice.[277]

VI. CONCLUSION

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

[275] *See* Cassidy, *supra* note 215, at 646 (discussing how these virtues are essential for a prosecutor to be ethical and that a prosecutor must possess practical wisdom, i.e. "the ability to deliberate well – to recognize and perceive proper ends, and then to select those means that are likely to achieve such ends.").
[276] *See* Green, *supra* note 171, at 608.
[277] *See* Cassidy *supra* note 215, at 643.