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# HUDDLED MASSES YEARNING TO BREATHE FREE: PROSECUTORIAL DISCRETION AND IMMIGRATION LAW

*Justin A. Miller*<sup>1</sup>

## INTRODUCTION

**T**here are currently more than 11.4 million illegal immigrants trapped in prosecutorial limbo in the United States.<sup>2</sup> They are neither fully citizen nor fully alien; while they pay taxes, they are ineligible for many of the services they help support.<sup>3</sup> In some cases they can serve within the military and risk their lives for

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2 *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RESEARCH CENTER: HISPANIC TRENDS [HTTP://WWW.PEWHISPANIC.ORG/2014/12/11/UNAUTHORIZED-TRENDS/](http://www.pewhispanic.org/2014/12/11/unauthorized-trends/) (last visited Oct. 28, 2015).

3 *Unauthorized Immigrants Pay Taxes, Too*, AMERICAN IMMIGRATION COUNCIL <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-pay-taxes-too>. *Immigrants Are Makers, Not Takers*, CENTER FOR AMERICAN PROGRESS <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers/>

a country to which they do not legally belong.<sup>4</sup> They represent families and felons, workers and idlers, sincere and deceitful—in short, a comprehensive swath of humanity.

Over the course of United States history, various federal agencies have been tasked with enforcing the laws governing these immigrants. The legality of a federal agency establishing broad generalizations or prioritizations of enforcement has been established in the judicial record.<sup>5</sup> Despite this prioritization, implementation

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4 *In Death, A Marine Gets His Life Wife*, TIME <http://content.time.com/time/world/article/0,8599,438626,00.html> *Military to Allow Undocumented Immigrants to Serve*, USA TODAY <http://www.usatoday.com/story/news/nation/2014/09/25/policy-to-allow-undocumented-immigrants-in-military/16225135/> Lance Corporal José Gutierrez was the first casualty of the War on Terror in Iraq. He fled his homeland of Guatemala as a young child and sought asylum in the United States at the age of 16. He joined the Marine Corp, hoping for a path to citizenship in order to bring his sister (still in Guatemala) to the United States. He was killed when his unit came under fire in the Iraqi port of Umm Qasr.

5 *Wayte v. United States*, 470 U.S. 598, 607 (1985) states that “when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President’s constitutional duty to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, and it reflects a recognition that the “faithful[.]” execution of the law does not necessarily entail “act[ing] against each technical violation of the statute” that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to “balanc[e] . . . a number of factors which are peculiarly within its expertise.” *Id.* These factors include “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.” *Id.* at 831; cf. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan”

of prosecutorial discretion must be on a case-by-case basis.<sup>6</sup> In addition, prosecutorial discretion cannot be “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,”<sup>7</sup> a standard that has been affirmed in subsequent cases.<sup>8</sup> While governmental agencies must prioritize their respective efforts and resources, they are not given license to exercise that discretion at will.

Thus while an agency may establish guidelines for exercising its discretion to prosecute, it may neither be so specific nor so broad in those guidelines so as to specifically target a group favorably or unfavorably in an immigration decision. Paradoxically, the agency’s guidelines must allow for decisions on a case-by-case basis while assuring that cases with similar merits be decided similarly. It requires balancing the mercy of individuality before the court with the justice of equality before the law.

These case-by-case decisions regarding the enforcement of law allow executive officials to determine who will be accountable for breaking the law and who will be overlooked. The nebulous nature of discretion thus makes it a target for the ire of the misinformed masses, even those that should know better.<sup>9</sup> Despite the enormous power granted to executive agencies through discretion, this power should be controlled, not eliminated.

The power of discretion is a necessary element of immigration law, but the ambiguity which currently plagues the immigration system causes many problems for officials, innocent bystanders, and the accused. Greater clarity is needed to resolve the lack of coordination between federal and state efforts to influence immigration reform. Once the power of discretion is clearly defined and understood between the federal and state governments, it will allow for a “tear

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6 *The Constitutional Limits of Prosecutorial Discretion*, THE WASHINGTON POST <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/22/the-constitutional-limits-of-prosecutorial-discretion/>

7 *Oyler v. Boles*, 368 U.S. 448 (1962).

8 *Reno v. American-Arab Anti-Discrimination Comm.* (97-1252) 525 U.S. 471 (1999) 119 F.3d 1367, vacated and remanded.

9 See Steve King Tweet @SteveKingIA 2:58 PM 20 Jan 2015.

in the eye of the law.”<sup>10</sup> The sympathetic understanding that discretion introduces into the immigration system permits a sympathetic glance for the unfortunate so that Liberty can continue to cry out:

Give me your tired, your poor,  
 Your huddled masses yearning to breathe free,  
 The wretched refuse of your teeming shore.  
 Send these, the homeless, tempest-tost to me,  
 I lift my lamp beside the golden door!<sup>11</sup>

That golden door of the American dream has needed very little oil on its hinges over the course of American history as it has constantly widened or narrowed in the face of oncoming immigrants.

### BACKGROUND

The greatest broadening swing of the immigration door in recent history was when President Barack Obama issued a presidential memorandum on immigration that would attempt to focus on deporting “felons not families.”<sup>12</sup> It would attempt to do this by enlarging the Deferred Action for Childhood Arrivals (DACA) program in what has been termed the Deferred Action for Parents of Americans (DAPA). The original program was focused on protecting from deportation young immigrants that had been brought to the United

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10 Victor Hugo, *LES MISERABLES* 867 (Isabel F. Hapgood trans., Thomas Y. Crowell & Co. 1887).

11 Emma Lazarus, *The New Colossus* (1883), <http://www.loc.gov/exhibits/haventohome/haven-century.html#obj1>.

12 *Executive Actions on Immigration*, U.S. DEP’T OF HOMELAND SEC. (Apr. 15, 2015).

States before the age of sixteen.<sup>13</sup> This more recent executive order extended protection to parents of U.S. citizens in addition to extending that protection to spouses and children.<sup>14</sup> These Executive Orders operate on the principle of prosecutorial discretion. Discretion does not excuse the violation of the law, nor does it rewrite the law itself; instead, the Executive Branch has established a set of priorities for prosecution of immigration violations.<sup>15</sup>

Understanding the shifts in priority from the Executive Branch requires understanding the history of American immigration, which is a balance between many competing interests. Immigrants see a new and better opportunity for making a living. Other immigrants come to reunite with other immigrant family members who are

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13 *See Executive Actions on Immigration*, U.S. DEP'T OF HOMELAND SEC. (Apr. 15, 2015), for a complete listing of the original DACA guidelines. In part, they read that an individual requesting deferred action requires the following conditions to be met:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Had no lawful status on June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

14 *See Executive Actions on Immigration*, U.S. DEP'T OF HOMELAND SEC. (Apr. 15, 2015), [HTTP://WWW.USCIS.GOV/IMMIGRATIONACTION](http://www.uscis.gov/immigrationaction).

15 *See United States v. Batchelder*, 442 U. S. 114, 442 U. S. 125(1979) (footnote omitted) for a discussion of how the U.S. Supreme Court decided that “As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not “unfettered.’ Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.”

oftentimes already citizens. Some American citizens seem to vacillate between seeing immigrants as a way to fulfill a demand for cheap or seasonal labor while at other times perceiving them as a threat to American jobs. Still others welcome the diversity of immigrant neighbors.<sup>16</sup> The United States government must balance these competing interests with its own concern for the unity of families while attempting to preserve an inherent “American-ness” in a nation of immigrants.

In order to balance and uniformly administer these interests, the federal government has taken upon itself the duty of creating and enforcing the laws regarding immigration. The precedent for this duty hinges upon two sections of the Constitution: the federal government is to both “establish a uniform rule of naturalization”<sup>17</sup> as well as to “protect each of [the states] against invasion.”<sup>18</sup> Upon a somewhat tenuous interpretation of these two clauses, the federal government has assumed the exclusive right to enact legislation regarding immigration, although it did not do so for nearly 100 years following the adoption of the Constitution.

Many legislative acts, beginning as early as 1876, established quotas and targeted various origins of immigration by encouraging or restricting specific ethnicities. Over time, especially during the mid-twentieth century, it became apparent that government officials, from the police officer on the street to the courtroom prosecutor, were capable of exercising broad discretion in their prosecution of immigration violations. These discretionary powers were effectively denied as existing, but as a result of *Lennon v. Immigration and Naturalization Services* (INS), the INS was forced to define the parameters they were using in the exercise of their prosecutorial discretion.<sup>19</sup>

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16 *Views and Perceptions of Immigrants*, PEW RESEARCH CENTER: HISPANIC TRENDS <http://www.pewhispanic.org/2006/03/30/v-views-and-perceptions-of-immigrants/>

17 U.S. CONST. art. I, § 8, cl. 4.

18 U.S. CONST. art. IV, § 4.

19 *Lennon v. Immigration And Naturalization Service*, 527 F.2d 187 (2d Cir. 1975).

Most recently, the battle to define the limits of discretion culminated in a standoff between the federal and state governments in their efforts to control immigration.<sup>20</sup> On the state level, Arizona attempted to broaden prosecutorial discretionary powers. These changes included requiring federal registration documents to be carried by illegal immigrants within Arizona, allowing state and local law enforcement officers to enforce federal immigration laws, and penalizing any person found sheltering, hiring, or transporting illegal immigrants. On the federal level, these new laws were rebuffed by the Supreme Court.<sup>21</sup>

Following Arizona's attempts to broaden discretion in order to facilitate the deportation of immigrants, the Obama Administration attempted to broaden discretion in favor of retaining immigrants. In 2014, the Obama Administration attempted to expand these discretionary powers of the immigration services through an executive order.<sup>22</sup> The Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans (DAPA) programs would use prosecutorial and administrative discretion to prioritize illegal immigrants for deportation: "This memorandum confers no substantive right, immigration status or pathway to citizenship.... It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority."<sup>23</sup> This push and pull in the

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20 *Arizona v. United States*, 567 U.S. \_\_\_, (2012), Docket No. 11-182.

21 *ARIZONA ET AL. v. UNITED STATES CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT* No. 11-182. Argued April 25, 2012—Decided June 25, 2012

22 *Executive Actions on Immigration*, U.S. DEP'T OF HOMELAND SEC. (Apr. 15, 2015).

23 Memorandum from Jeh Charles Johnson to León Rodriguez, Thomas S. Winkowski, and R. Gil Kerlikowske (November 20, 2014), contains further information emphasizing the case-by-case nature of discretion within the immigration system: "Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis."



power of the prosecutor to make enforcement decisions, shown by the relationship between the state and federal governments, is slowly defining the limits of prosecutorial discretion.

This latest turn of the immigration debate has an ironic twist: one of the pledges of the Obama campaign was to reform immigration in favor of retaining immigrants, but the Obama Administration is responsible for more deportations than ever before, almost double the deportations of the previous George W. Bush Administration.<sup>24</sup>

Despite the increase in deportations, the Obama Administration has come under increased public scrutiny from anti-immigration groups because of largely misunderstood executive orders that expand prosecutorial discretion policies already in place. Instead of a reduction, perhaps prosecutorial discretion only needs to be more widely acknowledged and understood. It may be that the current reliance on prosecutorial discretion is desirable. Although prosecutorial discretion has recently been heavily criticized in the wake of these executive orders, its role and purpose is largely misunderstood; indeed, discretion has of necessity almost always been an element of the law.

The balance of discretion within the various executive departments varies between the respective branches; however, there are some overarching rules that apply to every branch of the executive branch. For example, the ruling in *Heckler v Chaney* was 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.”<sup>25</sup> This set a precedent for non-intervention in exercises of discretion.

The courts have followed *Heckler v Chaney*’s reasoning for decades, but the resulting ambiguity has caused a plethora of problems for immigration officials, innocent bystanders, and the accused. As the courts take another look at the immigration debate, perhaps many of the ambiguities could be solved by comparing immigration law with criminal law.

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24 SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (NYU Press, 1<sup>st</sup> ed. 2015).

25 *Heckler v. Chaney*, 470 U.S. 821 (1985).

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## PROOF OF CLAIM

### *I. Overview*

Once the Legislative Branch has enacted a law, it falls upon the executive branch of the federal government and its attending officers to enforce and execute the law: “[the President] shall take care that the laws be faithfully executed.”<sup>26</sup> In its attempts to regulate immigration, the federal government is unable to prosecute every immigration violation. One of the difficulties in using immigration data is that an accurate number of undocumented immigrants is somewhat difficult to estimate and the numbers can be inflated to skew the data. Reported deportations have decreased over the past five years: 2011 (396,906), 2012 (409,849), 2013 (368,644), 2014 (315,943), and 2015 (235,413) respectively. However this number includes those that are turned away immediately at the border.<sup>27</sup> A more accurate figure for the number of deportations in recent years is closer to 2011 (223,755), 2012 (180,970), 2013 (133,551), 2014 (102,224), and 2015 (69,478).<sup>28</sup> It is estimated that 150,000 people enter the United States illegally every year.<sup>29</sup> However, since the Recession in 2008 the number of Hispanic immigrants leaving the country has outnumbered the number entering.<sup>30</sup>

This decrease in immigration coincides with a sharp increase of regulations and reform for immigration. These reforms are occurring at the same time as the lowest net number of immigrants from

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26 U.S. CONST. art. II, § 3

27 *FY 2014 ICE Immigration Removals*, U.S. IMMIGRATION REMOVALS, <http://www.ice.gov/removal-statistics> (last visited Oct. 24, 2015).

28 *FY 2014 ICE Immigration Removals*, U.S. IMMIGRATION REMOVALS, <http://www.ice.gov/removal-statistics> (last visited Oct. 24, 2015).

29 THE MEXICO READER 3 (Gilbert M. Joseph, Timothy J. Henderson eds., Duke University Press Books, 2<sup>nd</sup> ed. 2003).

30 SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (NYU Press, 1<sup>st</sup> ed. 2015).

Mexico in recent history.<sup>31</sup> Between 2009 and 2014, about 1,000,000 Mexican nationals left the United States for Mexico as compared to about 870,000 Mexican nationals that left Mexico for the United States.<sup>32</sup>

## *II. Comparison with Criminal Law*

Setting aside the disputed legality of the Executive Order on Immigration, it exercises discretion favorably as measured both economically and humanitarily. The deeper question however, and the exploration of this paper, is the extent and limits of prosecutorial discretion within the immigration system. Society must ask itself if the immigration officials are currently allowed enough discretion to fulfill their charge efficiently and humanitarily, and if those are the goals that immigration officials should be concerned with. Immigration officials should have just as much discretionary power within their sphere of influence as prosecutors have within the criminal justice system.

The U.S. Supreme Court cited several reasons for their decision including dispersion of resources and the individual priorities and

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31 *More Mexicans Leaving Than Coming to the U.S.*, PEW RESEARCH CENTER: HISPANIC TRENDS <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/>

32 *More Mexicans Leaving Than Coming to the U.S.*, PEW RESEARCH CENTER: HISPANIC TRENDS <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/>

missions of the respective agencies.<sup>33</sup> The mission of the Department of Justice is to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.<sup>34</sup>

As they carry out the interests of the Department, officials are allowed broad discretion. Prosecutors are afforded almost unreviewable power to decide whether a person will or will not be tried for a crime. The decision of the prosecutor may not be reviewed, except “in cases of flagrant abuse, including criminal activity by a prosecutor, [then] may a court overrule a prosecutor’s decision.”<sup>35</sup> Furthermore, the ability of the prosecutor to exercise discretion in the criminal justice system is the basis for plea deals. In these plea deals a person may plead guilty to a lesser offense, thus expediting the process or in exchange for aiding another case as a witness, etc.

This same discretion is not afforded to the officials of the immigration system. There is a list of deportable offenses, and if a person is brought before them that meets those characteristics, then they place them in deportation proceedings. There is little to no room for

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33 See *Heckler v. Chaney*, 470 U.S. 821 (1985) for a discussion of how the “reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”

34 *Our Mission Statement*, U.S. DEP’T OF JUSTICE. (last visited on Feb. 26, 2016),

35 Stuart Diamond, *The Law; Prosecutorial Discretion: Worthy of Defense?*, THE NEW YORK TIMES <http://www.nytimes.com/1988/07/22/us/the-law-prosecutorial-discretion-worthy-of-defense.html>

an exception or a case of merit. Programs such as DACA and DAPA limit the discretionary power of the officials and are not adequate to handle the enormous amount of persons living in the United States illegally.

### *III. Victims of Immigration*

Problems with the use of discretion affect many more people than just the officials; victims of crimes and potential witnesses suffer as well. It is a lack of understanding regarding the limits of discretion that cause many of these problems. One such problem is that undocumented women who are victims of abuse often do not understand their rights in such situations. Although immigrants represent a fraction of the United States population, they are the victims of more than half of intimate partner homicides.<sup>36</sup> If they come forward and seek help, they can receive work permits and stay in the United States while also leaving their abuser.

Strict penalties on deportable offenses can also limit justice. If charges of domestic violence are brought against an undocumented spouse, he or she will be deported. This places many in a situation where the abuse is rationalized or marginalized because it only occurred once. When the choice is between enduring abuse and permanently separating a family, the choice is much more difficult than it otherwise would be.

The reluctance to speak up about criminal activity is not limited to domestic abuse. Witnesses or victims of a crime could be fearful about reporting the incident if they are undocumented. Thomas Manger, a police chief from Montgomery, Alabama dealing with this problem described a situation in which an undocumented woman's house was broken into. The undocumented woman was then severely beaten by her ex-boyfriend with a metal bar. Because she was undocumented, she hesitated to call the police until her friends convinced her. Her ex-boyfriend was sent to jail and she obtained a special visa. Manger said, "Criminals thrive in neighborhoods where

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36 *The Facts on Immigrant Women and Domestic Violence*, FUTURES WITHOUT VIOLENCE [https://www.futureswithoutviolence.org/userfiles/file/Children\\_and\\_Families/Immigrant.pdf](https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Immigrant.pdf)

people don't trust the police. This is a daily struggle for us."<sup>37</sup> Justice is poorly served in an environment of fear.

As the flow of immigration slows, officials will be able to focus their limited resources on more cases. The current guidelines will perhaps be too broad to allow for a careful evaluation of the merits of each immigrant. This is reflected in the fact that the Obama Administration is responsible for higher rates of deportation as compared to previous administrations. It is reported that there were more immigrants deported during the first five years of the Obama Administration than during the entire George W. Bush Administration.<sup>38</sup>

#### *IV. Miscommunication*

Misunderstandings regarding prosecutorial discretion extend to the relationship between local law enforcement and immigration officials. This miscommunication can lead to fatal tragedies. On 27 July 2015, Juan Emmanuel Razo-Ramirez, an illegal immigrant living in Ohio, allegedly attempted to rape a 14-year-old girl and shot a woman in the arm before killing another woman named Margaret Kostelnik. The situation culminated in a shootout with Lake County, Ohio police. Prior to the incident, Razo-Ramirez had been detained on 7 July by local law enforcement, but they were ordered to release him by immigration authorities.

One of the limits placed upon immigration officials is the conviction of felonies, which require mandatory deportation. Two permanent residents named Jose Antonio Lopez and Reymundo Toledo-Flores were convicted of drug crimes. These crimes were felonies on the state level, but only misdemeanors on the federal level. Lopez and Toledo-Flores would automatically be deported if they

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37 *For Immigrant Women, Domestic Violence Creates A Double Shadow*, THE WASHINGTON POST [https://www.washingtonpost.com/local/for-immigrant-women-domestic-violence-creates-a-double-shadow/2013/12/02/5626b85e-55e6-11e3-8304-caf30787c0a9\\_story.html](https://www.washingtonpost.com/local/for-immigrant-women-domestic-violence-creates-a-double-shadow/2013/12/02/5626b85e-55e6-11e3-8304-caf30787c0a9_story.html)

38 *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RESEARCH CENTER <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/>

were convicted of a felony, there was no room for a discretionary decision.

If they had not been illegal immigrants, the prosecution could have offered them a lighter sentence in exchange for a guilty plea, but that option is not currently available to immigration officials. Lopez and Toledo-Flores could only hope that the court would rule in their favor. In Lopez and Toledo-Flores' respective cases, the Supreme Court held that a state-level felony does not fulfill the requirements of mandatory deportation. Although Lopez and Toledo-Flores received a favorable ruling, their case could just as easily have been ruled against them. With no option for discretion, they would have been deported.

Sergio C. Garcia is one case in which discretion was used to avoid deportation proceedings. In 2009 Garcia passed the California State Bar Exam and began practicing as an attorney. Two weeks later he was notified that his admission was a mistake because he was an undocumented immigrant. Upon appeal the California Supreme Court readmitted Garcia to the Bar, due in large part to a recent act of legislation passed by the California legislature specifically allowing undocumented immigrants that fulfill all other requirements to be admitted to the Bar. The Court found that although immigration violations could constitute a civil offense, they were not criminal offenses.

Furthermore, the California Supreme Court opined that "under current federal immigration policy it is extremely unlikely that immigration officials would pursue sanctions against an undocumented immigrant who has been living in this country for a substantial period of time, who has been educated here, and whose only unlawful conduct is unlawful presence in this country." The Court determined that as all immigrants, documented and undocumented, are encouraged to contribute to society, passage to the State Bar is in the interests of all concerned.

## CONCLUSION

Immigration policy as it stands does not allow officials sufficient leeway to enforce the laws of the land while still allowing them to be

merciful. The case of Sergio C. Garcia illustrates what must occur in the immigration debate. The California Supreme Court acted only after the California Legislature passed an act which was signed by the Governor. In the deadlock between the United States Supreme Court, the President, and the United States Congress, a lack of communication and cooperation is compounding already existing problems.

When the Executive Order was issued, twenty-two states in addition to four state governors joined together to dispute the legality of the order. In February 2015, U.S. District Judge Andrew S. Hanen of the U. S. District Court for the Southern District of Texas blocked the programs from going into effect, “holding that the administration had failed to comply with the procedural requirements under the Administrative Procedures Act, a federal statute that sets out rules for the way that federal agencies can establish regulations.”<sup>39</sup> Then in November 2015, Judge Hanen’s ruling was validated by the 5<sup>th</sup> Circuit Court of Appeals further reinforcing the case against the extension of DACA benefits and the creation of DAPA benefits.<sup>40</sup> The Department of Justice announced that they would seek further review from the U.S. Supreme Court. It now appears that this case could be the final attempt of the Obama Administration to carry out its immigration policy reform agenda. Although the timeline for entering

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39 *Federal Appeals Court Sides with Texas Against Obama on Immigration*, CNN POLITICS <http://www.cnn.com/2015/05/26/politics/obama-immigration-texas-federal-appeals-court/>

40 *Federal Appeals Court Sides with Texas Against Obama on Immigration*, CNN POLITICS <http://www.cnn.com/2015/05/26/politics/obama-immigration-texas-federal-appeals-court/>



the case into the U.S. Supreme Court docket was very tight,<sup>41</sup> Texas filed its brief in opposition in time for the case to enter the docket. The case will be argued in the 2016 docket with a decision being issued in June 2016.<sup>42</sup>

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- 41     *See* Matt Ford, *A Ruling Against the Obama Administration on Immigration*, THE ATLANTIC <http://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077/> for a discussion on how “[Texas’s] brief in opposition must be filed 30 days after the case is “placed on the docket.” Therefore, if the [Obama administration’s] cert petition is filed anytime between now and November 20 or so, Texas’s brief in opposition would be filed on or before December 22, and the petition could be distributed for the January 8 conference. The only wild card is if Texas either (a) waives the brief in opposition, forcing the Court to order them to file one, and thus stretching the clock or (b) requests an extension, pushing us past the January 8 conference. But in all likelihood, this case will be argued the last week in April or the first week in May of 2016, with a decision in June 2016.”
- 42     *Supreme Court to Take Up Obama Immigration Actions*, CNN POLITICS <http://www.cnn.com/2016/01/19/politics/supreme-court-to-take-up-obama-immigration-actions/>

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## APPENDIX A

*Executive Actions on Immigration*, U.S. DEP'T OF HOMELAND SEC. (Apr. 15, 2015)

“On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.

These initiatives include:

- Expanding the population eligible for the Deferred Action for Childhood Arrivals (DACA) program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two years to three years.
- Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents\* program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks
- Expanding the use of provisional waivers of unlawful presence to include the spouses and sons and daughters of lawful permanent residents and the sons and daughters of U.S. citizens
- Modernizing, improving and clarifying immigrant and non-immigrant visa programs to grow our economy and create jobs

Promoting citizenship education and public awareness for lawful permanent residents and providing an option for naturalization applicants to use credit cards to pay the application fee.”