LEGAL MEMORANDUM

TO: National Governing Board Policy Committee

FROM: Yael Bromberg

DATE: November 25, 2014

RE: **Legal Analysis of Executive Authority on Immigration Relief**

Executive Summary

On November 20, 2014, President Obama publicly announced a series of Executive actions which demonstrate a lawful, limited, and restrained step toward fixing an immigration system that is demonstrably broken, unjust, and unenforceable.

The Executive actions will provide temporary deferred deportation and work authorization, on a case-by-case basis, for parents of United States citizens and lawful permanent residents. The actions also expand eligibility for deferred deportation to individuals who arrived to the United States as children. Additionally, the actions will increase resources for border security and focus immigration enforcement on criminals and recent arrivals. Thus, the directives are expected to provide clearer guidance to agencies that enforce immigration laws on how to prioritize deportations, rendering those with strong family ties and no serious criminal history less of a priority than convicted criminals and recent entrants.

Congressional inaction is not the basis for Obama's authority to act. Rather, Executive authority for the exercise of prosecutorial discretion is steeped in the Constitution, reaffirmed by the Supreme Court, premised in administrative procedure law, and expressly provided for in the immigration statutes.

Presidents Reagan and Bush Senior took similar measures to expand deferred deportation and work authorization to children and spouses of those who qualified for amnesty under the 1986 immigration bill. Indeed, the Bush Senior action provided relief to the same proportion of undocumented persons residing in country as the impending Obama actions.

Congress has remedies at its disposal if it disagrees with the President, the most logical of which would be to finally pass a comprehensive immigration reform bill. Moreover, the exercise of prosecutorial discretion is limited and cannot be applied in an unconstitutional or discriminatory manner, or as a circumvention of a statutory mandate.

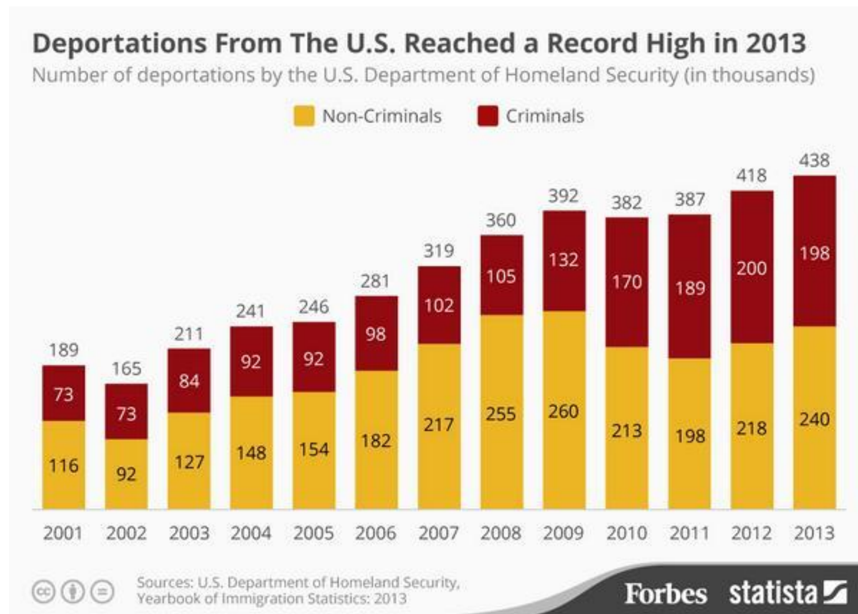
Although the text of the Executive orders, presidential memoranda and other directives have yet to be released, there is no basis for impeachment or litigation here based on the current announcement. The actions focus on implementation of statute rather than nullification of a duly passed law. As such, opponents' threats of government shutdown, impeachment, or gridlock would be an inexcusable and irresponsible response, and an abrogation of Congress's duty to "support and defend the Constitution."

I. INTRODUCTION

The forthcoming series of Executive actions will expand eligibility for a temporary grant of deferred action and work authorization, on a case-by-case basis, to nearly forty percent of the undocumented population currently residing in the United States. Republicans have threatened to oppose any unilateral Executive action to provide immigration relief, for example by threatening impeachment, litigation, holding up the confirmation of Loretta Lynch as Attorney General, stipulating or withholding budget appropriations, or government shutdown.

At the same time, President Obama's strong stance on deportation has led immigrant activists to label him "Deporter-in-Chief." Obama has deported immigrants at a faster rate than any other president in U.S. history, at a record of two million deportations during his administration alone. According to the Center for American Progress, 200,000 parents of U.S. citizen children were deported between 2010 and 2012, and 5,100 children of deported immigrants were in the foster care system as of 2011.[1] As the chart below demonstrates, the deportation rate has increased, even at the lowest priority rung of non-criminals:

[1] Report, Marshall Fitz, *What the President Can do on Immigration if Congress Fails to Act*, Center for American Progress, 8 (July 2014) (internal reference omitted), *available at*: http://cdn.americanprogress.org/wp-content/uploads/2014/07/FitzAdminRelief-report2.pdf (last visited Nov. 16, 2014).



It is estimated that 11.7 million undocumented immigrants reside within the country. Nearly thirty years have gone by since the last passage of comprehensive immigration reform by the Reagan Administration in 1986. With approximately 18 billion dollars dedicated to the U.S. Customs and Border Protection (CBP) and the U.S. Immigration and Customs Enforcement (ICE) in 2013 – a budget which is approximately 24% higher than collective spending of all federal law enforcement agencies combined[2] – the Department of Homeland Security (DHS) only deported approximately 3% of the total undocumented population last year – a record high in deportations. Meanwhile, the number of cases pending in the immigration court system has more than tripled over the past fifteen years, and it now takes an average of approximately 560 days for a case to be processed.

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[2] See Policy Brief, Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute: Washington, D.C. (Jan. 2013), *available at*: http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery (last visited Nov. 24, 2014).

There is no doubt that the immigration system is broken and needs to be fixed. The anticipated Executive actions have sparked a debate over the permissible scope of President Obama's constitutional authority. We conclude that the impending orders are lawful, limited, and restrained applications of prosecutorial discretion and are supported by the Constitution, administrative procedure law, immigration law, and case law.[3]

The analysis below sets forth:

1. Legal authority for Executive action on immigration.
    a. The constitutional foundation for prosecutorial discretion and its statutory limitations in general.
    b. Prosecutorial discretion to defer deportation is expressly authorized by the immigration code.
2. Examples of Executive administrative action in immigration.
    a. The Morton Memo.
    b. The Deferred Action for Childhood Arrivals (DACA) Program.
    c. Long history of Executive administrative actions on immigration.
    d. Presidents Reagan and Bush Senior have led the way on Executive authority for immigration relief.
3. Political context as to what type of precedent the Executive action may set for future presidents.

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[3] The Office of Legal Counsel reached similar conclusions in its Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President. See Memorandum Opinion by Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014), *available at*: http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf (last visited Nov. 24, 2014).

II. LEGAL ANALYSIS

1. Legal Authority for Executive Action on Immigration

a. The constitutional foundation for prosecutorial discretion and its statutory limitations in general.

Article I, § 8 of the U.S. Constitution vests in Congress the power to "establish a uniform Rule of Naturalization." Article II, § 3 contains the "Take Care" Clause by which the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." The tension between these clauses is at issue here.

Legal scholar Jonathan Turley firmly believes that President Obama has repeatedly exceeded his permissible authority. In the immigration context, Turley raises valid points on the need for congressional debate:

> The immigration laws are the product of prolonged debates and deliberations over provisions ranging from public services to driver's licenses to ICE proceedings to deportations. Many of these issues are considered in combination in comprehensive statutes where the final legislation is a multivariable compromise by legislators. Severity in one area can at times be a trade-off for leniency in another area. Regardless of such trade-offs, the end result is by definition a majoritarian compromise that is either signed into law by a president or enacted through a veto override. The use of Executive orders to circumvent federal legislation increases the shift toward the concentration of Executive power in our system and the diminishment of the role of the legislative process itself. It is precisely what the Founders sought to avoid in establishing the tripartite system.[4]

[4] Written Statement to the Committee on the Judiciary United States House of Representatives, Jonathan Turley, *The President's Constitutional Duty to Faithfully Execute the Laws*, at 3-4 (Dec. 3, 2013), *available at*: http://judiciary.house.gov/_cache/files/2d1fda91-18a4-467f-818c-62025feaaa6f/120313-turley-testimony.pdf (last visited Nov. 16, 2014).

On the other hand, the well-established doctrine of prosecutorial discretion, also rooted in Article II, empowers the Executive to act with some degree of autonomy. This power is based on separation of power, and so prosecutorial discretion is considered a constitutionally-based doctrine. "After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed." In re: Aiken County et al., 725 F.3d 255, 264 (D.C. Cir. 2013) (discussed further below). "Congress obviously has tools to deter the Executive from exercising authority in this way — for example by using the appropriations power or the advice and consent power to thwart other aspects of the Executive's agenda (and ultimately, of course, Congress has the impeachment power). But Congress may not overturn a pardon or direct that the Executive prosecute a particular individual or class of individuals." Id., n. 8.

The Supreme Court recently relied on the doctrine in its consideration of federal preemption over immigration enforcement. In Arizona v. United States, the Supreme Court rejected the state's attempt to regulate immigration through SB 1070, a controversial racial profiling bill. 132 S. Ct. 2492 (2012). The Supreme Court provided, in pertinent part:

> A principal feature of the removal system is the broad discretion exercised by immigration officials. See Brief for Former Commissioners of the United States Immigration and Naturalization Service as *Amici Curiae* 8-13 (hereinafter Brief for Former INS Commissioners). Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See *§ 1229a(c)(4)*; see also, *e.g.*, *§§ 1158* (asylum), *1229b* (cancellation of removal), *1229c* (voluntary departure).

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning 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. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.
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> Id. at 2499.

Thus, Arizona v. United States is instructive in that it emphasizes the "broad discretion" of the Executive branch over immigration to provide relief from removal.

In 1985, the Supreme Court recognized the "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise" when an agency decides not to undertake certain enforcement actions through the civil or criminal process. Heckler v. Chaney, 470 U.S. 821, 831 (1985) (rejecting a challenge against the Food and Drug Administration ["FDA"] for not exercising its enforcement authority over drugs administered to prisoners sentenced to death by lethal injection). Heckler explained:

> [T]he agency must not only assess whether a violation has occurred, *but whether agency resources are best spent* on this violation or another, *whether the agency is likely to succeed if it acts*, whether the particular enforcement action requested *best fits the agency's overall policies*, and, indeed, *whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than*

> *the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute*. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 87 (1975).
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> 470 U.S. at 831-32 (emphasis added).

Heckler examined this complicated balancing of factors in light of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., which governs the manner in which federal administrative agencies may propose and establish regulations to implement congressional statutes. An exception to judicial review of an agency decision expressly applies "to the extent that agency action is committed to agency discretion by law." 5 USC § 701(a)(2). Thus, the Supreme Court held in Heckler that the FDA's decision not to take the enforcement actions requested by the prisoner-plaintiffs was not subject to judicial review pursuant to the APA.

The Supreme Court continued:

> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. See, e. g., FTC v. Klesner, 280 U.S. 19 (1929). *Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."* U.S. Const., Art. II, § 3.
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> Id. (emphasis added).

President Obama's executive actions are similar insomuch as DHS is set to establish a system by which it can streamline a very limited class of parents and youth on a temporary, case-by-case basis. By not prosecuting these individuals, the lack of agency action provides no basis for judicial review "to determine whether the agency exceeded its statutory powers." Id. At the same time, the fact that there is a bureaucratic methodology by which a class of individuals might opt-in for relief arguably establishes a proactive agency action and a nexus for judicial review. Still, review of that agency mechanism will be foreclosed insomuch as it fits within agency discretion to implement, rather than nullify, the law to best meet agency goals given agency resources.

The APA applies to federal Executive departments such as the Department of Homeland Security, which contains the Immigration and Customs Enforcement (ICE), Citizenship and Immigration Services (USCIS), and Customs & Border Protection (CBP). The APA prescribes the scope of judicial review of agency action. To that extent:

> [T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
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> 1) compel agency action unlawfully withheld or unreasonably delayed; and
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> 2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USC §§ 556 and 557]

> or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> 5 U.S.C. § 706.

Although Arizona v. United States, *supra* at 6-7, and the cases that follow below, interpret the doctrine of prosecutorial discretion without mention of the APA, the principles outlined immediately above reflect the guideposts for the general limitations of prosecutorial discretion, which is inherently a function of administrative law.[5]

For example, in In re Aiken County, the U.S. Court of Appeals for the District of Columbia Circuit found that prosecutorial discretion does not allow the Executive to simply disregard or defy a statute because of a policy objection. In that case, the Nuclear Regulatory Commission violated the Nuclear Waste Policy Act which mandates that the Commission consider a license application and issue a final decision to approve or disapprove it. 725 F.3d 255. The Commission defied the statute by refusing to review a license application to store nuclear waste at Yucca Mountain. The D.C. Circuit found against the Commission, explaining that unless Congress says otherwise or there are no appropriated funds remaining, the Commission cannot simply disregard its statutory obligations.

In re Aiken County further delineates the doctrine of prosecutorial discretion, saying:

> Prosecutorial discretion encompasses the Executive's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law. Prosecutorial discretion does not include the power to disregard other statutory obligations that apply to the Executive Branch, such as statutory requirements to issue rules, see Massachusetts v. EPA, 549 U.S. 497, 527-28, 127 S. Ct. 1438,

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[5] The next subsection will further describe how the doctrine is explicitly baked into the Title 8 immigration code.

> 167 L. Ed. 2d 248 (2007) (explaining the difference), or to pay benefits, or to implement or administer statutory projects or programs. *Put another way, prosecutorial discretion encompasses the discretion not to enforce a law against private parties; it does not encompass the discretion not to follow a law imposing a mandate or prohibition on the Executive Branch.*
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> Id. at 266 (emphasis added).[6]

That finding echoes the APA principle for judicial invalidation of agency decisions which are not in accordance with law, 5 U.S.C. § 706(2)(A), *supra* at 9-10, and which are in excess of statutory authority or limitations, id. at § 706(2)(C).

Indeed, although prosecutorial discretion is broad, it is not "unfettered," and selectivity in enforcement is "subject to constitutional constraints." Wayte v. United States, 470 U.S. 598, 608 (1985) (internal reference omitted). "In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights." Id. (internal reference omitted). That principle resembles Section 706 of the APA, which provides that the court shall set aside an agency function that is "contrary to constitutional right[.]" 5 U.S.C. § 706(2)(B), *supra* at 9-10, or which is "arbitrary, capricious, [or] an abuse of discretion," id. § 702(2)(A).

Another limitation of the exercise of prosecutorial discretion is found in the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601-688. The Act was passed in response to congressional sentiment that President Nixon was abusing his power of impoundment by withholding funding of programs he opposed. The Supreme Court case

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6 See also id., n. 11 ("Of course . . . the President may decline to follow a law that purports to require the Executive Branch to prosecute certain offenses or offenders. Such a law would interfere with the President's Article II prosecutorial discretion.).

Train v. City of New York, 420 U.S. 35 (1975) followed, whereby the Court found that the President cannot frustrate the will of Congress by killing a program through impoundment, i.e., by not spending money that has been appropriated by Congress. Therein, President Nixon did not disperse all the funds allocated to states seeking federal monetary assistance under the Federal Water Pollution Control Act Amendments of 1972, and ordered the impoundment of substantial amounts of environmental protection funds for a program he had earlier vetoed but had been overridden by Congress. The case illustrates that the presidential power of impoundment, even without the 1974 Act, is not unlimited and that the President is required to carry out the full objectives or scope of programs for which budget authority is provided by Congress.

b. Prosecutorial discretion to defer deportation is expressly authorized by the immigration code.

The discussion above explains the constitutional foundation of the doctrine of prosecutorial discretion, related case law, and its limitations as per the Administrative Procedure Act and the Congressional Budget and Impoundment Control Act. Additionally, in passing the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 101 *et seq*., Congress empowered DHS with the "administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens[.]" 8 U.S.C. § 1103(a) (1). The INA vests in the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3).[7]

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[7] Similarly, the Homeland Security Act of 2002, 6 U.S.C. § 202(5), makes DHS responsible for "[e]stablishing national immigration enforcement policies and priorities." Coextensively, in appropriating funds for DHS's enforcement activities, Congress directs DHS

The INA expressly recognizes an individual's ability to apply for "deferred action" following the denial of a request for an administrative stay of removal. See 8 USC § 1227(d)(2) ("The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, *deferred action*, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.") (emphasis added). The INA also expressly recognizes "*deferred action* and work authorization" as a tool for protecting certain domestic violence victims and their children. See 8 U.S.C. § 1154(a)(1)(D)(i)(II, IV) (emphasis added). The related regulations define deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 CFR § 274a.12(c)(14).

Notably, Title 8 explicitly bars judicial review of DHS's use of prosecutorial discretion in the commencement of proceedings, adjudication of cases, or execution of removal orders. See 8 USCS § 1252(g) (judicial review of orders of removal) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

Although it is otherwise prohibited to hire undocumented persons, through the Immigration Reform and Control Act of 1986 ("IRCA"), Congress delegated to the Attorney General (now the Secretary of Homeland Security) the power to grant work authorization to aliens who are unlawfully present. See 8 U.S.C. §§ 1324a – 1324b (general penalty provisions: unlawful employment of aliens, unfair immigration-related employment practices).

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to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, 251.

> [W]ith respect to the employment of an alien at a particular time, . . . is not [ ] either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General.*
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> 8 USC § 1324a(h)(3) (emphasis added).

Here, the related DHS regulations provide that USCIS may issue work permits to recipients of deferred action upon demonstration of "economic necessity." 8 CFR § 274a.12(c)(14).

In sum, prosecutorial discretion is expressly provided and baked into the immigration code and is applied on a case-by-case basis. Judicial review of such individual determinations in the immigration context is largely barred. If agency decisions were applied in a manner that is constitutionally or statutorily infirm, the APA offers a remedy. Moreover, an administrative decision to act or not act may not be in direct violation of congressional statute due to a policy disagreement. See In re Aiken County, *supra* at 10-11 (congressional mandate to consider licensing applications may not be ignored); See also Train v. City of New York, *supra* at 11-12 (Executive may not abuse power of impoundment by withholding congressionally allocated funds for programs). The Executive is charged with the task to "Take Care" and apply the law using congressionally-allocated resources. It is therefore logical that positive and negative factors be taken into account to prioritize the allocation of such resources. Past Executive Orders pertaining to immigration have guided personnel in such decision-making, as described next.

2. Examples of Executive Administrative Action in Immigration

a. The Morton Memo.

In 2011, John T. Morton, Director of U.S. Immigration and Customs Enforcement (ICE) issued personnel guidance on the exercise of prosecutorial discretion. The Morton Memo explains that "ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes present, as much as reasonably possible, the

agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system."

The Morton Memo then explains that prosecutorial discretion should be applied consistent with agency priorities in: settling or dismissing a proceeding; granting deferred action, granting parole, or staying a final order of removal; agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal; pursuing an appeal; executing a removal order; and responding to or joining in a motion to reopen removal proceedings and to consider joining a motion to grant relief or a benefit.

The Morton Memo sets forth a non-exhaustive list of 19 factors to consider when exercising the doctrine, and notes specific positive and negative factors that should "prompt particular care and consideration." Positive factors are: veterans and members of the U.S. armed forces; long-time lawful permanent residents; minors and elderly individuals; individuals present in the United States since childhood; pregnant or nursing women; victims of domestic violence, trafficking, or other serious crimes; individuals who suffer from a serious mental or physical disability; and individuals with serious health conditions. Negative factors are: individuals who pose a clear risk of national security; serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind; known gang members or other individuals who pose a clear danger to public safety; and individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

b. The Deferred Action for Childhood Arrivals (DACA) Program.

Approximately one year later, on June 15, 2012, Secretary of Homeland Security Janet Napolitano released a memorandum "setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home." DHS announced that individuals are eligible for deferred action for two years, subject to renewal, and could apply for employment authorization. The eligibility criteria for deferred action are:

- under age 16 at the time of entry into the United States;
- continuous residence in the United States for at least five years preceding the date of the memorandum;
- in school, graduated from a high school or obtained general education development certificate, or honorably discharged from the Armed Forces;
- not convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, and not otherwise a threat to national security or public safety;
- age 30 or below.

DACA set forth a new mechanism by which eligible youth could proactively apply for both deferred action and for employment authorization. This is different than the previous general policy of deferred action for undocumented immigrants, as illustrated above in the Morton Memo, in that DACA provided a mechanism by which low-risk eligible youth may proactively apply for temporary relief on a case-by-case basis, rather than wait to get swept up into the immigration enforcement system.

c. Long history of Executive administrative actions on immigration.

The Congressional Research Service compiled a list of Executive administrative actions since 1976 which granted blanket or categorical deferrals of deportation. See Chart, U.S.

Congressional Research Service, *Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, by Andorra Bruno, Todd Garvey, Kate Manuel, Ruth Ellen Wasem, CRS Report 7-7500, at 20-23 (July 13, 2012). Most of the deferrals were done on a country-specific basis, usually in response to war, civil unrest, or natural disaster. As summarized by the American Immigration Council:

> - **Large-scale actions**: In addition to Family Fairness, other large-scale actions include paroles of up to 600,000 Cubans in the 1960s and over 300,000 Southeast Asians in the 1970s, President Carter's suspension of deportations for over 250,000 visa-holders, and President Reagan's deferral of deportations for up to 200,000 Nicaraguans.
> - **Family-based actions:** Other actions to protect families include the suspended deportations of families of visa-holders (Carter), parole of foreign-born orphans (Eisenhower, Obama), deferred action to widows of U.S. citizens and their children (Obama), and parole-in-place to families of military members (Obama).
> - **Actions while legislation was pending**: Other actions taken while legislation was pending include parole of Cuban asylum seekers fleeing Castro (Nixon, Kennedy, Johnson), deferred action to battered immigrants whom the Violence Against Women Act (VAWA) would protect (Clinton), parole of orphans (Eisenhower), and DACA (Obama).[8]

Even where these programs are applied, the individual still goes through agency screening on a case-by-case basis, and relief was temporary. As further described in the public letter by immigration law professors and scholars to President Obama:

> Numerous administrations have issued directives using prosecutorial discretion as a tool to protect specifically defined – and often large – classes. In 2005, the George W. Bush administration announced a "deferred action" program for foreign academic students affected by Hurricane Katrina. In 2007, the George W. Bush administration exercised prosecutorial discretion in the form of "Deferred Enforcement Departure" for certain

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[8] Report, *Executive Grants of Temporary Immigration Relief, 1956 – President*, Immigration Policy Center, *available at*: http://www.immigrationpolicy.org/just-facts/executive-grants-temporary-immigration-relief-1956-present (last visited Nov. 16, 2014).

> Liberians. In 1990, the George Bush Sr. administration announced a "Family Fairness" policy to defer deportations and provide whole authorization of up to 1.5 million unauthorized spouses and children of immigrants who qualified for legalization under legislation passed by Congress in 1986. In 1981, the Ronald Reagan administration issued a form of prosecutorial discretion called "Extended Voluntary Departure" to thousands of Polish nationals. The legal sources and history for immigration prosecutorial discretion described above are by no means exhaustive, but underscore the legal authority for an administration to apply prosecutorial discretion to both individuals and groups.[9]

d. Presidents Reagan and Bush Senior have led the way on Executive authority for immigration relief.

The policies implemented by Ronald Reagan and George H.W. Bush merit particular attention for our purposes. In effect, these conservative presidents led the way for deferred action and work authorization under fairly similar circumstances.[10]

On November 6, 1986, the Immigration Reform and Control Act ("IRCA") was enacted and signed into law by Ronald Reagan. IRCA provided a path to legalization for up to three million undocumented immigrants if they had been continuously present in the U.S. since January 1, 1982.[11] At the time, INS estimated that four million undocumented immigrants would apply for legal status through the act and that roughly half of them would be eligible. However, IRCA had a major shortfall in that it excluded non-qualifying spouses and children, and forced them to wait in line, creating mixed-status families similar to those we see today.

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[9] Letter to President Obama from law professors and scholars, Executive authority to protect individuals or groups from deportation (Sept. 3, 2014), *available at*: https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf (last visited Nov. 16, 2014).

[10] See also Report, American Immigration Council, *supra* footnote 7.

[11] Eligibility for amnesty also required the penalty of a fine, back taxes due, an admission of guilt, absence of criminal history, and a possession of minimal knowledge of U.S. history, government, and the English language.

Then, in 1987, Reagan's Immigration and Naturalization Service (INS) Commissioner, Alan C. Nelson, announced a blanket deferral of deportation for children under 18 who were living in a two-parent household with both parents legalizing, or with a single parent who was legalizing. The policy affected more than 100,000 families.[12]

In July of 1989, the Senate passed a bill by 81-17 that would prohibit the deportation of both family members and children of immigrants who were in the process of legalizing and directed officials to grant work authorizations. However, the legislation stalled in the House.

Next, on February 2, 1990, INS Commissioner under George Bush Senior, Gene McNary, announced a policy effective on February 14, that allowed close family members of those who qualified for 1986 amnesty a renewable, one-year authorization to live in this country. Specifically, relief was made available to spouses and unmarried children under 18 years of age who could prove that they lived continuously in the United States since the passage of IRCA. Essentially, the 1990 George Bush Senior policy responded to Congressional inaction by administratively implementing the Senate bill's provisions. The Bush Senior Administration anticipated that the "Family Fairness" program would affect up to 1.5 million family members, which represented over 40 percent of the 3.5 million undocumented immigrants in the U.S. at the time.

In March 1990, the House then introduced legislation with similar provisions to stay deportation. Finally in October of 1990, Congress passed a combined Immigration Act with a permanent "Family Unity" provision.

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[12] Additionally, Reagan's Attorney General Meese authorized INS to defer deportation proceedings for "compelling or humanitarian factors."

In sum, although Congress decided on amnesty eligibility standards in 1986, Executive action twice provided deferred action to individuals who did not make it into the amnesty class – for eligible children in 1987, and then for both unauthorized spouses and children in 1990 – after Congress clearly stalled on this latter effort in the interim. The Reagan Administration's 1987 action more closely resembles DACA, and the Bush Senior Administration's 1990 action resembles Obama's forthcoming actions. The CRS chart tracking Executive action since 1976 demonstrates that the history of immigration law has often developed first by Executive action, and then by legislation.

3. Political context as to what type of precedent the Executive action may set for future presidents.

The Center for American Progress (CAP) highlights an important point – that the Executive's exercise of prosecutorial discretion in the area of immigration is not novel.

> This concept of prioritization and prosecutorial discretion is also utilized by federal agencies beyond DHS. The Environmental Protection Agency, or EPA, for example, uses discretion when determining what types of environmental violations to prioritize and which violators to pursue. The EPA determined this year that when enforcing the Clean Water Act, enforcement officials should target "serious sources of pollution and serious violations." What does this prioritization look like in practice? Given, for instance, a light bulb factory that is pervasively contaminating a local waterway, and a single, temporary construction site that contributes a small amount to urban runoff, the EPA would devote its efforts to sanctioning the factory.
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> Similarly, when reviewing tax returns, the Internal Revenue Service, or IRS, focuses on specific groups of people and businesses. The audit rate for individuals whose adjusted gross income, or AGI, is greater than $10 million is 26 percent whereas the audit rate for individuals whose AGI is between $50,000 and $70,000 is a mere 0.62 percent. The IRS does not enforce our laws evenly across the income distribution but instead targets specific groups – such as high-income earners – that will yield the highest return on their investment of investigative resources. Ultimately, prosecutorial discretion and policies such as those pursued by the

> EPA and IRS allow agencies to maximize the effectiveness of their enforcement efforts.
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> Report, Center for American Progress, *supra* at footnote 1.

Ultimately, when applied in a lawful manner, prosecutorial discretion is a political and policy decision. Similar to the EPA and IRS examples, a future president would be able to apply discretion to prioritize, investigate, and prosecute certain offenses over others in a variety of policy arenas, so long as the application of prosecutorial discretion did not conflict with the principles in the Administrative Procedures Act and the Congressional Budget and Impoundment Act. President Obama's anticipated Executive order on immigration does not change this calculus or set any new precedents.

III. CONCLUSION

In conclusion, prosecutorial discretion in immigration decisions for deferred action and work authorization is firmly grounded in the U.S. Constitution, case law and in immigration law and administrative procedure law. The Supreme Court upheld the doctrine most recently in Arizona v. United States, wherein the Court emphasized the "broad discretion" of the Executive branch to provide relief from removal in immigration matters. Case law emphasizes that agency resources may be applied so as to best fit agency priorities, but those decisions are not "unfettered" and cannot be arbitrary, discriminatory or in violation of a statutory directive. It is important to emphasize that even where prosecutorial discretion is applied through blanket relief under immigration law, individuals are still screened on a case-by-case basis, and that such relief is temporary.

Ultimately, the internal mechanism by which an agency decides to allocate its resources is largely protected by this doctrine unless Congress explicates otherwise. In the case of the

Executive actions at issue here, President Obama proposes a mechanism by which certain, narrowly categorized eligible individuals may step out of the shadows and affirmatively request temporary relief and work authorization. Similar measures were implemented by Ronald Reagan and George Bush Senior. The current status quo policy is regressive and inefficient, allowing low-priority individuals to be swept into the costly immigration system. If DHS makes a determination that its resources are better spent and its goals are better met by setting up a proactive mechanism, that decision is protected by agency discretion as long as it does not conflict with the restrictions set forth above.