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Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull's-Eye.

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DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): A NON-LEGISLATIVE MEANS TO AN END THAT MISSES THE BULL'S-EYE

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I. INTRODUCTION

"I am hoping for the best. This is a chance to have a life and take away the obstacles keeping me from doing better in my life."

–R.H.[1]

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1. R.H., whose name will remain confidential to protect his security, is an undocumented immigrant who came to the United States with his mother at the age of eight. His mother brought him here to begin a life safe from the gangs of Honduras and to have a better future. He has lived in the United States for nine years and is now majoring in physical education and pursuing a career in music. R.H. is a DREAMer and when the hope of Deferred Action for Childhood Arrivals (DACA) was introduced he contacted the St. Mary's University School of Law Center for Legal and Social Justice, which has been offering several clinics to educate the community on DACA and offering services to help DREAMers complete and submit applications.

R.H. is one of approximately 1.7 million[2] undocumented immigrants[3] whom on June 15, 2012 received hope through the initiative "Deferred Action for Childhood Arrivals" (DACA),[4] which provides temporary relief from removal.[5] DACA is a non-legislative policy directive by the Department of Homeland Security (DHS) guiding its departments of Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) to exercise prosecutorial discretion by deferred action when enforcing the immigration laws against certain young people who were brought to the United States as children, know the United States as their home, and did not intentionally violate the law.[6] Deferring action essentially means that the government will defer commencing removal proceedings and will temporarily terminate removal proceedings that have already begun for those individuals, which meet the criteria established in the memorandum.[7]

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2. Jeffrey Passel and Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW RESEARCH CENTER (Aug. 14, 2012), http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules/.

3. Undocumented immigrant is the term used throughout this Comment to refer to noncitizens residing in the United States without legal authorization. Because of the nature of this Comment, which deals with the humanitarian values of DREAMers, who are youth that did not intentionally break U.S. immigration law of their own volition, this undocumented immigrant term is more appropriate.

4. Memorandum from Janet Napolitano, Sec'y, DHS, to David V. Aguilar, Acting Comm'r, CBP, Alejandro Mayorkas, Dir., USCIS, and John Morton, Dir., ICE, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf.

5. Deportation is the term used colloquially, however "removal" is the proper legal term for individuals the government deems to be unlawfully in the country and wants to remove. *Deportation*, http://www.uscis.gov/portal/site/uscis/menuitem (follow "Resources" hyperlink; then "Glossary" hyperlink; then "Deportation" hyperlink; or "Removal" hyperlink) (last visited Feb. 15, 2013). Prior to 1997, there were two separate removal procedures, deportation and exclusion. *Id.* Deportation was the "process of deporting foreign nationals" already in the country, and exclusion dealt with foreign nationals "trying to gain admission into the United States." *Id.* After the enactment of the Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), deportation and exclusion are cohesively referred to as removal. Removal "may be based on grounds of inadmissibility or deportability" and is managed by U.S. Immigration and Customs Enforcement. *Id.*

6. *Deferred Action for Childhood Arrivals: A Q&A Guide (Updated)*, IMMIGR. POL'Y CENTER (Aug. 17, 2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/deferred_action_for_childhood_arrivals_qa_081712.pdf.

7. *Id.*

The Obama Administration claims DACA is an initiative to provide humanitarian relief to DREAMers[8] who have been made vulnerable because of the outdated immigration system and the failure of Congress to pass the DREAM Act. Others argue however, that "[the] policy is nothing more than political theater,"[9] which has starkly polarized the parties and hindered substantial immigration reform from occurring in the near future.[10] The general consensus is that the immigration system is broken and that reform is needed,[11] however, Democrats and Republicans differ greatly on the administration's use of deferred action as a means to fixing the broken system.[12] Immigrant-rights advocates and Democrats hail the

8. The term "DREAMers" comes from a bill known as Development, Relief, and Education for Alien Minors (DREAM) Act that was first introduced to Congress in 2001 by Republicans and Democrats to provide a path to citizenship for qualified young people who were brought to the United States as children without legal authorization, but which over the years and after many proposed versions has continuously failed to pass. Steve Manas, *Obama Administration Announces Change in Policy Toward Undocumented Youth*, RUTGERS (June 20, 2012), http://news.rutgers.edu/medrel/q-and-a-hot-topic/hot-topic-2012/obama-administration-20120618. The term "DREAMers" also refers to those individuals who, after the consistent failure of passing the DREAM Act, are now seeking relief under DACA as they wait for permanent DREAM Act like legislation to pass in Congress. *Id. See generally* S. 1291, 107th Cong. (2001) (delineating the provisions of the DREAM Act introduced by Senator Orrin Hatch in 2001).

9. Rebecca Burns, *Deferred Action: the Stuff of DREAMs?*, IN THESE TIMES (Sept. 16, 2012), http://www.inthesetimes.com/article/13821/dream_on/ (questioning whether deferred action will provide undocumented youth the relief they are seeking or cause more problems); *see also* Victor Rodriguez, *Gingrich: Obama Pulled 'Election-Year Gimmick' on Immigration*, PATRIOT ACTION NETWORK (June 17, 2012, 10:37 AM), http://resistance.ning.com/profiles/blogs/gingrich-obama-pulled-election-year-gimmick-on-immigration (referring to the initiative as an "election-year gimmick" by the Obama administration to get votes).

10. *See Texas Lawmakers, Immigration Lawyers Discuss Impact of Broken Immigration System*, HOUSTON CHRON. (Mar. 30, 2012), http://blog.chron.com/txpotomac/2012/03/texas-lawmakers-immigration-lawyers-discuss-impact-of-broken-immigration-system/ (arguing that the "extremism plaguing Washington and the strong partisanship brought by an election year" will prevent immigration reform in the near future).

11. IMMIGRATION POLICY CTR., BREAKING DOWN THE PROBLEMS: WHAT'S WRONG WITH OUR IMMIGRATION SYSTEM? 3 (Oct. 2009), http://immigrationpolicy.org/special-reports/breaking-down-problems-whats-wrong-our-current-immigration-system (explaining that for the past two decades, while the United States "has experienced dramatic political, cultural, and scientific advances[,]" its immigration system has remained the same and that the old laws are "outdated and inefficient"); *see also* Jesse Lee, *President Obama on Fixing Our Broken Immigration System: "E Pluribus, Unum"*, THE WHITE HOUSE (May 10, 2011), www.whitehouse.gov/blog/2011/05/10/president-obama-fixing-our-broken-immigration-system-e-pluribus-unum (stating that one of the major frustrations of the broken immigration system is that people are breaking the rules, cutting in front of the line, and "so many illegal immigrants makes a mockery of all those who are trying to immigrate legally").

12. When politicians refer to the "broken immigration system" they are referring to a broad range of problems that the federal government needs to comprehensively address.

policy as a "bold response to the broken immigration system."[13] They believe that Congress has given enforcement agencies the power to use prosecutorial discretion and that the Constitution has given the Executive Branch the authority to implement the law to the best of their ability.[14] As the law itself is fundamentally broken, they believe that deferred action is an appropriate means for effectively and efficiently managing institutional resources while promoting humanitarian values.[15] Republicans claim the initiative is an unconstitutional use of executive authority that bypasses Congress's role as lawmaker and ignores current immigration law.[16] Although Republicans may not agree with DACA, many are open to providing DREAMers with other types of relief.[17] However, with a nearing election and the continued failure of the DREAM Act, many Republicans view that the unilateral directive as a hasty, Band-Aid type

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See IMMIGRATION POLICY CTR., BREAKING DOWN THE PROBLEMS, *supra* note 11, at 4 (stating the numerous issues with our current immigration system). The major issues include outdated visa caps, an employment-based visa system that is not responsive to employers' labor needs, the deterioration of workplace conditions that affect all workers, lengthy backlogs on visa and citizenship applications, 12 million unauthorized people living in limbo, expensive and ineffective enforcement measures that are not working, and a U.S. border that is more dangerous than ever. *Id.*

13. Annaluisa Padilla, *Obama's DREAMER Initiative Is Smart Immigration Enforcement*, AM. IMMIGR. LAYWERS ASS'N (June 20, 2012), http://ailaleadershipblog.org/2012/06/20/obamas-dreamer-initiative-is-smart-immigration-enforcement/.

14. *See* Marcus Feldman, *Fox Hosts Hate Group Leader to Attack New Immigration Policy*, MEDIA MATTERS FOR AM. (June 18, 2012, 6:02 PM), http://mediamatters.org/blog/2012/06/18/fox-hosts-hate-group-leader-to-attack-new-immig/182766 (noting AILA President, David Leopold's contention that "'[a]ll law enforcement agencies' have prosecutorial discretion, 'including those that enforce immigration laws'"); *The Executive Branch*, THE WHITE HOUSE, http://www.whitehouse.gov/our-government/executive-branch (explaining the President's responsibility for "implementing and enforcing the laws written by Congress . . . .").

15. *See* Padilla, *supra* note 13 (explaining that "[d]eferred action has long been used by [the] U.S. [ ] to prevent the removal of immigrants for humanitarian reasons").

16. *See Executive Discretion: Mini-DREAM and The Rule Of Law*, THE ECONOMIST (June 18, 2012, 6:28 PM), http://www.economist.com/blogs/democracyinamerica/2012/06/executive-discretion (discussing the opinions of certain outspoken Republicans who believe that the Obama administration has abused their executive power).

17. *See* Gerry Mullany, *Rubio Calls Obama's Dream Act Move a 'Short-Term Fix'*, THE CAUCUS: THE POLITICS & GOV'T BLOG OF THE TIMES (June 24, 2012, 1:13 PM), http://thecaucus.blogs.nytimes.com/2012/06/24/rubio-calls-obamas-dream-act-move-a-short-term-fix/ (restating Marco Rubio's statements in an interview to NBC's "Meet the Press" where he called DACA "a short-term fix to a long-term problem" and talked about the bill he wants to pass for DREAMers that would provide visas); *see also Mitt Romney on Immigration*, ON THE ISSUES, http://www.ontheissues.org/2012/Mitt_Romney_Immigration.htm (last visited Oct. 26, 2012) (quoting Romney as wanting to fix the immigration system in a way that provides DREAMers with temporary work visas, future green cards upon receiving an advanced degree, and the possibility of permanent resident status).

solution that fails to address the intricacies and complexities that immigration reform requires.[18]

The legal issue is that DACA is not a law; it is a non-legislative rule for the exercise of prosecutorial discretion as deferred action, and as such has legal limitations that affect DACA applicants and recipients. Deferred action and non-legislative rules each have limitations. The purpose of this Comment is to examine these limitations and their effect on DACA applicants and recipients—those like R.H. This Comment analyzes the concept that although the Executive Branch has the legal authority to exercise deferred action within their prosecutorial discretion and may implement that policy by non-legislative means, the policy creates risk, vulnerability, and instability. DACA is a means to an end that misses the bull's-eye.[19] To develop this analysis, Part II discusses the historical and legislative atmosphere pressuring the creation of DACA. Part III provides a detailed account of the provisions set forth by DACA, the federal government's use of deferred action, and the limitations of deferred action and how they affect DACA applicants and recipients. Part IV discusses the limitations of non-legislative rules and how enacting DACA by such means creates risk for DREAMers. Part V analyzes the future of DACA and proposes several actions that could be taken to reduce the vulnerability of DREAMers in the future.

II. How DACA Came About

Providing relief to undocumented immigrants is not a new concept. Over the years, Congress has standardized relief from removal; however, the extent of that relief has consistently changed as more lenient standards have been applied during certain periods and harsher standards in others. Prior to 1940, the only means a deportable, undocumented immigrant had to lawfully remain in the United States was to have Congress enact a private bill.[20] Then, the Alien Registration Act of 1940 amended the 1917 Immigration Act to "suspend an alien's deportation if he could prove five years of residence in the United States with good moral char-

18. Jon Huntsman, *A GOP Opportunity on Immigration*, Wall St. J., Aug. 26, 2012, http://online.wsj.com/article/SB10000872396390443855804577600892810188600.html (claiming that the Executive's policy is the result of political theater politics and merely a "Band-Aid for young people caught in our immigration laws").

19. The term "bull's-eye" refers to immigration reform and policies that meet the goal of providing relief without creating additional vulnerability and risk and that also dutifully consider the complex issues of the broken immigration system by creating policies that do not encourage amnesty, prevent future illegal immigration, and are bipartisan.

20. *See* William C.B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 Ind. L.J. 885, 888 n.26 (1997) (citing The Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153).

acter, and that deportation would result in serious economic detriment to a spouse, parent, or minor child who was a [U.S.] citizen or a lawfully permanent resident."[21]

In 1952, the Immigration and Nationality Act (INA) organized and codified a variety of statutes governing U.S. immigration law into one body of text.[22] Over the past sixty years, parts of the Act have remained the same, but others have been amended or substantially modified.[23] The Immigration Nationality Act of 1952 responded to the criticism that undocumented immigrants were abusing the suspension of deportation relief by eliminating the "serious economic detriment" standard and instead requiring "exceptional and extremely unusual hardship to the alien or to his spouse, parent[,] or child, who is a citizen or alien lawfully admitted for permanent residence," "good moral character," and continuous residency.[24] Because of the harshness of the "exceptional and extremely unusual hardship" standard, Congress in 1962 amended the hardship standard by creating two different hardship standards.[25] For serious violators, Congress maintained the "exceptional and extremely unusual hardship"[26] standard, and "for those found deportable on less serious grounds" Congress limited the requirement to "extreme hardship."[27]

Today the criteria for terminating removal proceedings are the harshest they have been in the past sixty years because of the Illegal Immigration

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21. *Id.*

22. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163, enacted June 17, 1952 (codified as amended at 8 U.S.C. §§ 1101 et seq.).

23. *See* Underwood, *supra* note 20, at 888-95 (providing a historical overview of "cancellation of deportation" relief).

24. *Id.* at 889-90 (quoting the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 244(a), 66 Stat. 163, enacted June 17, 1952, codified as amended at 8 U.S.C. §§ 1101 et seq.).

25. *Id.* at 891.

26. Under INA § 244(a), 8 U.S.C. § 1254(a) (1994), before its repeal, serious violators were undocumented immigrants found deportable for the grounds specified in § 244(a)(2) and § 241(a)(2), 8 U.S.C. § 1251(a)(2), including but not limited to, convictions of crimes of moral turpitude; convictions of an aggravated felony; convictions of violating any law or regulation relating to controlled substances; convictions of certain firearm offenses; convictions of espionage, sabotage, or treason; convictions of threatening the President; convictions of violating laws relating to the departure or entry of persons in the United States and importing aliens for an immoral purpose; and/or engaging in terrorist activities. *See* Underwood, *supra* note 20, at 890–91 n.43 (quoting INA § 244(a), 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA of 1996, Pub. L. 104-208, §§ 308(b)(7), 110 Stat. 3009, (requiring a showing of "exceptional and extremely unusual hardship" for serious violators).

27. Underwood, *supra* note 20, at 890–91 n.42 (citing Act of Oct. 24, 1962, Pub. L. No. 87-885, § 244, 76 Stat. 1247); *see* INA § 244(a), 8 U.S.C. § 1254(a) (1994), *repealed by* IIRIRA of 1996, Pub. L. 104-208, § 308(b)(7), 110 Stat. 3009, (creating an exception for those in Section 1251(a)(4)(D) or those identified in 244(a)(2) or (3) as requiring the "exceptional and extremely unusual hardship" standard).

Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[28] IIRIRA was created to address the growing population of undocumented immigrants; however, under the popular cover of fighting illegal immigration, the Act "cut[ ] back long-established rules that limit[ed] [the] abuse and unfairness" of the government in its role of enforcing immigration law.[29] Pre-IIRIRA, many DREAMers would have had relief from deportation under suspension of removal.[30] However, the consequences of IIRIRA and Congress's failure to pass comprehensive reform has left DREAMers vulnerable and with limited options for relief.

A. *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

Before the enactment of IIRIRA, INA provided a form of relief called "[s]uspension of [d]eportation."[31] "Suspension of [d]eportation" allowed the Executive Office for Immigration Review (EOIR) to "exercise [its] discretion to grant suspension of deportation" to a person who proved that they had been continuously present in the United States for seven years, proved good moral character, and showed that deportation would create an extreme hardship upon herself or a U.S. citizen or lawful permanent resident (LPR) spouse, parent, or child.[32] If EOIR granted "suspension of deportation," the person would receive LPR status.[33]

The passage of IIRIRA[34] vastly changed the immigration laws of the United States. Congress changed "deportation proceedings" to "removal proceedings" and deleted suspension of deportation relief, except in cer-

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28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546; *see* 8 U.S.C. § 1101 (2006) (codifying IIRIRA); *see* Underwood, *supra* note 20, at 885 (claiming that IIRIRA has "severely circumscribe[ed] cancellation of deportation" by creating stringent new eligibility requirements that the most deserving undocumented immigrants will not be able to meet).

29. Underwood, *supra* note 20, at 885.

30. Elwin Griffith, *Admission and Cancellation of Removal Under the Immigration and Nationality Act*, 2005 MICH. ST. L. REV. 979, 1026 (2005) ("Congress replaced suspension of deportation with cancellation of removal in 1996."); *see INS v. St. Cyr: The Supreme Court and Draconian Congressional Criminal-Immigration Laws*, UTAH B.J. 8, 10 (2001) (explaining that IIRIRA was executed in 1996).

31. INA § 244(a); 8 U.S.C. § 1254 (2004); *see* AM. IMMIGRATION LAWYERS ASS'N, REPRESENTING CLIENTS IN IMMIGRATION COURT 201 (discussing the relief available under pre-IIRIRA and IIRIRA immigration laws for the suspension of deportation and cancellation of removal for non-lawful permanent residents).

32. AM. IMMIGRATION LAWYERS ASS'N, REPRESENTING CLIENTS IN IMMIGRATION COURT 201 (citing INA § 244(a); 8 U.S.C. § 1254 (1994).

33. *Id.*

34. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009.

tain circumstances.[35] In those circumstances, Congress has replaced suspension of deportation with "[c]ancellation of [r]emoval" under INA § 240.[36] The eligibility requirements a person must prove under "[c]ancellation of [r]emoval" are much stricter than the previous suspension of deportation provisions.[37] A nonpermanent resident must prove that: (1) they have been physically present in the United States for a continuous period of at least ten years; (2) they have good moral character; 3) they have no conviction of an offense that would make them inadmissible or deportable; and 4) their removal would result in "exceptional and extremely unusual hardship to a U.S. citizen or LPR spouse, parent, or child."[38]

The major differences of cancellation of removal are that it increased the physically present requirement from seven years to ten, raised the hardship standard from "extreme" to "exceptional and extremely unusual," and eliminated a showing that deportation could create a severe hardship upon the undocumented immigrant herself.[39] IIRIRA also limited the number of cancellation of removal grants to 4,000 per fiscal year,[40] and eliminated many avenues for judicial review of INS decisions, including deferred action.[41] In cases where an applicant has been denied cancellation of removal, the Court has consistently denied reviewing decisions made by the Board of Immigration Appeals.[42]

By increasing the continuous presence term and eliminating hardship to oneself, many DREAMers do not qualify for cancellation of removal. First, ten years of continuous physical presence is a long time for DREAMers, especially if they did not come in as infants. Second, elimi-

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35. *See* AM. IMMIGRATION LAWYERS ASS'N, *supra* note 32 (discussing the changes IIRIRA made to "suspension of deportation").

36. *See id.* (noting language changes implemented by IIRIRA).

37. *See* Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 597 (9th Cir. 2002) (stating that if INS had commenced deportation hearings before 1997 Jimenez-Angeles would have been eligible for the pre-IIRIRA remedy of "suspension of deportation," but because INS did not commence proceedings until 1998 after the effective date of IIRIRA, the court held that Jimenez-Angeles' case was governed by IIRIRA, that those rules are not impermissibly retroactive, and affirmed the Immigration Judge's decision of removal).

38. INA § 240A(b), 8 U.S.C. § 1229b(b) (2008).

39. *Id.*

40. *Id.* § 240A(e)(1).

41. IIRIRA § 306(a)(2), 8 U.S.C. § 1252(a)(2)(B); *see* Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 286-92 (2010) (discussing the federal agency's immunity from judicial review and the "Supreme Court's reluctance to permit judicial review over prosecutorial discretion.").

42. *See* Martinez v. INS, 523 F.3d 365, 377 (2nd Cir. 2008) (denying an undocumented individual's petition for review of the decision of the Board of Immigration Appeals (BIA)); *see also Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/biainfo.htm (last visited Dec. 14, 2012) (summarizing the functions of the BIA).

nating hardship to oneself severely limits the youth who are able to apply for cancellation of removal. Within their own right, DREAMers are "arguably the most sympathetic population in the United States" because they have "great intellectual promise," consider the United States their home, and for many their "immigration status was beyond their control."[43]

There are other factors besides looking at hardship to one's spouse, parent, or child that have humanitarian value. These include personal health, education opportunities, and economic hardship. Even if DREAMers can show that their deportation would have an "exceptional and extremely unusual hardship" on a parent, that parent must be a U.S. citizen or LPR.[44] However, one of the major issues of DREAMers is that they were brought here illegally by their parents, many of which are presumably not U.S. citizens or LPRs. The harshened requirements of the IIRIRA "Cancellation of Removal" provisions have made DREAMers a vulnerable group with few alternative forms of relief. Possible alternatives for relief include a case-by-case exercise of prosecutorial discretion or passing a private bill in Congress.[45] The private bill method has continuously failed for the past ten years, leaving a directive for exercising prosecutorial discretion by deferred action a means of last resort.

B. *The Failure of Congress to Pass Comprehensive Reform*

In order to rectify the hardship IIRIRA has caused DREAMers, select members of Congress, attorneys, and immigration advocates have been in an on-going battle since 2001 to advance the Congressional immigration reform bill called the Development, Relief, and Education of Alien Minors Act, or the DREAM Act.[46] However, the bill has continuously failed to pass for over a decade.[47] The purpose of the DREAM Act is to

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43. Shoba S. Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 19 (2012) (discussing the politics of using deferred action in immigration law and in particular for DREAMers).

44. INA § 240A(b)(1)(D); 8 U.S.C. § 1229(b)(1)(D) (2006).

45. *See* Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 624 (2011) (discussing the relief available to DREAMers, in particular the relief that the DREAM Act proposes).

46. *See With Failure to Pass DREAM Act, a Battle Was Lost but Not the War*, FOX NEWS LATINO (Dec. 29, 2010), http://latino.foxnews.com/latino/news/2010/12/29/failure-pass-dream-act-battle-lost-war/ (summarizing the failure of the DREAM Act over the last decade and the politics surrounding the Act and predicting a continuing fight for reform in the future).

47. *Id.* The DREAM Act has been proposed at least twenty-four times over the past decade with no version being passed. *E.g.*, 107th Cong. §§ 2–3 (2001); S. 1545, 108th Cong. (2003); S. 2863, 108th Cong. §§ 1801–1813 (2004); S. 2075, 109th Cong. (2005); H.R. 5131, 109th Cong. (2006); S. 2611, 109th Cong. §§ 621–632 (2006); H.R. 1275, 110th Cong. (2007);

"allow children who have been brought to the United States through no volition of their own to fulfill their dreams, to secure a college degree[,] and legal status."[48] The Act would provide conditional status with a path to citizenship for select undocumented immigrant students who have been in the United States for an extended period of time, finished high school, and who attend an institution of higher education or serve in the military.[49] The process of attaining citizenship would occur in phases, with each phase providing a higher level of status, and would culminate after a minimum of thirteen years.[50]

The bill, which is commonly associated with the Democratic agenda, has a more bipartisan political history than it appears. The Act was first introduced in 2001 by two Republicans, Senator Orrin Hatch (R-Utah)[51] and Congressman Chris Cannon (R-Utah),[52] and then directed by Democratic Senator Richard Durbin (D-Ill.) in 2005.[53] The DREAM Act bill

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H.R. 1645, 110th Cong. §§ 621–632 (2007); S. 774, 110th Cong. (2007); S. 1348, 110th Cong. §§ 621–632 (2007) (as amended by S.A. 1150 §§ 612–619); S. 1639, 110th Cong. §§ 612–620 (2007); S. 2205, 110th Cong. (2007); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); H.R. 5281, 111th Cong. § 5016 (2010); H.R. 6497, 111th Cong. (2010); S. 3827, 111th Cong. (2010); S. 3932, 111th Cong. §§ 531–542 (2010); S. 3962, 111th Cong. (2010); S. 3963, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); S. 1258, 112th Cong. §§ 141–149 (2011); H.R. 5869, 112th Cong. (2012).

48. Barron, *supra* note 45, at 632 n.72 (citing 147 Cong. Rec. S8,581 (daily ed. Aug. 1, 2001) (statement of Sen. Orrin Hatch) (discussing the history and politics of the DREAM Act).

49. *See id.* at 626–27 (discussing the main provisions of the DREAM Act).

50. *See id.* (explaining that the DREAM Act "provides a [conditional] path to citizenship for select [undocumented] immigrant students in three phases . . . .").

51. *Id.* at 632 (providing historical context of DREAM Act and showing initial bipartisanship); Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 115 (2008) (proposing that Senator Hatch's Republican influence is stunted at a federal level as polarization stunts progress on more specific issues related to immigration on a state level); *Orrin Hatch on Immigration*, ON THE ISSUES, http://www.ontheissues.org/international/Orrin_Hatch_Immigration.htm (last updated April 9, 2012) (exposing that while Senator Hatch championed the success of the DREAM Act he was opposed to comprehensive immigration reform that would increase policing states bordering Mexico).

52. *See* Barron, *supra* note 45, at 632 (citing Student Adjustment Act, H.R. 1918, 107th Cong. (2001) (providing historical context of the DREAM Act and showing initial bipartisanship)); *The Dream Act*, AM. IMMIGR. COUNCIL (Nov. 18, 2010), http://www.immigrationpolicy.org/just-facts/dream-act (reaffirming steady bipartisan support for the DREAM Act); *Senator Durban Re-Introduces DREAM Act on Heels of President's Immigration Speech*, IMMIGR. IMPACT, http://immigrationimpact.com/2011/05/11/senator-durbin-re-introduces-dream-act-on-heels-of-president%E2%80%99s-immigration-speech/ (last visited Dec, 14, 2012) (stating that Chris Cannon is a Republican legislator from Utah that introduced the bill while serving in the House of Representatives).

53. Barron, *supra* note 45, at 631 (citing S. 729, 111th Cong. (2010) (listing Republican Senator Richard Durbin as a cosponsor)) (revealing previous bipartisan support for the

retained bipartisan sponsorship until 2009,[54] but even with bipartisan support the Act never got enough votes to pass,[55] and as time passed, relations between Republicans and Democrats, and, more broadly, proponents and opponents of the DREAM Act have become more acrid and sharply divided on the merits of the bill and its implications.[56]

The main issue its opponents have consistently professed since its introduction is that the DREAM Act is "amnesty,"[57] which rewards illegal

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DREAM Act); *Senator Durban Re-Introduces DREAM Act on Heels of President's Immigration Speech*, IMMIGR. IMPACT, http://immigrationimpact.com/2011/05/11/senator-durbin-re-introduces-dream-act-on-heels-of-president%E2%80%99s-immigration-speech/ (last visited Dec. 14, 2012) ("[I]t is important to note that without the federal DREAM Act introduced by Senator Durbin . . . students would never be able to legalize their status.").

54. James Walsh, *The DREAM Act Scam*, NEWSMAX (Feb. 28, 2012), http://www.newsmax.com/jameswalsh/dream-act-scam-amnesty/2012/02/28/id/430879 ("In 2009, while Democrats held the Presidency and super majorities in both the Senate and the House, an updated DREAM Act failed again, even though it was a major issue for the Hispanic immigrant community.").

55. *See* Barron, *supra* note 45, at 635 (discussing the failure of the DREAM Act and stating that the November 2010 midterm election was a major defeat for Democrats); *see also Procedural vote on DREAM Act Fails in the Senate*, CNN POLITICS (Dec. 18, 2010), http://articles.cnn.com/2010-12-18/politics/congress.dream.act_1_dream-act-procedural-vote-illegal-immigrants?_s=PM:POLITICS (explaining the procedural reasons for the bill's failure); Walsh, *supra* note 54 ("Arguments against enacting the DREAM Act include concern for national security, as a rising number of domestic lone-wolf terrorists were radicalized in their teens and 20s. Among those immigrants who have become U.S. citizens, some admit they lied when they swore allegiance to the United States.").

56. Barron, *supra* note 45, at 632 (emphasizing that the current political debate is no longer bipartisan and has become starkly divisive on the merits and implications of the bill); Donny Shaw, *DREAM Act No Longer Bipartisan*, OPEN CONGRESS BLOG (May 12, 2011), http://www.opencongress.org/articles/view/2289-DREAM-Act-No-Longer-Bipartisan (citing the election of Barack Obama as President of the United States as a contributing factor to the division of support in Congress).

57. Amnesty is defined as:

> [a] pardon extended by the government to a group or class of persons, usu. for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted . . . [u]nlike an ordinary pardon, amnesty is usu. addressed to crimes against state sovereignty — that is, to political offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment.

BLACK'S LAW DICTIONARY 99 (9th ed. 2009). *See generally* Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291 (2008) (discussing the historical overview of immigration reform and the use of amnesty as a politicized term). According to Republican Senator Jeff Sessions of Alabama,

> If we pass this amnesty, we will signal to the world that we're not serious about the enforcement of our laws or our borders . . . . It will say, you make plans—you can make plans to bring in your brother, your sister, your cousin, your nephew, your friend, into the country illegally as a teenager, and there will be no principled reason in the future for the next congress then sitting to not pass another "dream" act. And it

behavior and does not effectively prevent future floods of illegal immigration.[58] Another concern is that once benefactors receive legal status, they then would be able to petition for the admission of their relatives[59] and would receive education benefits and public benefits at the expense of legal residents and citizens.[60] There is also strong disagreement over whether the Act would boost the economy or cost the government money.[61] Others oppose the DREAM Act because it is merely an immigration provision rather than part of a comprehensive immigration plan to overhaul the broken immigration system.[62]

> will only be a matter of time before that next group illegally here will make the same heartfelt pleas that we hear today.

Procedural Vote on DREAM Act Fails in the Senate, CNN POLITICS (Dec. 18, 2010), http://articles.cnn.com/2010-12-18/politics/congress.dream.act_1_dream-act-procedural-vote-illegal-immigrants?_s=PM:POLITICS.

58. *See* Bob Dane & Kristen Williams, *Amnesty for Illegal Aliens Begins Today and Congress Couldn't Care Less*, FOX NEWS (Aug. 15, 2012), http://www.foxnews.com/opinion/2012/08/15/amnesty-for-illegal-aliens-begins-today-and-congress-couldnt-care-less/ (providing an example on how immigrants are afforded amnesty by not having to be interviewed as a part of immigration procedures); Brian Naylor, *Democrats Push DREAM Act; Critics Call It Amnesty*, NPR (Dec. 6. 2010, 12:01 AM), http://www.npr.org/2010/12/06/131796206/democrats-push-dream-act-critics-call-it-amnesty ("Opponents say the DREAM Act is likely to cost some $6 billion a year—a charge backers say doesn't add up—[ ]fewer jobs for U.S.-born workers."); *but cf. The Dream Act: Myths and Facts*, CONNECTING OUR WORLD, http://www.connectingourworld.org/get-involved/reaching-for-a-dream/the-dream-act-myths-and-facts/ (last visited Dec. 14, 2012) (stating opponents to the DREAM Act overlook opportunities this piece of legislation provides for immigrants that want to make a positive contribution to the nation of the United States).

59. *Get the Facts on the DREAM Act*, THE WHITE HOUSE (Nov. 30, 2010), http://www.whitehouse.gov/blog/2010/12/01/get-facts-dream-act.

> DREAM Act beneficiaries would only be able to petition for entry of their parents or siblings if they have satisfied all of the requirements under the DREMA Act. Even then, they would be subject to the same annual caps waiting periods in order to petition for their relatives; the bottom line is that it would take many years before parents or siblings who previously entered the country illegally could obtain a green card.

Id.

60. Contrary to arguments made by the opposition, the DREAM Act does not provide access to federal funding for education unless they actualize into a U.S. citizen. *See* Kelsey Sheehy, *States' DREAM Acts Could Deter High School Dropouts*, U.S. NEWS (Aug. 6, 2012, 1:30 PM), http://www.usnews.com/education/high-schools/articles/2012/07/27/states-dream-acts-could-deter-high-school-dropouts (stating that applicants must meet state residency requirements to be eligible for higher education tuition.).

61. Barron, *supra* note 45, at 644–47 (discussing that with the current competition for jobs and extremely limited state resources the educational and public benefits proposed by the DREAM Act is a real concern that cannot be brushed aside by DREAM Act advocates).

62. *Id.* at 647 n.174; Statement of Administration Policy, Executive Office of the President (Oct. 24, 2007), *available at* http://www.aila.com/content/default.aspx?docid=23685.

These are real and valid concerns that are presenting a major roadblock to immigration reform and need to be approached at face value and with a willingness of both parties to compromise and cooperate.[63] Unfortunately, the issue is so politically driven that all previous bipartisan efforts have unraveled.[64] Even with a Democratic majority in both Houses of Congress from 2008 to 2010, the Obama Administration failed to pass the DREAM Act.[65] President Obama, who supported the Act in 2005 as Senator and made campaign promises to make immigration reform a priority in his administration, has been unsuccessful in dispelling the current congressional stalemate to get comprehensive reform passed.[66] In order to pass the DREAM Act in the future, the Act "should be further restricted to ensure that only the most deserving and faultless individuals may take advantage of the bill and it should be combined with increased enforcement measures aimed at other populations of illegal immigrants."[67] In addition to increasing enforcement measures, Democrats should focus on the potential areas of cooperation and compromise, such as lowering the age of eligibility, more clearly defining the "good moral

63. *See Obama Says DREAM Act Hasn't Changed Since Republicans Supported It, Only Politics Has*, POLITIFACT (2012), http://www.politifact.com/truth-o-meter/statements/2012/jun/26/barack-obama/obama-says-dream-act-hasnt-changed-republicans-sup/ (explaining that revisions since the first proposal of the bill have been more restrictive in access thus appealing to conservatives).

64. *See* Jennifer Bendery, *John Boehner Blames Obama For Derailing Dream Act After He Derailed Dram Act-Style Bill*, HUFF. POST POLITICS (June 19, 2012, 4:14 PM), http://www.huffingtonpost.com/2012/06/19/john-boehner-obama-dream-act_n_1609147.html (expressing that the political environment is hostile and even more so now with DACA, that comprehensive bipartisan reform seems unlikely, and also showing that there is a blame game that further heats the political environment).

65. *See* David Freelander, *Senate Fight Over Filibuster Reform Rages, With Eye on Nuclear Option*, THE DAILY BEAST (Dec. 13, 2012, 4:45 AM), http://www.thedailybeast.com/articles/2012/12/13/senate-fight-over-filibuster-reform-rages-with-eye-on-nuclear-option.html (citing how the inability to discuss bills such as the Employee Free Choice Act and the DREAM Act in the Senate resulted in the failure of passing either even with Democrats controlling both chambers of Congress).

66. Barron, *supra* note 45, at 634-35; *see also* Corey Dade, *Obama's Deportation Policies Have Failed, Immigrant Advocates Say*, NPR (June 11, 2012, 6:36 PM), http://www.npr.org/blogs/itsallpolitics/2012/06/11/154782404/immigrant-advocates-obamas-deportation-policy-a-failure (asserting that attaching the DREAM Act to the National Defense Authorization Act of 2010 did not go unnoticed by Republicans who flexed their political muscle by striking down the National Defense Authorization Act along with the DREAM Act).

67. Barron, *supra* note 45, at 655 (concluding that more cooperation and compromise is needed and that there are areas of the DREAM Act that could be altered a bit more to create a more balanced, bipartisan plan).

character" requirement, tightening the waiver and hardship exceptions, and possibly cutting back on other types of legal immigration.[68]

Even though the Obama Administration greatly increased the agency's enforcement measures[69] and provided clear direction that its priority is to efficiently use its resources by prioritizing the removal of criminals,[70] the stalemate continues and DREAMers are still no closer to getting legislative relief. Because of the harshness of IIRIRA and the continued failure of the DREAM Act, DREAMers have become an increasingly vulnerable group and have few options left for relief. Since IIRIRA, the role of prosecutorial discretion as deferred action has become increasingly important in the immigration context,[71] and in many cases has become the only means for averting the extreme hardship associated with the removal of certain classes of individuals.[72] Therefore, DACA has been

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68. *Id.* at 647-54 (discussing areas of the DREAM Act where there is room for cooperation and compromise for moving the DREAM Act forward).

69. Obama's administration has deported almost 1.5 million unauthorized immigrants, which is more than the first six and half years of George Bush's administration and higher than any other period in history. Alex Nowrasteh, *President Obama: Deporter in Chief*, FORBES (July 30, 2012, 10:19 AM), http://www.forbes.com/sites/alexnowrasteh/2012/07/30/president-obama-deporter-in-chief/; *see Ice Total Removals*, ICE.ORG (Aug. 25, 2012), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf (noting that President Obama deported more immigrants in his first term as President than President George W. Bush achieved in a little over six years). *See generally* DHS, 2010 YEARBOOK OF IMMIGR. STATISTICS (Aug. 2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf (showing statistical data on immigration to the United States since 1890).

70. *See* Memorandum from John Morton, Dir., ICE, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (discussing how agency employees should exercise prosecutorial discretion, the factors they should consider, and making those who present security issues a high priority for enforcement); *Secure Communities: Get the Facts*, ICE, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited Oct. 30, 2012) (discussing ICE's "Secure Communities" initiative to focus its resources and prioritize the removal of individuals who have a criminal history or pose a significant threat to the public through an information-sharing partnership between ICE and the FBI to identify undocumented, criminal immigrants).

71. *See* Carolina Núñez, *Recognizing the Role of Discretion in the Immigration System*, JURIST (Aug. 16, 2012), http://jurist.org/forum/2012/08/carolina-nunez-immigration-discretion.php (discussing the increasing role that deferred action has been playing and a shift to a more "nuanced approach to immigration law that accounts for individual circumstances.").

72. *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Cases(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081835 (discussing that because getting a unanimous vote for private bills is difficult and has only

used by the Obama Administration as a last resort effort to help DREAMers who are in desperate need for relief. The rest of this comment addresses the issue of the Executive's authority to implement DACA and how such policy making fails to provide the type of relief DREAMers and this country deserve from its leaders.

III. DACA AND DEFERRED ACTION

The intention of DACA is admirable in that it seeks to protect a class of individuals who historically have been eligible for relief and now have been made vulnerable by a harsh and inefficient immigration system. Although there are those who claim that the presidential directive calling for deferred action is an over-extension of the Executive's authority that bypasses Congress, the use of deferred action is a legitimate legal tool that the government has used consistently in immigration since the 1970s to avert extreme hardship, use resources efficiently, and promote humanitarian values.[73] However, the exercise of prosecutorial discretion by deferred action, a.k.a. DACA, has legal limitations that present DREAMers with substantial risk.[74]

A. *What is DACA?*

Deferred Action for Childhood Arrivals (DACA) is a memorandum that was issued on June 15, 2012 by the Secretary of Homeland Security, Janet Napolitano, and is titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."[75] While this guidance took effect immediately, ICE and USCIS imple-

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been accomplished in a few instances (e.g. VAWA), deferred action is a final avenue to relief from enforcement).

73. *See* Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244–47 (2010) (discussing the theories underlying the use of prosecutorial discretion and affirming that goals of prosecutorial discretion include saving costs and resources and promoting humanitarian values).

74. *See* Joel Rose, *For Undocumented Youth, New Policy Carries Risks*, NPR (Aug. 15, 2012, 12:18 PM), http://www.npr.org/2012/08/15/158872445/for-undocumented-youth-new-policy-carries-risks (discussing that DACA comes with risks such as what the government will do with applicants' information if they are rejected and how it will affect unemployed Americans); *see also* Rafael Carranza, *Deferred Action Applications Comes with Risks: Immigration Attorney*, VALLEYCENTRAL (Aug. 19, 2012, 10:52 PM), http://www.valleycentral.com/news/story.aspx?id=790375 (discussing the risks of DACA, including its discretionary nature, that it is a brand new process, that it is not a change of law but merely a change of policy, and the fear of what will happen to the policy after the presidential election).

75. *See* Memorandum from Janet Napolitano, *supra* note 4 (introducing DACA criteria to be considered in these cases and detailing why young people brought to this country as children should be subject to prosecutorial discretion when it comes to their cases).

mented their application processes on August 15, 2012.[76] The purpose of the non-legislative directive is to instruct the various departments of Homeland Security (DPS), including Immigration Customs and Enforcement (ICE), Customs and Border Patrol (CBP), and U.S. Citizenship and Immigration Services (USCIS), to exercise their prosecutorial discretion by deferring action when enforcing immigration law against certain young people who would benefit from DREAM Act legislation—i.e., those who were brought to the United States as young children, who do not present a risk to national security or public safety, and who pursue an education or serve in the military.[77] The memorandum states that these individuals are a low enforcement priority and that deferring action is a humanitarian[78] and efficient use of the government's limited resources.[79]

By deferring action, the government is exercising its discretion to defer commencing removal proceedings or temporarily terminate removal proceedings that have already begun.[80] In order to be considered for deferred action, an individual must statisfy the following:[81]

- Came to United States before the age of sixteen;[82]
- Was under the age of thirty-one and had no valid immigration status on June 15, 2012;[83]
- Have continuously resided in the United States between June 15, 2007 and the present;[84]

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76. *See id.* (directing ICE and USCIS "to begin implementing [the] process within 60 days of the date of this memorandum.").

77. *See id.* (stating criteria to be considered by ICE, CBP, and USCIS in handling deferred action for low threat cases).

78. *See id.* (noting that the enforcement of immigration laws in a strong and sensible manner means considering the individual circumstances of each case, refraining from removing "productive young people to countries where they may not have lived or even speak the language," and that these young people may have "contributed to our country in significant ways.").

79. *See id.* (stating that "young people who were brought to this country as children and know only this country as home . . . [are] low priority cases" on whom enforcement resources should not be expended in order to focus on those who meet the Department's enforcement priorities).

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

81. *See* Memorandum from Janet Napolitano, *supra* note 4 (outlining the criteria that should be considered before employing deferred action).

82. *Id.*

83. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

84. *See Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, NAT'L IMMIGR. LAW CENTER (Sept. 27, 2012), http://www.nilc.org/FAQdeferredactionyouth.html (explaining that an applicant can prove continuous residence by "submitting a document for each 12-month period since June 15, 2007" and if

- Is currently in school,[85] has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony offense, a significant misdemeanor offense,[86] multiple misdemeanor offenses,[87] or otherwise pose a threat to national security or public safety.

In order to apply, an applicant must be fifteen years or older, unless the individual is in removal proceedings or has a final order of removal or voluntary departure.[88] They must also pass a background check and be able to prove that they meet the above criteria through verifiable documentation.[89] Also, applicants should not leave the United States.[90]

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they cannot, applicants may consider "submitting affidavits from at least two individuals who have personal knowledge that [they] were in the [United States]" from 2007 until the present).

85. *Id.* In school means, an applicant:

> [M]ust be enrolled in:
>
> 1) a public or private elementary school, junior high or middle school, high school, or secondary school;
>
> 2) an education, literacy, or career-training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment, and where you are working toward such placement; or
>
> 3) an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a GED exam or other equivalent state-authorized exam.

Id.

86. *Id.* A misdemeanor is a

> crime for which the maximum term of imprisonment is one year or less but more than five days . . . [and includes] [a]n offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking . . . [or an offense] for which [one was] sentenced to more than 90 days in custody.

Id.

87. *Id.*

> Any misdemeanor (not meeting the definition of 'significant misdemeanor') for which you are sentenced to at least one day in custody . . . [does not include] immigration-related offenses created by state immigration laws as being misdemeanor offenses or felonies. For instance, Arizona, Alabama, and other states have passed laws that make it a crime for undocumented people to engage in many everyday actions.

Id.

88. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

89. *See* Memorandum from Janet Napolitano, *supra* note 4 (explaining that no applicant for deferred action as outlined in the memo will receive such action until they have undergone a background check); *see also Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84 (explaining that docu-

For individuals who meet the criteria and pass the background check, DACA may be applied on a case-by-case basis in four scenarios: 1) individuals who are encountered by ICE, CBP or USCIS;[91] 2) individuals who are in removal proceedings but not yet subject to a final order of removal;[92] 3) individuals subject to a final order;[93] and 4) individuals who are not currently in removal proceedings.[94] For those whom ICE, CBP, or USCIS encounter, ICE and CBP should immediately exercise their discretion to prevent individuals from being placed in removal proceedings or being removed, and USCIS should issue "Notices to Appear" in accordance with the memorandum.[95]

For individuals who are in removal proceedings but not yet subject to a final order of removal, ICE should immediately begin to offer deferred action for a period of two years, subject to renewal, as part of their case-by-case review, and ICE should implement a process where individuals who believe they meet the criteria can request the ICE Office of the Public Advocate to review their case.[96] For individuals subject to a final order, USCIS should implement a process where those individuals,

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ments such as "financial records (lease agreements, phone bills, credit card bills), medical records, school records (diplomas, GED certificates, report cards, school transcripts), employment records, and military records" provide proof for meeting the memorandum's criteria).

90. *See Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84 (explaining that traveling outside of the United States after August 15, 2012 will cause applicants to lose their eligibility for deferred action, unless they have applied for and received advance parole which would allow them to leave for humanitarian, employment, and educational reasons, but even advance parole does not guarantee that they will be able to return).

91. *See* Memorandum from Janet Napolitano, *supra* note 4 (stating that deferred action will be considered on a case-by-case basis, one such case being with illegal immigrants who are encountered by ICE, CBP, and USCIS).

92. *See id.* (stating that deferred action will be considered on a case-by-case basis, one such case being with individuals who have not yet been issued final removal orders).

93. *See id.* (showing that on a case-by-case basis, DACA may be available for illegal immigrants who are subject to final orders from immigration agencies).

94. *See id.* (affirming that deferred action can be considered for illegal immigrants who are not currently in removal proceedings).

95. *Id.*

96. *See id.* (explaining the process that should be followed when an individual is in a removal proceedings, but has not yet been subject to a final removal order); *see also Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84 (explaining that for those who are currently detained by ICE and where ICE is currently reviewing their case, ICE should offer them deferred action if ICE identifies the case as meeting the eligibility requirements outlined in the memorandum, and if ICE has not reviewed their case, those detained should inform their detention officer or contact the ICE Office of the Public Advocate).

regardless of their age, may request deferred action.[97] For individuals not in removal proceedings, USCIS should establish a process for individuals fifteen years or older to request deferred action.[98] Even if an individual meets all the criteria, DHS has the discretionary authority to not grant deferred action.[99] However, when an individual has been approved for deferred action, it should extend for a period of two years, subject to renewal.[100]

When an individual requests deferred action from USCIS, their information, "including information about family members and guardians, will not be shared with ICE [or] . . . CBP for the purpose of deportation proceedings unless [their] case involves fraud, a criminal offense, a threat to public safety or national security, or other exceptional circumstances."[101] However, the information "may be shared with national security and law enforcement agencies, including ICE or CBP, for purposes other than deportation . . . ."[102] Purposes other than deportation include "identify[ing] or prevent[ing] fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense."[103] If deferred action is denied because of a criminal offense, fraud, a threat to national security or public safety, or exceptional circumstances, USCIS shall refer

97. *See* Memorandum from Janet Napolitano, *supra* note 4 (stating that a process should be implemented within sixty days of receipt of the memo to handle cases pertaining to those individuals that are subject to a final removal order).

98. *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84. An individual can apply for deferred action by submitting the I-821D "Consideration of Deferred Action for Childhood Arrivals" form together with the I-765 and I-765WS forms requesting a work permit to USCIS. *Id.* If USCIS finds that the request is complete, a receipt notice will be sent, followed by an appointment notice to visit to be fingerprinted and photographed. *Id.* Applicants are notified of final determination by USICS in writing. *Id.* "The application fee is $465, which consists of a $380 fee for the employment authorization application and $85 fee for fingerprints. Fee waivers are not available. However, fee exemptions [may] be available in limited circumstances." *Id.* The request should include evidence that you are eligible for deferred action under the criteria outlined in the memo. *Id.*

99. *See* Memorandum from Janet Napolitano, *supra* note 4 (emphasizing that "DHS cannot provide any assurance that relief will be granted in all cases."); *see also FAC: The Obama Administration's Deferred Action for Childhood Arrivals*, NAT'L IMMIGR. LAW CENTER, http://www.nilc.org/FAQdeferredactionyouth.html (last updated Sept. 27, 2012) (clarifying that even if an applicant meets the requirements for deferred action outlined in the memorandum, DHS still has the discretion to decide if they will grant it).

100. Memorandum from Janet Napolitano, *supra* note 4.

101. *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84.

102. *Id.*

103. *Id.* Information disclosed in a deferred action request may be used for certain purposes, but never in regards to the deportation of a family member.

the case to ICE; however if there is no evidence of those circumstances, it is against USCIS policy to refer cases to ICE.[104]

When deferred action is granted by ICE or USCIS, USCIS shall accept and may approve applications for work authorization during the two-year period of deferred action.[105] To receive work authorization, applicants must prove financial necessity.[106] DACA does not ensure that approved applicants will also be able to get a driver's license[107] or in-state tuition.[108] It is important to note that DACA is only temporary and can be terminated at any time at the agency's discretion;[109] renewal is based on the agency's discretion;[110] it does not absolve any previous or subsequent periods of unlawfulness;[111] it does not extend to the recipients' family members;[112] and it does not confer a "substantive right, immigration status[,] or pathway to citizenship."[113]

B. *Deferred Action and the Federal Government's Role in Immigration Law*

The DACA Memo concludes by stating that "[o]nly the Congress, acting through its legislative authority, can confer [sic] rights" of immigration status or citizenship, and that it is the Executive Branch's role to "'set forth policy for the exercise of discretion within the framework of the existing law '"[114] Opponents of DACA are concerned that these distinct roles have been compromised and that the Executive Branch has overstepped its authority by pushing policy that goes against the will of

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104. *Id.*

105. Memorandum from Janet Napolitano, *supra* note 4.

106. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, *avalailable at* www.uscis.gov/portal/site/uscis/menuitem (follow "Forms" hyperlink; then "I-765, Application for Employment Authorization" hyperlink) (last visited Oct. 31, 2012) (listing work authorization forms and application instructions). The requirements are such that the applicant must establish economic necessity under 8 CFR 274a.12(c)(14), (18) and 8 CFR 214.2(f).

107. *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, *supra* note 84. Driver's license eligibility requirements for immigrants vary by state. *Id.* Deferred action is listed in the federal Real ID Act as a basis of eligibility for a license, and arguments have been made in support of granting driver's licenses to deferred action recipients. *Id.* Even so, the granting of driver's licenses is not guaranteed and may take advocacy to make such request a reality for deferred action recipients. *Id.*

108. *Id.*

109. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

110. *Id.*

111. *Frequently Asked Questions*, ICE.GOV (June 15, 2012), *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/faq-deferred-action-process.pdf.

112. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

113. Memorandum from Janet Napolitano, *supra* note 4.

114. *Id.*

Congress and confers benefits it has no authority to bestow.[115] This comment will show that the Executive Branch has the authority to set forth policy that directs the exercise of prosecutorial discretion such as deferred action; however, it is not without limitations.

The federal government has supreme power over immigration.[116] Although Congress and the Executive Branch share this power, they have different roles. Under a federalist system of government, it is Congress's role to legislate for the general interest of the nation and foster harmony within the United States.[117] Because immigration is an area that requires national uniformity,[118] Congress constructs this uniformity by creating a comprehensive, regulatory scheme[119] and defining the Executive Branch's authority by statute.[120] The President and Congress then create administrative agencies, such as the Department of Homeland Security and its sub-units,[121] to promulgate and enforce those regulations. It is the

115. *See Executive Discretion*, *supra* note 16 (showing that some outspoken Republicans believe that the Obama administration has abused their executive power).

116. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (holding that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (finding that the federal government has the exclusive right to regulate immigration in order to maintain "absolute independence and security throughout its entire territory.").

117. *See* Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972) (discussing that immigration is an area of national import that requires uniformity and that Congress through its plenary power is to govern immigration issues); *see also* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555-56 (1995) (explaining that it is Congress who "legislate[s] . . . for the general interests of the union" and provides "harmony [within] the United States.").

118. *See* United States v. Hernandez-Guerrero, 963 F. Supp. 933, 1078 (S.D. Cal. 1997) (indicating that it is within Congress's exclusive authority to regulate commerce); *see also* U.S. CONST. art. 1, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations and among the several States.").

119. *See id.* (discussing that Congress regulates the immigration sphere "by passing [a] comprehensive, detailed regulatory scheme" which is "embodied in the Immigration and Nationality Act."). The act stands as its own body of law, but is also contained in the United States Code (U.S.C.) under Title 8. 8 U.S.C. "Aliens and Nationality."

120. 18A Fed. Proc., L. Ed § 45:3 (Sept. 2012) (citing *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), on reh'g, 727 F.2d 957 (11th Cir. 1984), judgment aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985)).

121. The Homeland Security Act of 2002 established the Department of Homeland Security (DHS) by combining twenty-two different federal departments and agencies into a unified and integrated cabinet agency to prevent United States' vulnerability to terrorism and enhance national security. Homeland Security Act of 2002, 6 U.S.C. §§ 111, 121 (2006); *see Creation of the Department of Homeland Security*, U.S. DHS, http://www.dhs.gov/creation-department-homeland-security (last visited Dec. 9, 2012) (describing how DHS was initially created and subsequently modified); *see also Key DHS Laws*, U.S. DHS, http:// www.dhs.gov/key-dhs-laws (last visited Dec. 9, 2012) (identifying key DHS laws

role of the Executive and its agencies, however, with authority granted by Congress, to decide exactly how to promulgate and enforce those regulations.[122]

The Department of Homeland Security is the cabinet department of the U.S. federal government created to "secure the nation from the many threats we face."[123] In order to carry out this mission, DHS delegates regulatory responsibilities to sub-units or operation components, and it oversees these components to make sure its regulatory initiatives align with this mission.[124] The U.S. Citizenship & Immigration Services, U.S. Customs & Border Protection, and U.S. Immigration & Customs Enforcement are the units that specifically assist DHS with its immigration functions.[125] These functions or services include "asylum, citizenship, and green card applications; border-related enforcement action such as border patrol and inspections; and interior enforcement activities, such as the detention and removal of noncitizens."[126]

The decision to place an undocumented immigrant in removal proceedings belongs exclusively to DHS.[127] Not all undocumented immigrants residing in the United States are placed in removal proceedings.[128] Some are removed expeditiously, while others are considered for prosecutorial discretion.[129] When DHS decides to charge a foreign-born individual with violating immigration law, the Department of Justice's Executive Office for Immigration Review (EOIR), the immigration court system, adjudicates the cases and decides whether that individual should be re-

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across different fields, from Immigration and Border Control, to Maritime and Transportation Security, to Emergency Management).

122. *See Regulations and the Rulemaking Process*, OFFICE OF INFO. & REGULATORY AFFAIRS, http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Dec. 9, 2012) (discussing Congress's process for promulgating rules which permit agencies to have the discretion and authority to issue regulations).

123. *About DHS*, U.S. DHS, http://www.dhs.gov/about-dhs (last visited Dec. 9, 2012).

124. *See Department Components*, U.S. DHS, http://www.dhs.gov/ department-components (last visited Dec. 9, 2012) (recognizing the agency's major components, including U.S. Citizenship & Immigration Services (USCIS), U.S. Coast Guard (USCG), U.S. Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), U.S. Immigration and Customs Enforcement (ICE), U.S. Secret Service (USSS), and Transportation Security Administration (TSA)).

125. *Id.*

126. Wadhia, *Sharing Secrets*, *supra* note 43, at 4.

127. *See* Cortez-Felipe v. INS, 245 F.3d 1054, 1057 (9th Cir. 2001) (reaffirming that "[t]he Attorney General has discretion regarding when and whether to initiate deportation proceedings."); *see also* Yao v. INS, 2 F.3d 317, 319 (9th Cir. 1993) (holding that "[a]s a matter of statutory authority and administrative discretion, the INS is free to decide not to commence deportation proceedings . . . .").

128. Wadhia, *Sharing Secrets*, *supra* note 43, at 5.

129. *Id.*

moved from the United States or granted relief from removal and permitted to remain in the country.[130]

DHS initiates removal proceedings by serving the individual with a charging document, called a Notice to Appear, and filing it in one of EOIR's immigration courts.[131] After receiving the Notice to Appear from DHS, the court schedules a removal hearing before an immigration judge. [132] A DHS attorney represents the government in its attempt to meet the burden of proof needed to remove the individual from the United States, while those attempting to be removed must find representation at their own expense.[133] Although immigration judges generally preside over removal proceedings, they also have the authority to oversee other types of reviews and hearings.[134] In each proceeding, review, or hearing, they make their decisions "on a case-by-case basis according to U.S. immigration law, regulations[,] and precedent decisions"[135] and may order the individual to be removed or may grant the individual relief from removal.[136] If removal is ordered, DHS may then remove the individual from the United States.[137]

When DHS decides not to "assert the full scope of the agency's enforcement authority in each and every case," it has made an act of favorable prosecutorial discretion.[138] Prosecutorial discretion is defined as "the authority of an agency or officer to decide what charges to bring

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130. *Exec. Office for Immigration Review*, U.S. DEP'T OF JUSTICE (Sept. 9, 2010), http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm. The Board of Immigration Appeals, the EOIR's appellate component, is the "highest administrative tribunal for interpreting and applying U.S. immigration law" and decides appeals of immigration judge decisions. *Id.* The Office of the Chief Administrative Hearing Officer (OCAHO) does not hear cases related to removal proceedings, but rather cases dealing with "employer sanctions for illegal hiring of unauthorized workers, document fraud, and unfair immigration-related employment practices." *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* (defining bond redetermination hearing, rescission hearing, withholding-only hearing, asylum-only hearing, credible fear review, claimed status review, and *in abstentia* hearing).

135. *Id.*

136. *Id.*

137. *Id.*

138. Wadhia, *Sharing Secrets*, *supra* note 43, at 6; *see Understanding Prosecutorial Discretion in Immigration Law*, IMMIGR. POL'Y CENTER (Sept. 9, 2011), http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law (identifying many ways prosecutorial discretion can be exercised and identifying examples of the favorable exercise of prosecutorial discretion).

and how to pursue each case."[139] It is an administrative tool that allows an enforcement agency to prioritize who they prosecute[140] in order to "conserv[e] limited enforcement resources" and also "protec[t] core American values of humanitarianism and fairness."[141]

In *Heckler v. Chaney*, the Supreme Court made it clear that an agency has absolute discretion whether or not to prosecute or enforce a case within criminal, civil, or administrative contexts.[142] Within the immigration context, prosecutorial discretion may be exercised at any stage of the enforcement process, "including, but not limited to, interrogation, arrest, charging, detention, trial[,] and removal[,]"[143] and it may take various forms, such as the government "granting a temporary stay of removal, joining in a motion to terminate removal proceedings, granting an order of supervision, cancelling a Notice to Appear, or granting deferred action."[144]

The authority of the Executive Branch to exercise prosecutorial discretion—specifically in its immigration enforcement role—has been progressively defined through immigration statutes, court decisions, and agency memorandum.[145] Because of the enormous impact enforcement actions have on undocumented immigrants and their families, it is important to develop a "sound policy on prosecutorial discretion[,]" and for it "to be administered with strong guidelines . . . ."[146]

The INS[147] relied heavily on the principles of prosecutorial discretion in the criminal context for developing its use within the scope of immigra-

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139. *Understanding Prosecutorial Discretion in Immigration Law*, IMMIGR. POL'Y CENTER (May 26, 2011), http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law.

140. *See id.* (describing prosecutorial discretion as the use of a priority system).

141. Leopold, *supra* note 80.

142. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (holding that "an 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."); *see also* Leopold, *supra* note 80 (affirmatively citing *Heckler v. Chaney*).

143. Wadhia, *Sharing Secrets*, *supra* note 43, at 7.

144. *Id.*

145. 8 U.S.C. § 1103 (2006); 8 C.F.R. § 274a.12(c)(14); (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. 103.1(a)(1)(ii) (1975); *Heckler*, 470 U.S. at 831; Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975).

146. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 278 (discussing the importance of policies involving prosecutorial discretion).

147. *See* The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. § 101), *available at* http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (establishing the Department of Homeland Security); *see also Creation of the Department of Homeland Security*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/creation-department-homeland-security (last visited Dec. 12, 2012) (describing how the Department of Homeland Security came into being); *see also Key DHS Laws*,

tion. [148] The Meissner Memo, one of the seminal authorities on prosecutorial discretion, relies on the Department of Justice's U.S. Attorney's Manual's Principles of Federal Prosecution, which provides that Federal prosecutors may use their discretion to depart from principles in the manual to administer "fair and effective law enforcement" when doing so is a substantial federal interest.[149] Over the years, INS worked towards better defining the use of prosecutorial discretion through various memoranda, and DHS has continued that tradition, which can be seen with the recent Morton Memo.[150] Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens,[151] DACA is part of a "two-pronged initiative to implement the June 2011 Morton Memo across all DHS divisions to ensure that DHS priorities remain[ ] focused on removing persons who are most dangerous to the country."[152]

Since the immigration court dockets are currently backlogged with nearly 300,000 pending cases, the first prong of the initiative is to administratively close, or remove from the active docket, all low priority cases following the priority factors set forth in the Morton Memo.[153] The second prong is to issue agency-wide guidance in accordance with the Morton Memo on how to appropriately exercise discretion in these low

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U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/key-dhs-laws (last visited Dec. 12, 2012) (detailing the laws making up the Department of Homeland Security, including the INS); *Executive Discretion*, *supra* note 16 (discussing President Obama's use of prosecutorial discretion in regards to undocumented immigrants that came to the United States as children).

148. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 268-74 (explaining that the criminal context is an important stepping-off point for prosecutorial discretion in the immigration arena).

149. *Id.*

150. *See* Memorandum from John Morton, *supra* note 70 (directing the exercise of prosecutorial discretion according to agency enforcement priorities, which are focused on promoting "security, border security, public safety, and the integrity of the immigration system[,]" and providing a list of discretionary factors agency officers may consider for case-by-case favorable exercises of discretion to terminate removal proceedings).

151. *See* Memorandum from Doris Meissner, Comm'r, INS, to Regional Directors, District Dirs., Chief Patrol Agents, and Regional and District Counsel, on Exercising Prosecutorial Discretion (Nov. 17, 2000), *available at* http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view (describing the process to be followed for prosecutorial discretion); *see also* Memorandum from John Morton, *supra* note 70 (outlining the original provisions for prosecutorial discretion including priority, which agency employees may use this discretion, and the factors to be considered).

152. *Understanding Prosecutorial Discretion in Immigration Law*, *supra* note 139.

153. *Id.*

priority cases.[154] According to the Morton Memo factors, DREAMers are a low priority.[155] The DACA Memo provides agency-wide guidance in accordance with the Morton Memo to exercise prosecutorial discretion as deferred action for DREAMers who meet certain criteria.[156] DHS, while declining to grant the deferral of removal of DREAMers across the board, has clearly stated that CBP, ICE, and USCIS may defer removal on a case-by-case basis.[157]

Deferred action is one way in which DHS may exercise prosecutorial discretion. It is an act of administrative convenience that allows the government to prioritize their enforcement cases to use resources more efficiently and address humanitarian concerns.[158] When a noncitizen is granted deferred action, DHS is deciding to refrain from taking enforcement action against the individual for a specific period of time.[159] The agency's authority to defer removal action is "founded in DHS's overall authority for the administration and enforcement of the immigration law . . . regulations . . . and [the] legacy of the INS Operations Instructions."[160]

The use of deferred action in immigration was introduced in 1975 in *Lennon v. INS*.[161] This subsequently lead to the creation of deferred action under the Operations Instructions (O.I.).[162] Although the O.I. was

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154. *Id.*

155. DREAMers meet several positive factors outlined in the Morton Memo, including: they are minors, have been present in the United States since childhood, have limited ties to their home country, and they have pursued or are pursuing an education, and/or have served in the military. Memorandum from John Morton, *supra* note 70.

156. *See generally id.* (citing the original memo that outlined prosecutorial discretion).

157. *Understanding Prosecutorial Discretion in Immigration Law*, *supra* note 139.

158. Leopold, *supra* note 80.

159. *Id.*

160. *Id.*

161. 527 F.2d 187, 195 (2d Cir. 1975) (holding that selective prosecution may be administered to terminate deportation). The Lennon lawsuit revealed the use of prosecutorial discretion and the "non-priority" program. Lennon, who believed he was being deported for political reasons (although also having overstayed his visa), requested for non-priority status. *Id.* "Lennon contend[ed] that he was singled out for deportation because of his political activities and beliefs." *Id.* Before the Lennon lawsuit, the non-priority program (now deferred action) was available under the INS "Operations Instructions," but the information was private. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73. Due to the Lennon lawsuit, INS made information about the non-priority program public and issued guidance on deferred action. *Id.* at 248.

162. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 248 (discussing the evolution of deferred action). The O.I. Factors for deferred action consider:

1) advanced or tender age;
2) many years' presence in the United States;
3) physical or mental condition requiring care or treatment in the United States;

rescinded in 1996 with the creation of IIRIRA, there was no intention by the agency to eliminate deferred action relief, and the agency has continued to utilize the factors outlined in the O.I. in various agency memoranda, directing the agency's use of deferred action.[163] Deferred action is typically administered on a case-by-case basis; DHS however, has designated certain categories of individuals eligible for deferred action, including battered immigrants, nonimmigrant visa applicants, academic students affected by Hurricane Katrina, and widows and widowers of U.S. citizens.[164] DACA, despite directly targeting DREAMers as a category, is unlike the above-mentioned categories, in that it reviews each DREAMer on a case-by-case basis.

Deferred action as an exercise of prosecutorial discretion is a flexible tool that may be legally utilized by the Executive Branch and DHS as a means to affect change when Congress is gridlocked and immigration legislation is failing. However, deferred action has limitations. First, it only provides temporary relief.[165] Second, it can be terminated at any time pursuant to the agency's discretion.[166] Third, deferred action does not confer any legal immigration status upon noncitizens.[167] Lastly, discretionary agency decisions, such as deferred action, have limited judicial

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4) family situation in the United States effect of expulsion;

5) criminal, immoral or subversive activities or affiliations recent conduct. *Id.*

The governing section stated:

(ii) Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category."

Id.

163. *Id.* at 245. Some of the 2000 Meissner Memo factors to be considered in making prosecutorial decisions like deferred action include: immigration status of the applicant; length of residence in the United States; criminal history and circumstances surrounding such history; humanitarian concerns such as family ties, tender age at the time of entry into the United States, special medical conditions and circumstances in the country to which the beneficiary could be potentially removed; likelihood of being removed; current or past cooperation with law enforcement; service in the U.S. military; immigration history. Memorandum from Doris Meissner, *supra* note 151. The 2011 Morton Memo is unique because it explains who within ICE has authority to exercise prosecutorial discretion and the role of ICE attorneys to exercise prosecutorial discretion in any immigration removal proceeding before the EOIR. Memorandum from John Morton, *supra* note 70.

164. Leopold, *supra* note 80.

165. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

166. Rafael Carranza, *Deferred Action Applications Comes with Risks: Immigration* Attorney, VALLEYCENTRAL (Aug. 19, 2012, 10:52 PM), http://www.valleycentral.com/news/story.aspx?id=790375.

167. *Deferred Action for Childhood Arrivals: A Q&A Guide*, *supra* note 6.

review.[168] These limitations present significant risks for DACA recipients and do not promote a stable nor secure society.

First, because deferred action is only temporary, it makes it difficult for its recipients to plan ahead for the future.[169] For example, a DACA recipient who works really hard in school and plans to go to college has no security that her deferred action will be renewed; a recent college graduate and her potential employers have no security that her deferred action will be renewed; and at no point can a DACA recipient have complete assurance that in the midst of the deferred action period that DHS will not change its mind, end deferred action, and commence removal proceedings. This affects the lives of not only the recipient, but also her teachers, family, school friends, and employer. This instability does not provide security for DACA recipients; it does not promote economic growth; and it does not encourage a secure and stable society.

Second, since deferred action does not confer any legal immigration status upon the noncitizen,[170] DACA recipients do not have access to the benefits of citizenship, such as voting, bringing family members to the United States, traveling, having social security benefits, health care, or a driver's license, becoming eligible for federal jobs, or becoming an elected official.[171] This prevents them from being able to fully participate in society; a society in which many of them have much to offer, consider their home, and to whom they want to give their full allegiance.[172] Because DACA confers no substantive right, immigration status, or pathway

168. *Heckler* held that discretionary decisions made by an agency are presumptively unreviewable by the courts because of the unknown factors considered by the agency. Heckler v. Chaney, 470 U.S. 821, 832 (1985). This unreviewable presumption has been advanced by *Reno v. AADC*, holding that "an [undocumented immigrant] in this country has no constitutional right to assert selective enforcement as [a] defense against deportation[,]" and the INA Section 242(g) prevents judicial review over the agency's discretionary decision to "execute removal orders against any alien." Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 288–89.

169. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 298 (stating that large populations of undocumented aliens have been allowed to remain in the United States in "limbo" and are vulnerable to removal at any time); Carranza, *supra* note 166 (stating that deferred action is discretionary and can be terminated at any time by any administration).

170. Memorandum from Janet Napolitano, *supra* note 4.

171. USCIS, A GUIDE TO NATURALIZATION 3, *available at* http://www.uscis.gov/files/article/M-476.pdf (last visited Oct. 31, 2012); *see The Benefits of Citizenship*, MARSHALL ADULT EDUC., http://resources.marshalladulteducation.org/citizenship.htm (last visited Oct. 31, 2012) (discussing the benefits of citizenship and the importance of each benefit).

172. *See* USCIS, A GUIDE TO NATURALIZATION, *supra* note 171 (reiterating the significant benefits after gaining American citizenship).

to citizenship, it is prevented from being called amnesty.[173] However, this "no benefit" clause fails to consider that work authorization is a benefit.[174] Once the government decides not to remove an individual, it is in their best interest to let those who have financial needs have the means to provide for themselves and not become a public charge.[175] As a benefit, work authorization should be given uniformly and according to clear standards that may be challenged when one who appears to possess similar criteria should be eligible or in cases where denial seems arbitrary.[176]

Third, the government has consistently held that there is no judicial review of an agency's discretionary decisions. [177] This lack of judicial review over deferred action presents serious concerns about uniformity, equality, and responsibility.[178] Although the memorandum provides guidance on the exercise of deferred action, it is still discretionary, and not mandatory that agency officers apply it in every case.[179] Because deferred action is discretionary, a major concern is what responsibility agency actors have to follow the directives.[180] When a directive is not mandatory or required, its application may be applied inconsistently with the established criteria, and this causes concern that officers are making decisions based on national origin or race.[181] Without judicial review,[182] there is no accountability that the agency as a whole is upholding its directives consistently and equally. This is necessary for establishing a clear standard that its recipients and their lawyers may rely on. When people cannot predict how and when a certain directive will apply, this presents significant risks for its potential recipients because it does not provide stability or security.

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173. *Why Deferred Action is Not Amnesty*, IMMIGR. IMPACT (Aug. 13, 2012), http://immigrationimpact.com/2012/08/13/why-deferred-action-is-not-amnesty/.

174. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 293-94.

175. *See id.* at 295 (stating that those individuals who are eligible for deferred action are eligible for work authorization benefits and these benefits should be extended to those who reside here indefinitely because of favorable prosecutorial discretion).

176. *Id.* at 293-94.

177. *See* Reno v. AADC, 525 U.S. 471, 485, (1999) (stating that courts have little to no review over an agency's discretionary decision).

178. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 286–91 (discussing lack of judicial review for deferred action).

179. *Id.* at 292.

180. *Id.* at 287.

181. *See id.* at 286-91 (discussing generally how immigration officials have the discretion to deport groups or individuals without having to reveal why they are being deported).

182. *Id.* Reluctance to enforce judicial review over prosecutorial discretion decisions dates back to the nineteenth century. *Id.* "[V]irtual immunity" from judicial review thus grants federal agents a boundless and broad discretion applied to their decisions. *Id.*

The Executive Branch has broad authority over immigration matters[183] and has various tools that it may exercise to affect immigration policy and enforcement. Deferred action is one of these tools. It allows agencies to flexibly direct policy as society changes before the law changes. Although the Executive Branch had the legal authority to enact DACA, the limitations of deferred action being temporary, discretionary, not providing status, and not being subject to judicial review opens DACA recipients to significant risk. The risks of deferred action are not conclusive, but are intensified by DACA being a non-legislative directive rather than a legislative reform.

IV. The Use of Non-Legislative Rules and Their Effects on DACA Applicants

Although the Executive has the authority to grant administrative and humanitarian relief through deferred action, the controversy surrounding DACA is whether it "circumvent[ed] Congress and [abused] [E]xecutive [B]ranch authority to allow illegal immigrants to remain in the United States"[184] by creating a new law or whether it is merely an "extension and application of current law to contemporary national needs, values and priorities."[185] DACA is not a new law; it is a rule that the Executive may use to "implement, interpret, or prescribe law or policy or describ[e] the organization, procedure, or practice requirements of [the] agency."[186]

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183. 3A Am. Jur. 2d Aliens and Citizens § 287 (2012).

184. Wadhia, *Sharing Secrets*, *supra* note 43, at 24. Wadhia cites a letter from Lamar Smith in which he is expressing his concerns that the agency's use of prosecutorial discretion and deferred action circumvents Congress. *Id.* The HALT (Hinder the Administration's Legalization Temptation) Act is a congressional bill that was introduced in 2011 to prevent DHS from granting deferred action and to "suspend" the handful of discretionary remedies available under the immigration laws until January 21, 2013 when the bill would expire and Obama's first presidential term would come to an end. S. 1380, 112th Cong. (2011). However, there are others who oppose the HALT Act and who are in support of the President's use of deferred action as an exercise of prosecutorial discretion and want to preserve the few discretionary remedies available under the immigration laws. *See* Letter to Hiroshi Motomura, Susan Westerberg Prager Professor of Law, UCLA Law School to the President of the United States, on Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries (May 28, 2012), *available at* http://www.nilc.org/document.html?id=754 (showing that the Executive's call for deferred action is legal and not completely opposed).

185. *Seth Hoy,* President Obama Issued a Directive, Not an 'Executive Order' or 'New Law', Immigr. Impact (June 19, 2012), http://www.immigrationimpact.com/2012/06/19/president-obama-issued-a-memo-not-an-executive-order/.

186. 5 U.S.C. § 551(4) (2006); *see* Vanessa K. Burrows & Todd Garvey, Cong. Research Serv., A Brief Overview of Rulemaking and Judicial Review 1 (Jan. 4, 2011), *available at* http://www.wise-intern.org/orientation/documents/CRSrulemakingCB.pdf (stating that agencies may promulgate rules).

However, the agency must follow the procedures for rulemaking established by the Administrative Procedure Act (APA).[187]

The memorandum, "Deferred Action for Childhood Arrivals (DACA)," has been mislabeled several different things, including a presidential executive order and a presidential directive.[188] An executive order[189] is an official document signed by the President, numbered consecutively, and appears in the Federal Register and the Code of Federal Regulations.[190] The order or directive is issued by the President "to direct or instruct the actions of executive agencies or government officials, or to set policies for the Executive Branch to follow."[191] Executive orders are not subject to the restrictions of the Administrative Procedure Act[192] but have the same effect of a statute, essentially making it a "law of the land in the same manner as congressional legislation or a judicial decision."[193]

A presidential directive is substantively the same as an executive order and has the same legal effectiveness.[194] The difference is that "a presidential directive is not styled as an executive order . . . [and] would not

187. *See* VANESSA K. BURROWS & TODD GARVEY, CONG. RESEARCH SERV., A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (Jan. 4, 2011), *available at* http://www.wise-intern.org/orientation/documents/CRSrulemakingCB.pdf (describing the general provisions of the APA); *see also* 5 U.S.C. § 553 (2006)(outlining the rule making process).

188. *See Hoy, supra* note 185 (showing that there is a political debate over whether the memorandum was an executive order or merely a directive).

189. The authority for a President to use an executive order is found under Article II of the Constitution. U.S. CONST. art. II § 1, cl. 1 (stating that "[t]he executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II § 3, cl. 5 (stating that the President "shall take care that the laws be faithfully executed."). Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (overturning a presidential executive order and holding that executive orders are not to make new laws but further a law put forth by Congress or the Constitution).

190. *Executive Orders FAQ's*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/executive-orders/about.html (last visited Oct. 28, 2012).

191. *See* BLACK'S LAW DICTIONARY 651 (9th ed. 2009) (stating the definition of executive order as, "[a]n order issued by or on behalf of the President, usu. intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow.").

192. John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 342 (2010).

193. *Id.* at 348. Executive orders provide presidents with the means of pursuing their objectives quickly and without restrictions but that still have the effect of law. *Id.*

194. Memorandum from Randolph D. Moss, Acting Assistant Att'y Gen., for the Counsel to the President, on Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order (Jan. 29, 2000), *available at* http://www.justice.gov/olc/predirective.htm.

automatically lapse upon a change of administration . . . ."[195] A presidential directive is issued by the Office of the Chief Executive and "[may] be published in the Federal Register, regardless of how it is styled."[196] DACA is neither an executive order nor a presidential directive because it was not directly administered by the President, and it has not been published on the Federal Register as an Executive Order.[197]

Although DACA was submitted to the Federal Register on August 16, 2012[198] and went through the notice and comment process until it closed on September 17, 2012,[199] DACA has not been published and has not become a final rule. These procedures are outlined in the Administrative Procedure Act for rulemaking.[200] The issue is whether DACA is a legislative rule or a non-legislative rule.[201] The distinction is important because it impacts DACA applicants and recipients.

There are various methods for promulgating rules, and the method chosen by the agency affects the "procedures the agency is required to undertake and the deference with which a reviewing court will accord the rule."[202] The most common procedure for promulgating legislative rules

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195. *Id.*

196. *Id.*

197. *See 2012 Executive Orders Disposition Tables: Barack Obama - 2012*, NAT'L ARCHIVES, http://www.archives.gov/federal-register/executive-orders/2012.html (listing all Executive Orders issued in 2012, none of which is DACA).

198. DHS and USCIS submitted an emergency information collection request on August 16, 2012 to the Federal Register. *Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D, New Information Collection; Emergency Submission to the Office of Management and Budget; Comment Request*, FED. REGISTER: THE DAILY JOURNAL OF THE [U.S.] GOV'T, *available at* http://www.federalregister.gov/articles/2012/08/16/2012-20247/agency-information-collection-activities-consideration-of-deferred-action-for-childhood-arrivals. *See Request for Deferred Action for Childhood Arrivals, Form I-821D*, REGULATIONS.GOV., http://www.regulations.gov/#!docketBrowser;dct=PS;rpp=100;so=DESC;sb=docId;po=0;D=USCIS-2012-0012 (last visited Feb. 27, 2013) (including all comments made on Deferred Action for Childhood Arrivals). *See generally* A GUIDE TO THE RULEMAKING PROCESS, FEDERALREGISTER.GOV. (2011), http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (discussing final orders).

199. All comments are posted, without change to the Federal eRulemaking Portal. Search results for "deferred action for childhood arrivals" then select "open folder" for Agency Information Collection Activities: Consideration of Deferred Action for Childhood Arrivals, Form I-821D; Revision of a currently approved collection. REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=USCIS-2012-0012 (last visited Feb. 27, 2013).

200. Administrative Procedure Act, 5 U.S.C. § 553 (2006).

201. *See Deferred Action for Childhood Arrivals*, IMMIGR. EQUALITY, http://immigrationequality.org/issues/immigration-basics/daca/ (last visited Dec. 12, 2012) (clarifying the difference between DACA and a legislative measure, such as the DREAM Act).

202. BURROWS & GARVEY, *supra* note 187.

is through the informal rulemaking process.[203] This method requires a notice-and-comment procedure which ensures that the public is informed of the proposed rules before they take effect and have an opportunity to comment on the rule's content.[204] Adequate notice is achieved by publishing a proposed rule in the Federal Register and providing "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[205] The comment period provides the occasion for persons to comment on the content of the proposed rule.[206] Once the comment period closes, the agency will analyze and incorporate the relevant comments and then respond with a "concise general statement" of the "basis and purpose" of the final rule.[207] The final rule, along with the general statement, is then published in the Federal Register and finally codified in the Code of Federal Regulations.[208] The advantages of legislative rules are that they are open to judicial review and have the force and effect of law, which makes sure the agency does not exceed their rulemaking authority and binds them to their decisions.

Since DACA has not become a published rule or a final legislative rule yet,[209] it is not privy to judicial review and the full force and effect of law. Instead, DACA is a non-legislative rule. Non-legislative rules are "interpretative rules [or] [g]eneral statements of policy"[210] that "allow agencies to efficiently perform routine[ ] duties, while encouraging agencies to provide the public with timely policy guidance . . . ."[211] The DHS memorandum[212] for DACA is a policy statement. Policy statements are "issued by an agency to advise the public prospectively of the manner in which

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203. Administrative Procedure Act, 5 U.S.C. § 553 (2006).

204. *Id.* § 553(b)1–(c); *see* BURROWS & GARVEY, *supra* note 187 (discussing the informal rulemaking process).

205. BURROWS & GARVEY, *supra* note 187 (citing Forester v. Consumer Product Safety Commission, 559 F.2d 774, 787 (D.C. Cir. 1977)).

206. Administrative Procedure Act, 5 U.S.C. § 553(c) (2006).

207. *Id.*

208. *Id.* § 553(d)(1)–(3). *See* A GUIDE TO THE RULEMAKING PROCESS, FEDERALREGISTER.GOV. (2011), http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (discussing how final rules are published, go into effect, and are integrated into the Code of Federal Regulations).

209. Search results for "deferred action for childhood arrivals," FEDERALREGISTER.GOV., http://www.federalregister.gov/articles/search?commit=Go&conditions%5Bterm%5D=deferred+action+for+childhood+arrivals&conditions%5Btype%5D=RULE (last visited Feb. 27, 2013) (listing of final legislative rules, which does not include Deferred Action for Childhood Arrivals).

210. BURROWS & GARVEY, *supra* note 187, at 7.

211. *Id.*

212. A memorandum is "a communication that contains directive, advisory, or informative matter." MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/memorandum (last visited Oct. 28, 2012).

the agency proposes to exercise a discretionary power" like deferred action.[213] Generally, non-legislative rules "[do not] engage in the lengthy, [and sometimes], burdensome notice-and-comment process."[214] However, a non-legislative rule "cannot go beyond the text of a statute" and substantively change the existing law "without first providing [adequate] notice and comment."[215] Although this provides the agency with flexibility, non-legislative rules do not carry the full force and effect of law.

In addition to DACA not procedurally meeting the requirements of a legislative rule, deferred action has not historically been recognized as a legislative rule.[216] Most courts have held that the INS's "Operating Instructions,"[217] which issued guidance on deferred action, was not a legislative rule subject to the notice-and-comment requirement but "instead operate[d] as an internal guideline or general statement of policy."[218] The one exception was the 9th Circuit in *Nicolas v. INS* which held that the Operations Instructions (O.I.) operated more like "a substantive provision for relief than an internal procedural guideline . . . [for] administrative convenience."[219] INS later modified the O.I. to clarify that deferred action is a discretionary act and not a formal benefit.[220] If the O.I. was not considered a legislative rule, which was more cohesive and structured than the string of memos following its abolishment, then DACA as a single memorandum is not likely a legislative rule either. Also, DACA is distinguishable from the Ninth Circuit's holding in *Nicolas v. INS* in that it specifically characterizes itself as an administrative convenience to prioritize cases and efficiently utilize limited agency enforcement resources rather than a substantive benefit.[221]

Second, INS proposed submitting deferred action to the rulemaking process in 1979, but abandoned the effort in January of 1981.[222] The rules

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213. BURROWS & GARVEY, *supra* note 187, at 7.

214. *Id.*

215. *Id.*

216. *See* Shoba S. Wadhia, *Deferred Action in Immigration Law: The Next Generation*, IMMIGR. PROF. BLOG (June 28, 2012), http://lawprofessors.typepad.com/immigration/2012/06/deferred-action-in-immigration-law-the-next-generation-by-.html (discussing the history of prosecutorial discretion, a.k.a. deferred action).

217. INS, Operating Instructions, O.I. 103.1 (a)(1)(ii) (1975).

218. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 282.

219. *Id.* at 249–50.

220. *Id.* at 282.

221. *See* Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979) (finding that the O.I. operated like a substantive benefit).

222. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 284-85 (noting that INS does not want to restrict the use of deferred action to a rule because it would be impossible to foresee all possible factors).

would have amended Chapter 1 of Title 8 of the Code of Federal Regulations, identified factors for INS officers and employees to consider when exercising discretionary benefits, and required a favorable exercise of discretion in the absence of adverse factors.[223] However, INS feared the rules would "eliminate discretionary powers by converting [them] into a body of law."[224] Therefore, the proposed rules were cancelled in order to prevent "hampering the free exercise of discretionary authority" by subjecting the flexibility of deferred action to a rigid set of factors that might cause discretionary abuse and administrative paralysis.[225]

DACA, therefore, is a non-legislative rule for procedural and historical reasons. First, although it has gone through the notice and comment process it has not met the requirements of a legislative rule because it has not been published on the Federal Register, and it has not become a final rule. Second, historically the Operations Instructions—a more cohesive and structured policy than the current memorandums—were not held to be a legislative rule, and INS abandoned submitting deferred action to the rulemaking process in order to maintain its flexible nature.

Although the Executive has the authority to use non-legislative means for directing policy regarding discretionary powers like deferred action which provide agencies the ability to guide policy in a flexible and timely way, there are limitations to non-legislative rules that open DACA recipients to vulnerability and risk. First, non-legislative rules do not have the force and effect of law and are therefore "less binding and potentially more arbitrary" which necessarily creates significant risk for those it aims to protect.[226] Second, when deferred action is not subject to the notice and comment procedure, DACA recipients have no assurance that the government will be bound by its own directive.[227] DHS's failure to recognize deferred action as a rule has made noncitizen grantees vulnerable to removal at a future date while also alienating a number of qualified noncitizens from having knowledge about deferred action.[228] Third, the APA provides comprehensive judicial review of agency actions for legislative rules; deferred action however, falls into the "exception" category

223. *Id.*

224. *Id.* at 285.

225. *Id.* at 284.

226. *Id.* at 281.

227. *See* Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 283 (discussing the need to subject deferred action to the notice and comment process so undocumented immigrants can have assurance that the government will be bound to their directives).

228. *See id.* at 286 (explaining the limits that not recognizing deferred action as a legislative rule has on undocumented immigrants).

and is not privy to judicial review.[229] The APA presumption of judicial review does not apply when statutes preclude judicial review or where agency action is committed to agency discretion by law. The exercise of deferred action has been committed to DHS by statute, and courts have consistently held that deferred action is not open to judicial review.[230] Lastly, there is concern that DACA has gone "beyond the text of a statute" and has substantively changed the existing law without following the necessary procedures. DACA has been challenged by ICE agents who have sued DHS claiming that their superiors have prevented them from following the law by "requiring" them to administer deferred action rather than them implement it on a discretionary basis.[231] The court's ruling could have a significant effect on the future of DACA.

The culmination of these risks encourages insecurity and instability because DACA recipients have no reliance that the directive will be upheld in the future or that it has any binding effect. This raises great risk when DACA requires its applicants to come out of the shadows and submit their personal information, yet provides limited assurance that the initiative can be depended upon. If DACA is cancelled, either because it is found unconstitutional or because of a change in administrations, there is the fear that DHS will use that information to round-up and remove them. The non-binding and potentially temporary characteristics of non-legislative rules and deferred action present significant risks for DREAMers seeking to find hope and protection in DACA.

V. Conclusion: What To Do With DACA

Although the Executive Branch has the legal authority to exercise deferred action within their prosecutorial discretion and may implement that policy by non-legislative means, DACA is a policy that creates risk, vulnerability, and instability. The end goal of relief for DREAMers should be to provide relief that is secure and stable so that they can plan for their future, live a life without fear, know that their hard work will be of value, and that allows them to be a dependable player in society. It is also relief that considers the issues facing the immigration system by not encouraging future illegal immigration and upholds the integrity of a system where applicants have been waiting in line for years to legally come

229. Burrows & Garvey, *supra* note 187, at 9.

230. INA § 242(g); Reno v. AADC, 525 U.S. 471, 471 (1999); Heckler v. Chaney, 470 U.S. 821, 831 (1985); Chevron U.S.A. Inc. v. Resources Defense Council, Inc., 467 U.S. 837, 837 (1984).

231. *See* ICE Agents v. Napolitano, Complaint, Civil Action No. 3:12-CV- 03247-O (U.S. Dist. Ct. Dallas, 2012), *amended* Oct. 10, 2012; *available at* http://www.numbersusa.com/content/files/Amended_Complaint.pdf (outlining the suit brought against the U.S. government to declare the DACA directive unlawful and unconstitutional).

to the United States.[232] DACA is not that type of relief. It is a means to an end that misses the bull's-eye. It is a unilateral policy that ignores the political environment, further divides the parties, and is only a Band-Aid remedy to the deeper problems that constitute the broken immigration system. This mediocre form of relief opens R.H. and other DREAMers to significant risk, instability, and vulnerability.

The problem with DACA is not whether it can be done, but whether it should be done. This Comment has discussed that 1) Congress has provided for the use of deferred action in the area of immigration, and that it is a form of relief that has been used consistently since the 1970s to consider humanitarian values and more efficiently use agency resources;[233] and 2) that DHS has been given rulemaking powers to flexibly and efficiently direct policy such as the use of deferred action.[234] Therefore, the Executive Branch may legally use memoranda, such as DACA, to direct the agency to exercise their prosecutorial discretion as deferred action when enforcing the law against undocumented individuals who came to the United States as children. However, because of the limitations of deferred action and non-legislative rules, the DACA initiative is a policy that creates risk and perpetuates instability, insecurity, and vulnerability.

The risks of DACA are that it only provides temporary relief; it is discretionary and can be terminated at any time; it does not confer any legal immigration status; it has limited judicial review; it does not have the force and effect of law; it is not binding; and its future viability is questionable.[235] About 180,000 DREAMers have applied for deferred action, and only 4,591 of those requests were approved as of October 2012.[236] In order to prevent current and future recipients and applicants, like R.H., from the risks that DACA presents, DHS should publish "Deferred Action for Childhood Arrivals" on the Federal Register and use the informal rulemaking procedures of Section 553 of the APA to make it a final rule.[237] This would allow for an inclusive discussion on the merits of the proposed rule, better educate the public on its merits, and provide the

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232. *See* IMMIGRATION POLICY CENTER, BREAKING DOWN THE PROBLEMS, *supra* note 11 (explaining the failures and limitations of the current immigration system).

233. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (noting that Congress had the plenary power to decide the outcome of immigration issues within the United States).

234. *See* BURROWS & GARVEY, *supra* note 187 (proposing that federal agencies have broad discretion to implement various policies and rules).

235. *Id.* at 9.

236. *Deferred Action for Childhood Arrivals Process*, USCIS.GOV (Oct. 2012), *available at* http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACAOct2012.pdf.

237. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, *supra* note 73, at 279.

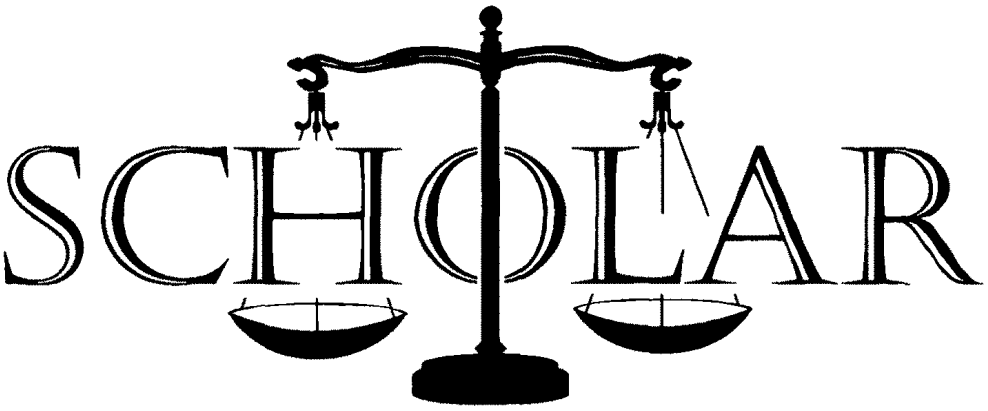
opportunity for judicial review.[238] It would also provide greater oversight, accountability, and transparency to make sure that immigration officers are implementing deferred action consistently and judiciously.[239]

Legislators, politicians, lawyers and immigration advocates should continue working for DREAM Act legislative reform because that is the method that provides the most stability and security for DREAMers.[240] This will require cooperation and compromise that must be made on both sides. However, these methods may take a long time. Therefore, in the interim DACA is a legitimate form of relief that is available and which DREAMers should consider. However, it is not an option that is without risks. Accordingly, it is important that applicants and their lawyers are knowledgeable of the application process and fully aware of the risks deferred action presents. At the end of the day, the decision to take on the risks of applying belongs to the applicant and his or her family.

238. *Id.* at 265.

239. *Id.*

240. *See* Barron, *supra* note 45, at 647–48 (highlighting the importance of bipartisan cooperation to ensure the DREAM Act's future); Humberto Sanchez, *Dick Durbin Open to Working With Marco Rubio on DREAM Act*, ROLL CALL (Apr. 26, 2012, 3:48 PM), http://www.rollcall.com/news/dick_durbin_open_to_working_with_marco_rubio_on_dream_act-214136-1.html (noting a Democratic legislator's plea for bipartisan support in order to pass the DREAM Act); *The DREAM Act*, IMMIGR. POL'Y CENTER, http://www.immigrationpolicy.org/just-facts/dream-act (last updated May 18, 2011) ("For the DREAM Act to pass, it would likely need the support of both the moderate Republicans who supported it in the past, as well as the Democrats . . . .").



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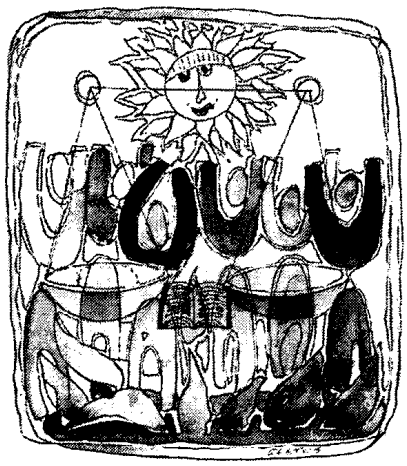

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The articles published in *The Scholar* will be building blocks for an understanding of the issues that face all of us today. These building blocks will form bridges: bridges to bring together all the members in our society, bridges to connect all groups that comprise our community, and bridges to access self-discovery and an understanding of the 'other.'

We wish to add to the existing discourse on the role of the law and hegemony in the lives and identities of minorities. We plan for the work of this journal to be transformative: it will educate, inform, and enlighten those who participate. We are creating an environment that will allow everyone to learn, to teach, to share, to work together, and to contribute to the legal and educational communities.

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