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DACA, GOVERNMENT LAWYERS, AND THE PUBLIC INTEREST

Stephen Lee & Sameer M. Ashar***

INTRODUCTION

On June 15, 2012, the Obama administration announced a significant change in immigration policy: Homeland Security Secretary Janet Napolitano began to instruct immigration officials to defer enforcement actions against those noncitizens who would likely be eligible for relief under the DREAM Act,¹ should Congress choose to pass it.² This program, which came to be known as Deferred Action for Childhood Arrivals (DACA), has become the most significant immigration-benefits program in a generation. Not since Congress passed a comprehensive reform bill in 1986, which included a pathway to citizenship,³ has an immigration program so quickly and positively changed the lives of unauthorized migrants. Under DACA, migrants who met criteria mirroring those included in the DREAM Act could pay an application fee and apply for deferred-action status.⁴ If granted such status, these migrants would be taken out of the pool of removable migrants

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1. DREAM Act of 2011, S. 952, 112th Cong. (2011). The DREAM Act proposed immigration relief for individuals who have been in the United States continuously for five years, were fifteen years old or younger when they entered the United States initially, had attained specific educational benchmarks, and who had not committed enumerated offenses. *Id.* § 3(b)(1).

2. Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> [<https://perma.cc/SG5M-25F6>].

3. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

4. See Press Release, Dep't of Homeland Sec., *supra* note 2.

on a two-year renewable basis.⁵ Equally important, DACA conferred additional benefits, including employment authorization that allowed beneficiaries to enter the formal labor market.⁶

Prior to 2012, the Department of Homeland Security (DHS) circulated prosecutorial discretion memos, which laid out removal priorities and instructed immigration officials to close cases for migrants who did not fit those priorities.⁷ These memos came to be known colloquially as the “Morton memos” after U.S. Immigrations and Customs Enforcement (ICE) Director John Morton, who authored them. So, why did DHS move away from this prosecutorial-discretion model to DACA to screen out Dreamers⁸ from the removal pipeline?

A common explanation is that DACA was an attempt by President Obama to further centralize decision-making authority within the White House and those with immediate access, like political appointees. These officials were much more likely to share the president’s values and views on immigration enforcement, unlike frontline officers who, as civil servants, worked across administrations and enjoyed employment protections. By this account, such a move was necessary to overcome efforts by frontline officers, especially within ICE (the agency with primary immigration enforcement responsibilities) to thwart or frustrate the president’s agenda.⁹

This Article joins the conversation regarding the shift to implement DACA and, in doing so, adds an empirical dimension. Drawing from seventeen

5. *See id.*

6. *See id.*

7. *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/3PV7-Y8AN>]; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All ICE Emps. (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/3JGU-8C85>]; Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t, to All ICE Emps. (June 30, 2010) [hereinafter June 2010 Morton Memo], <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf> [<https://perma.cc/G6T7-LCTJ>].

8. We use the term “Dreamer” as shorthand for the category of immigrants in the United States who would have benefited from passage of the DREAM Act. We use the term advisedly and acknowledge serious criticism of it, as well as the advocacy narrative surrounding it. Critics have argued that the Dreamer narrative delineates between deserving and undeserving immigrants, reinforcing the marginalization of adults who crossed the border into the United States and those who have become enmeshed in an expanding criminal legal system. *See* Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 *NEV. L.J.* 101, 141–54 (2013); Fanny Lauby, *Leaving the ‘Perfect DREAMer’ Behind? Narratives and Mobilization in Immigration Reform*, 15 *SOC. MOVEMENT STUD.* 374, 380–82 (2016).

9. *See* Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 *ADMIN. L. REV.* 347, 385–86 (2017); *see also* Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 693–94 (2015); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 187–88 (2015); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 *UCLA L. REV. DISCOURSE* 58, 89–90 (2015); Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 *WASHBURN L.J.* 1, 23 (2015).

interviews with political appointees within the executive branch during the Obama administration, as well as documents obtained under the Freedom of Information Act (FOIA), this Article makes two points. First, our findings tend to confirm the “centralization” thesis. Our interview subjects—political appointees within the Obama White House and DHS—tended to confirm that DACA was intended at least in part to neutralize the influence wielded by frontline ICE officers, who tended to embrace an aggressive approach to enforcement.¹⁰ Rather than trusting “immigration cops” within ICE to sort migrants for removal, political appointees opted to empower immigration officials within the United States Citizenship and Immigration Services (USCIS), an agency with experience in redistributing benefits to immigrants.¹¹

Second, this Article draws attention to an element of the DACA story that has thus far appeared intermittently or as an afterthought: the role of lawyers in the enforcement and administration of our nation’s immigration laws. Our data shows that political appointees embraced competing notions of government lawyering as they attempted to find relief for Dreamers through regulatory channels. In trying to provide Dreamers with relief through the Morton memos, the executive relied on a vision of lawyering commonly associated with the prosecution of criminal laws. This vision of *prosecutorial justice* elevates the judgment of lawyers above others involved in the removal process, including that of the ICE officers identifying and apprehending potentially removable immigrants as well as the political appointees empowered to set the enforcement agenda during the Obama years. This contrasts with the vision of lawyering at the heart of DACA.

The process by which government officials assess and adjudicate applications within the DACA setting differs from the Morton memos approach in some obvious ways. Notably, noncitizens self-screen and affirmatively apply for benefits under DACA whereas within the Morton memos scheme, noncitizens operated from a position of weakness as they negotiated relief as a supplicant while caught in the removal pipeline. Just as notable is that lawyering within the DACA model operated at a great distance from the actual adjudication of DACA applications—that is, the legal work emanated from counsel appointed to serve the president and the Secretary of Homeland Security rather than in the halls and conference rooms of the various ICE field offices. This model of *administrative justice* was on display in the rollout of both DACA and the now-defunct expanded DACA and Deferred Action for Parents of Americans (DAPA) programs, which were accompanied by a meticulous legal analysis provided by the Department of Justice (DOJ) Office of Legal Counsel.¹² Thus, our account suggests that while lawyers were central to the administration of immigration

10. See *infra* notes 81–82 and accompanying text.

11. See Chen, *supra* note 9, at 384–85.

12. See Memorandum from Karl R. Thompson, Principal Deputy Att’y Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. and Counsel to the President (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/CFS6-LQ7X>].

laws under the Morton memos approach, they operated at a greater distance from the daily implementation process. The USCIS officers reviewing and evaluating DACA applications possessed far less discretion than Office of the Principal Legal Advisor (OPLA) lawyers, and that is because the “legal work” they performed looked less like that of prosecutors in the criminal system and more like that of asylum or social security benefits officers who operated within a narrower set of parameters.

The period preceding and leading into DACA provides a useful opportunity to advance the discussion of the ethical basis for government lawyering. In a client-centered profession, government lawyers have presented some conceptual challenges given the indeterminacy and heterogeneity of the range of interests the federal government is supposed to serve. We save an extended treatment of this question for another day, but in the meantime, we offer some tentative thoughts on from where an ethical basis might arise in the context of immigration law. We focus on three conceptions in particular. Two of these conceptions are longstanding fixtures of the law and legal scholarship, but to our knowledge, legal scholars have not sufficiently extended discussions about these principles to the immigration context and certainly not to the DACA chapter in modern immigration history.

One is the conception of normative innocence, sometimes referred to as mercy. This is the principle that executive branch officials can and should use their vast discretionary powers to protect those who have violated the law as a formal matter but who have not violated basic tenets of morality. A second is the conception of the public interest. This reflects the notion that government lawyers, and governmental actors generally, ought to pursue policies that broadly serve the public’s interest rather than the narrower imperative of their agency or self-interested elected officials. A third and final conception, social movement mobilization, is relatively undertheorized in legal scholarship. Normative innocence and the public interest are constructed through the mobilization and exercise of political power. Social movements amalgamate and amplify the voices of the politically weak. This Article moves us toward a deeper examination of the process by which public power may be deployed or constrained through the discretion of government lawyers.

We draw our observations from two primary datasets. The first is based on semi-structured interviews with seventeen government officials who previously served in the Obama administration.¹³ All but one of the interviews lasted between an hour and an hour and a half and were conducted over the phone during a single session.¹⁴ All of the interviewees worked either in the White House or in an executive federal agency during the Obama

13. All of these interviews conformed with an interview protocol approved by the University of California, Irvine Institutional Review Board. Each interview subject provided informed consent. We identify interview subjects only by pseudonym and agency affiliation, but not title, to preserve anonymity.

14. One interview was split between two separate sessions.

administration. At the time of the interviews, during the Trump administration, none of our interviewees were working within the executive branch, which is not uncommon when a president from a different political party assumes office. We relied on snowball sampling, which is a useful tool for gathering data among populations that are difficult or costly to identify.¹⁵ This was particularly helpful for identifying government officials who helped draft, shape, and implement the content of both the pre-DACA and DACA immigration-enforcement programs. Toward the end of the data-gathering period, when asked whether we should be contacting other officials involved in shaping these programs, interview subjects began offering the same names, which helps confirm the completeness of the sampling set.¹⁶

Like any dataset, our interview dataset is limited in terms of the types of observations it can support. In particular, datasets created through snowball sampling can reflect the bias of the networks to which we have access.¹⁷ Because we identified many interviewees through referrals, we face the problem of oversampling—that is, those with larger personal networks likely had an outsized impact on the pool of interviewees.¹⁸ To help correct for this bias, we also considered a second dataset, one that was exogenously created. Journalists obtained internal government documents from an ICE field office in Houston through a FOIA request.¹⁹ This dataset contains its own limitations, namely that it was created in 2011,²⁰ prior to the announcement of DACA. But, at least as to the period immediately following the announcement of the Morton memos, this dataset tends to confirm our findings and conclusions about that period in the Houston field office. Relying on these internal documents also provides certain methodological advantages. In particular, internal exchanges such as email records provide a less filtered portrayal of agency dynamics than would in-person interviews, which might produce scripted answers.

This Article proceeds as follows: Part I provides a picture of immigration lawyers in federal government not featured in scholarship up to this point. This includes the frontline immigration prosecutors in ICE, agency officials at the upper echelons of ICE, USCIS, and DHS, and policy advisors in the White House and at the Office of Legal Counsel.

Part II retells the story of immigration enforcement during the Obama administration roughly between 2010 and 2012. Here, we show that our data largely confirms the centralization thesis advanced by immigration scholars. Importantly, our data shows that professional identity and competing

15. See Seymour Sudman & Graham Kalton, *New Developments in the Sampling of Special Populations*, 12 ANN. REV. SOC. 401, 413 (1986).

16. *Id.*

17. *Id.*

18. See Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174, 175 (1997).

19. See, e.g., Susan Carroll, *Report: Feds Downplayed ICE Case Dismissals*, HOUS. CHRON. (June 27, 2011), <https://www.chron.com/news/houston-texas/article/Report-Feds-downplayed-ICE-case-dismissals-2080532.php> [<https://perma.cc/Z36R-CFL7>].

20. *Id.*

conceptions of government lawyering played a key part in the process by which executive authority was centralized. During the pre-DACA years, political appointees relied on notions of government lawyering developed in the criminal law enforcement context. By issuing guidance documents and setting enforcement priorities, immigration enforcement during this era operated under the assumption that the immigration attorney had a comparative advantage in terms of identifying the kinds of cases that should be screened out of the removal pipeline. This is how much of the criminal law enforcement system operates and, in fact, this was part of the messaging that OPLA attorneys received. Thus, the creation of DACA amounted to a reassignment of discretionary authority, away from OPLA attorneys and away from frontline officers in meaningful ways. Instead, DACA is characterized by legal expertise operating at the senior levels of administration.

With a clear picture of the different ways that government lawyers shape immigration policy, Part III wrestles with the larger questions of what ethical constraints, if any, can limit and therefore legitimate the exercise of legal authority in this context. Borrowing from the legal-profession literature, we focus on two types of potential limitations, normative innocence and the public interest, and the process by which the politically weak may contribute to a delineation of these conceptions.

I. IMMIGRATION LAWYERS IN THE GOVERNMENT

Over the last several years, legal scholars have generated an important and helpful body of work focusing on the relationship between administrative practice and immigration law.²¹ One way to understand this work is as an attempt to disaggregate and examine the various components that comprise the “executive.”²² The result has been a crisper and more precise understanding of who exactly is “tak[ing] Care that the Laws be faithfully executed,”²³ at least in the immigration realm. This Part contributes to this project of disaggregation by foregrounding the work of lawyers within the executive dedicated to the implementation of federal immigration laws.²⁴

A core function of the government is to effectuate the immigration code’s deportation, or removal, provisions. These provisions invite great concern because of the human consequences of the expulsion of noncitizens. Lawyers feature prominently throughout this process. Removal decisions are not adjudicated before Article III courts. Rather, these decisions are largely resolved at the administrative level before immigration judges (IJs), who are

21. See generally Chen, *supra* note 9; Cox & Rodríguez, *supra* note 9; Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787 (2010).

22. See, e.g., Chen, *supra* note 9, at 359.

23. U.S. CONST. art. II, § 3.

24. For a helpful examination of the pathologies associated with our immigration judge corps, which is comprised of lawyers, see generally Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010).

housed within the DOJ.²⁵ IJs are the primary adjudicators within the immigration system and, by department regulation, they are required to be lawyers.²⁶ The DOJ also houses the Board of Immigration Appeals (BIA), which handles most appellate matters related to IJ decisions.²⁷ Congress has given the power to adjudicate immigration matters to the Attorney General by statute, but like IJs, the BIA is purely a creation of regulation.²⁸

The federal immigration system separates the adjudication of removal from its prosecution in administering these removal provisions. The federal lawyers charged with the responsibility of initiating removal proceedings against noncitizens work within ICE, which is housed in an entirely different department than IJs and the BIA.²⁹ Specifically, lawyers working within the OPLA—a program within ICE—represent the DHS in removal proceedings before IJs.³⁰ OPLA employs 1100 lawyers and 350 support personnel.³¹ It is divided into several “Offices of Chief Counsel,” which are scattered throughout the United States.³² As removal orders are appealed to the federal courts, lawyers in the Office of Immigration Litigation represent the government,³³ but OPLA lawyers provide support throughout the process.³⁴

Of course, in a technical sense, OPLA lawyers oversee a regulatory regime grounded in civil law and penalties, and yet the influence they wield over the criminal system warrants a broader critique. As legal scholars have persuasively argued, our immigration system provides an uneven and asymmetric set of protections and freely allows for the intermingling between criminal and civil legal tools to give federal regulators the greatest advantage

25. Beyond the IJs, federal district courts and magistrate judges play an important role in the adjudication of immigration-related crimes. Federal prosecutors initiate immigration-related criminal charges for crimes such as illegal reentry and smuggling before Article III courts. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1281 (2010). Magistrate judges oversee “petty courts” to resolve misdemeanor charges like mere illegal entry (as opposed to illegal reentry after removal). *Id.* at 1288.

26. See *Immigration Judge*, U.S. DEP’T JUST., <https://www.justice.gov/legal-careers/job/immigration-judge> [<https://perma.cc/WB4J-L9N4>] (last visited Mar. 15, 2019).

27. *Board of Immigration Appeals*, U.S. DEP’T JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/9P2N-LQZS>] (last visited Mar. 15, 2019).

28. 8 C.F.R. § 1003.1(a), (h) (2018).

29. See *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/about> [<https://perma.cc/7RLR-4HSL>] (last visited Mar. 15, 2019).

30. *Office of the Principal Legal Advisor (OPLA)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/opla#wcm-survey-target-id> [<http://perma.cc/B9P3-SYP6>] (last visited Mar. 15, 2019).

31. See *id.*

32. See *Principal Legal Advisor Offices*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/contact/legal> [<https://perma.cc/CJ4E-TNYD>] (last visited Mar. 15, 2019).

33. This office is lodged within the DOJ. See *Office of Immigration Litigation*, U.S. DEP’T JUST., <https://www.justice.gov/civil/office-immigration-litigation> [<https://perma.cc/3WS7-EFJH>] (last visited Mar. 15, 2019).

34. See U.S. DEP’T OF HOMELAND SEC., FY 2019 BUDGET IN BRIEF 33 (2018), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf> [<https://perma.cc/N56V-VMUQ>].

possible over noncitizens.³⁵ In addition to their power to initiate and to represent the government in removal proceedings, OPLA lawyers work closely with federal criminal prosecutors lodged within the DOJ. To assist criminal prosecutors, OPLA lawyers can exercise their discretion to delay the enforcement of immigration laws or effectuation of removal.³⁶

An interagency program known as the “Special Assistant United States Attorney” (SAUSA) program allows government immigration lawyers to do a rotation within the DOJ prosecuting immigration-related crimes.³⁷ As Ingrid Eagly has documented, the program allows attorneys within the Border Patrol and ICE to oversee large-scale enforcement actions, especially within the illegal-entry context.³⁸ The SAUSA program is also notable for the space it makes for nonlawyers to carry out lawyerly responsibilities.³⁹ As Professor Eagly observes, Border Patrol agents (that is, nonlawyers) have from time to time carried out misdemeanor prosecutions for illegal entry.⁴⁰ Under this arrangement, Border Patrol agents represent the government in court and handle all aspects of that prosecution unless the defendant requests a trial involving a licensed attorney.⁴¹

Aside from the enforcement of immigration laws, the other major role undertaken by agencies is the distribution of immigration-related benefits. The most recognizable program in this regard has been the DACA program, which conferred upon its beneficiaries the opportunity to obtain work authorization or “papers.”⁴² This program was administered by USCIS, which is a separate agency from ICE.⁴³ Strictly speaking, DACA applications were not adjudicated by lawyers, but USCIS did employ an internal review process that utilized legal expertise.

In particular, USCIS appointed a person to serve as ombudsman.⁴⁴ This was a position created by statute under the Homeland Security Act of 2002, which reorganized immigration agencies.⁴⁵ Like many ombudsman

35. See, e.g., Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 631–32, 636–39 (2012); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 475 (2007).

36. See *Protecting the Homeland: Tool Kit for Prosecutors*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 2011), <https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf> [<https://perma.cc/ZCJ8-BQ5V>]; see also David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 220–21 (2012).

37. See Eagly, *supra* note 25, at 1332.

38. See *id.*

39. *Id.* at 1333.

40. See *id.* at 1332–33.

41. See *id.* at 1333.

42. See *supra* notes 4–6 and accompanying text.

43. See *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/2RT6-34QW>] (last visited Mar. 15, 2019).

44. *Ombudsman—Case Assistance*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/case-assistance> [<https://perma.cc/S36H-66V7>] (last visited Mar. 15, 2019).

45. Specifically, Congress provides: “Within the Department, there shall be a position of Citizenship and Immigration Services Ombudsman (in this section referred to as the

programs, this office within USCIS is charged with resolving problems between and among affected members of the public and decision makers within the agency.⁴⁶ The ombudsman has no formal enforcement authority.⁴⁷ She can only make recommendations in particular cases.⁴⁸

Most of the ombudsman's power lies in documentation of agency performance as a whole. She is required to summarize and create an inventory of major problems plaguing the agency with an annual report to Congress.⁴⁹ Importantly, Congress intended for the ombudsman to enjoy some measure of independence and autonomy. Congress requires the ombudsman to send its annual report without any "prior comment or amendment" by senior leadership,⁵⁰ and each local ombudsman office must have forms of communication that are not subject to USCIS control or oversight.⁵¹ The ombudsman's power is akin to that wielded by inspectors general.⁵²

Finally, beyond enforcement and benefit programs, DHS utilizes legal expertise the way many agencies do, namely through general counsel offices. Just as ICE benefits from OPLA lawyers, other agencies with primary immigration responsibilities, such as USCIS and Customs and Border Protection (CBP), also utilize the services of "Chief Counsels."⁵³ While lawyers at the leadership level are political appointee positions—that is, lawyers who had to be confirmed by the Senate⁵⁴—most operated as a part of the civil service corps. The DHS indicates that over 1800 lawyers serve as general counsel.⁵⁵ General counsel facilitate the implementation of immigration laws by providing advice on the legality of a variety of programs and initiatives.⁵⁶

'Ombudsman'). The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law." See Homeland Security Act § 452, 6 U.S.C. § 272(a) (2012).

46. See *Ombudsman—Case Assistance*, *supra* note 44.

47. *Id.*

48. *Id.*

49. See 6 U.S.C. § 272(c)(1) (2012).

50. See *id.* § 272(c)(2).

51. See *id.* § 272(g)(2).

52. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1034–35 (2013); see also Shirin Sinnar, *Internal Oversight and the Tenuous Protection of Norms*, 93 N.Y.U. L. REV. ONLINE 61, 62 (2018).

53. See *Department of Homeland Security, Office of the General Counsel, Organization Chart Level 1*, U.S. DEP'T HOMELAND SECURITY (Aug. 2016), <https://www.dhs.gov/sites/default/files/publications/OGC%20Level%201%20%205-16.%20Generic.pdf> [<https://perma.cc/V9K5-RAQU>].

54. CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 23, 35, 39, 41 (2017).

55. See *Office of the General Counsel*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/office-general-counsel> [<https://perma.cc/W763-ZG9M>] (last visited Mar. 15, 2019).

56. *Id.*

II. FROM PROSECUTORIAL TO ADMINISTRATIVE JUSTICE

Immigration-enforcement policy during the Obama administration has been characterized as an exercise of centralization. Frustrated by a vast constellation of field offices, each operating largely independent of one another and without regard to the preferences of the White House, President Obama and senior leadership within the DHS set about to bring frontline immigration officials into alignment. As we show in this Part, empirical data supports this centralization thesis.

On December 18, 2010, the DREAM Act failed to clear the Senate.⁵⁷ From then on, immigrant youth activists increasingly came to focus on the formation of enforcement policy within DHS.⁵⁸ Importantly, as our data shows, the means by which the executive centralized authority utilized logic that is grounded in competing notions of lawyering and professional identity. Between this period and June 15, 2012, when DACA was announced, the DHS utilized a prosecutorial-justice model to help more equitably protect a category of immigrants who would be harshly impacted by removal.⁵⁹ Over time, this category evolved to become largely congruent with the Dreamer population. White House and senior DHS officials sought to create a new culture among its immigration lawyers so that government lawyers reimagined themselves as federal criminal prosecutors akin to U.S. attorneys. This is significant because, as mentioned earlier, the law treats immigration law—and therefore, the work that government officials do in this area—as civil, not criminal.⁶⁰ And yet, political appointees often and freely borrowed from notions of prosecutorial discretion developed largely in the criminal context to implement their mandate. Ultimately, the DHS struggled to successfully screen out Dreamers through this model, which helped lead to the creation of the DACA program. From a professional-identity standpoint, the hallmark of the DACA program was the use of legal expertise at the highest level of administration rather than at the moment of frontline implementation.

A. Priorities and Nonpriorities

Not long after Janet Napolitano was confirmed as Secretary of Homeland Security, she and her deputies began working to streamline the immigrant-removal process. Working closely with senior leadership in the three major immigration agencies—ICE, USCIS, and CBP—Secretary Napolitano and the DHS senior leadership sought out ways to maximize their resources. The primary strategy DHS relied upon was priority-setting—that is, identifying

57. See *Procedural Vote on DREAM Act Fails in Senate*, CNN (Dec. 18, 2010), <http://www.cnn.com/2010/POLITICS/12/18/congress.dream.act/index.html> [<http://perma.cc/JSP2-MMMQ>].

58. See Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1473–90 (2017) (describing the evolution of advocacy and activism in the context of the legislative paralysis between 2010 and 2012).

59. See *supra* note 7 and accompanying text.

60. See *supra* notes 25–35 and accompanying text.

the specific groups that immigration officials should target for removal.⁶¹ ICE Director John Morton was crucial in this regard. He issued a series of memos articulating the types of migrants ICE officials should target, policies on prosecutorial discretion, and instituting interagency collaborations to ensure that those otherwise-removable immigrants who had nonfrivolous claims for relief had the chance to pursue them on an expedited basis.⁶² He issued these “Morton memos” over a span of two years beginning in the summer of 2010.⁶³

One of the ways that ICE separated priorities from nonpriorities was through the presence of a pending application for an immigrant visa. In deciding whether to proceed with the removal of apprehended migrants, John Morton instructed agency personnel to focus on whether the migrant had a pending application with USCIS that might serve as the basis for relief against removal.⁶⁴ This directive both focused ICE’s attention on the presence of these factors in the removal process and instructed USCIS to engage in an expedited review of such migrants.⁶⁵

To the extent the Morton memos offered any kind of relief, such relief was defined in the negative—that is, migrants who were *not* an enforcement priority could take some comfort in knowing that they faced a statistically low chance of being expelled from the country. At least this is how senior officials described that system.

One interviewee, David, has had a long career in federal law enforcement.⁶⁶ He served as a part of senior leadership in ICE during the first several years of the Obama administration.⁶⁷ He described the years governed by the Morton memos in these terms:

Let’s say the majority of the 11 or 12 million people who are here in undocumented status . . . you know, they have virtually no chance of being arrested these days. ICE is not out there looking for undocumented aliens who have not committed crimes, who don’t pose a threat to the community. They’re just not. So, you don’t want to put yourself in the situation in the future where you might become a priority.⁶⁸

61. *Testimony of Secretary Napolitano Before the S. Comm. on the Judiciary, “Oversight of the Department of Homeland Security,”* U.S. DEP’T HOMELAND SECURITY (May 6, 2009), <https://www.dhs.gov/news/2009/05/07/secretary-napolitanos-testimony-oversight-department-homeland-security> [<https://perma.cc/U56F-QMR5>] (“In identifying individuals for removal, DHS will prioritize those who pose the most obvious threats to public safety.”).

62. *See supra* note 7.

63. *See supra* note 7.

64. Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t, to Peter S. Vincent, Principal Legal Advisor, and James Chaparro, Exec. Assoc. Dir. 2 (Aug. 20, 2010) [hereinafter August 2010 Morton Memo], <https://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf> [<https://perma.cc/Y5JS-59RZ>].

65. *Id.*

66. Interview with David, U.S. Immigration & Customs Enf’t (May 19, 2016) (transcript on file with authors).

67. *Id.*

68. *Id.*

Another senior official, also within ICE, concurred: “If they’re not committing a crime, we’re not gonna get them out anyway, and that should not be our priority.”⁶⁹

In formal terms, the legal relief that ICE government lawyers offered at this time was usually administrative closure—that is, the government would decline to initiate removal proceedings against the noncitizen.⁷⁰ Administrative closure did not create a pathway to regularizing status.⁷¹ Neither did it offer migrants employment-authorization documents, which would open up access to the formal labor market.

Another frequent complaint lodged by immigrant advocates, especially from the immigration bar, was the nature of the relief offered by prosecutorial discretion.⁷² Even if a migrant caught up in the removal pipeline received a favorable exercise of prosecutorial discretion, the migrant would only be able to receive administrative closure and not an opportunity to work.⁷³ As one official put it, “It wasn’t a good enough deal. They’d rather take their chances on a cancellation claim or their asylum claim than they would with some other claim they might have, you know, than they would accept administrative closure.”⁷⁴

During this period, the only type of administrative action that might be characterized as relief was to identify those removable immigrants with pending applications for relief with USCIS, which oversaw the family-based green card petition process, among other programs. Georgia, a senior White House official, confirmed that the enforcement-benefits distinction that is often used to distinguish between ICE and USCIS was slightly overstated:

I mean USCIS seemed like the most logical agency This is not the kind of thing that ICE does on a regular basis. And the idea was, you know DACA is a law enforcement policy, it’s not a benefits policy. The idea is that these folks should be out of the enforcement process and . . . allow ICE to go after people who are priorities. So you know, let’s not bog them down with implementing a program they have no expertise in. Let’s give it to the

69. Interview with Frank, U.S. Immigration & Customs Enf’t (May 31, 2016) (transcript on file with authors).

70. Lopez-Barrios, 20 I. & N. Dec. 203, 204 (B.I.A. 1990) (stating that administrative closure “allows the removal of cases from the immigration judge’s calendar in certain circumstances” but “does not result in a final order”).

71. Administratively closed cases from this period are now being reopened by DHS. Hamed Aleaziz, *The Trump Administration Is Seeking to Restart Thousands of Closed Deportation Cases*, BUZZFEED NEWS (Aug. 15, 2018, 9:45 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-deportations-immigration-ice-dhs-courts> [<https://perma.cc/Y7G4-U425>].

72. See Corey Dade, *Obama’s Deportation Policies Have Failed, Immigrant Advocates Say*, NPR (June 11, 2012, 6:36 PM), <https://www.npr.org/sections/itsallpolitics/2012/06/11/154782404/immigrant-advocates-obamas-deportation-policy-a-failure> [<https://perma.cc/MP6M-B4HP>].

73. See *id.* (quoting Crystal Williams, Executive Director of the American Immigration Lawyers Association: “It’s putting your file on a shelf. That’s it. No other possibilities are being offered, like the settlement of cases, adjustment of status.”).

74. Interview with Edgar, U.S. Immigration & Customs Enf’t (May 26, 2016) (transcript on file with authors) [hereinafter Interview 1 with Edgar].

agency within DHS, which is also you know an agency that cares about enforcement and does have enforcement as a part of their mandate . . . let's give it to them to implement it because we think they have the infrastructure to actually pull it together.⁷⁵

While ICE and USCIS are often understood to operate under separate mandates and have separate types of workplace cultures, the two agencies nevertheless coordinated their regulatory efforts in significant ways.

Things began to change on December 18, 2010, when the DREAM Act failed to clear the Senate. Up until that point, the groups categorized as nonpriorities remained fairly abstract and unformed. Usually, ICE fixated on more generic types of equities that could qualify as “humanitarian” reasons like illness, absence of criminal record, or being the parent of citizens.⁷⁶ But with this latest and very public congressional failure, the executive branch began to focus more intently on how DHS enforcement policy could cobble together some comparable form of relief for the Dreamer population.

While Dreamers are often associated with DACA, several interviewees noted that in reality, DACA represents an extension of the prosecutorial-discretion model that characterized the first part of the Obama administration's policy.⁷⁷ In other words, the parameters that eventually defined the contours of the DACA program were worked out during the Morton memos years. Edgar, a senior advisor to the Secretary of Homeland Security, noted that “the DACA story really has to begin much earlier where . . . we were attempting to kind of shift ICE to focus on convicted criminals . . . and so it began with that, and really, I think the DACA story really begins in 2010 when we issued the civil enforcement priorities memo.”⁷⁸ When asked about when she first learned of the DACA program, Georgia responded:

When did I first start to hear about it? I mean probably in . . . early 2010 I would say? Maybe 2009? You know, . . . I guess actually because we started working on the [prosecutorial discretion] memos. Yeah . . . I guess late 2009, early 2010 . . . you know deferred action is not a new concept, it's been around for many years.⁷⁹

Many senior officials cited pushback by career ICE officials as a significant hurdle to successfully implementing the prosecutorial-discretion

75. Interview with Georgia, White House Staff (Nov. 17, 2017) (transcript on file with authors).

76. Email from Arthur E. Adams on behalf of Mike P. Davis, Acting Dir., Office of the Principal Legal Advisor, to Raphael Choi et al. (Nov. 3, 2010, 4:33 PM), <https://www.scribd.com/document/58810530/2011-ICE-Report-FOIA-request> [<https://perma.cc/84NU-Q9TR>] (email at pages 51–52). This email was released pursuant to a FOIA request by the *Houston Chronicle*. See *infra* note 103 and accompanying text.

77. We note here that there is strong incentive for those concerned with the legality of DACA to emphasize its continuities with a conventional prosecutorial-discretion regime. But as we argue below, we think that the discontinuities between the two approaches are important and worth further evaluation in light of ongoing discussions about the role of the government lawyer in serving the public interest. See *infra* Part II.

78. Interview 1 with Edgar, *supra* note 74.

79. Interview with Georgia, *supra* note 75.

directives. Although ICE initiated a comprehensive review by lawyers in the field of hundreds of thousands of deportation cases for administrative closure, ultimately both frontline officers and agency leadership came to resist more affirmative efforts to protect segments of the undocumented population.⁸⁰ According to Edgar, during President Obama's first term, "ICE at this time under [John Morton] generally took a very hard line and . . . resisted everything."⁸¹ This seemed to be a sentiment shared by those working in the White House as well. Georgia noted:

2011 through 2012 was a really difficult time. . . . We had set up priorities for how we wanted immigration enforcement to take place. And, you know, our job was to set policy priorities, but I couldn't be a law enforcement agent all over the country. Neither could any of the headquarters people at DHS, right? So, you know, it was the job of local ICE officials, thousands of them across the country to be executing on the policies we had put forward.⁸²

Senior officials also fielded complaints from the immigrant-advocacy community.⁸³ A common complaint was that many immigrants with no or minor criminal records were being swept up into the removal pipeline.⁸⁴ In this sense, some of the officials found the priorities to be less helpful in sorting through the unauthorized-migrant pool. Although the putative focus of the Morton memos was on those who posed a national security threat or a danger to their communities, the memos also targeted recent immigration violators.⁸⁵ But, as Edgar explained:

[T]he third category was individuals who had reentered the country unlawfully. Um, people who have been previously deported in some fashion. You know, much later I realized what a problematic area that was in the priorities. . . . [I]t was only after I, frankly, I got to ICE and had access to a lot better data. Um that I was, you know, able to dig into their data pretty deep realized that a substantial portion of the 11.5 million [undocumented migrants in the United States] fell into that bucket.⁸⁶

The large number of migrants in this category came to overwhelm the process of identifying nonpriorities. According to Edgar, this helps explain why immigrants and their advocates were not "feeling the change quick

80. See Interview 1 with Edgar, *supra* note 74.

81. *Id.*

82. Interview with Georgia, *supra* note 75.

83. According to our informants, senior officials at DHS met with representatives from the American Immigration Lawyers' Association and, later, United We Dream as they worked on policy initiatives. See Interview with Frank, *supra* note 69.

84. See, e.g., Ken Dilanian, *Tough Enforcement Against Illegal Immigrants Is Decried*, L.A. TIMES (Apr. 21, 2010), <http://articles.latimes.com/2010/apr/21/nation/la-na-obama-immigration-20100422> [<https://perma.cc/P8GF-7WMV>] (quoting Deepak Bhargava, Executive Director of the Center for Community Change: "The president never said he was going [to] end immigration enforcement, but he sent a clear signal that he would redirect it to a focus on people with criminal records who are a threat to the country. That hasn't happened.").

85. June 2010 Morton Memo, *supra* note 7, at 2.

86. Interview 1 with Edgar, *supra* note 74.

enough.”⁸⁷ As Edgar noted: “everyone’s searching for an answer as to why . . . no one’s following the policies when—without realizing they are following the policies.”⁸⁸ The empirical data confirms this observation as studies have shown the backlog to have steadily increased between 2007 and 2015.⁸⁹

B. *The “Beauty of Prosecutorial Discretion”*

Senior leaders acknowledged that distrust characterized the relationship between senior leadership and career officials: “And so, you know, if you don’t have the trust and the buy-in, something of this nature is not going to succeed, right? Cause ultimately it has to rise or fall in the field. And as we’ve seen, there are pockets of pretty mass resistance.”⁹⁰ According to some officials, the distrust stemmed from a fundamental shift in how ICE was meant to operate.⁹¹ Georgia stated:

The policies we were setting weren’t fully taking hold. . . . [A] part of that is just, you know, it was a real shift in how an agency that was somewhat new but had a history of being around for a while . . . it was a shift in how they did business right? They were used to just saying whoever we run into we’re gonna pick up. If . . . we think they’re undocumented or bad actors, it doesn’t matter what their kind of equities are, right? So it was a shift in kind of saying “no we don’t want you to just pick up everyone, we want you to think about do these people really pose a threat to our communities?” And you know that really took time to take hold.⁹²

Some officials suggested that the notion of agency pushback was overblown. Steve, who served in the DHS during Obama’s second term—that is, well after the Morton memos era had passed—deflected criticisms against ICE as a rogue agency:

[Y]ou know, there may have been people at ICE that were initially hesitant. But you know, ICE followed orders. You didn’t see a lot of dissent, you didn’t see a lot of leaking of information the way you do now [W]ere they happy about everything? But also know they weren’t out there . . .

87. *Id.*

88. *Id.*

89. See *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, TRAC IMMIGR. (June 18, 2009), <http://trac.syr.edu/immigration/reports/208/> [<http://perma.cc/T2TL-FTSK>]; *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, U.S. GOV’T ACCOUNTABILITY OFF. (June 1, 2017), <https://www.gao.gov/products/GAO-17-438> [<https://perma.cc/6L8Q-K54A>]; see also Suzy Khimm, *Many Immigrants Facing Deportation Must Wait 550 Days for Their Day in Court*, WASH. POST (Feb. 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/02/22/many-immigrants-facing-deportation-must-wait-550-days-for-their-day-in-court/> [<https://perma.cc/4G3F-8JCN>].

90. Interview with Horace, U.S. Dep’t of Homeland Sec. (Oct. 11, 2016) (transcript on file with authors).

91. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1118–20 (2011).

92. Interview with Georgia, *supra* note 75.

when people are really offended or running roughshod they go out there and leak . . . that wasn't happening either.⁹³

David noted that the agency was heterogeneous and comprised of a variety of views on the wisdom of whatever mandate senior leadership doled out.⁹⁴ Still, he did not believe such disagreement ultimately mattered:

[A]ny law enforcement officer—federal, state or local—has their personal opinions but they work in at least quasi-paramilitary organizations. And when they are directed to do something, they do it. And their . . . personal opinions don't really matter. Ya know, I'm sure if you talked to certain police officers in Colorado and said, "hey what's your personal opinion about legalizing marijuana," some of them probably weren't all that happy about it. But they do what they have to do.⁹⁵

Whether or not the characterization of ICE at this time as a "rogue agency" is valid,⁹⁶ what is clear is that the DHS leadership set about conducting trainings around the country to close the gap separating senior leadership from career officers. Senior leadership did this by visiting the various field offices to expand on the mechanics of the prosecutorial-discretion system and to address concerns. Central to this endeavor was the reconceptualization of lawyers in the field in the model of federal prosecutors. The message political appointees circulated was clear: that the power immigration lawyers in the agency exercised was akin to the criminal law enforcement powers of their DOJ counterparts.

Georgia noted that "there was a series of trainings that happened after all the different policy memos that were put out."⁹⁷ She referred to these as "town halls" where Secretary Napolitano and ICE Director John Morton "would talk about various issues impacting the agencies, particularly ICE. . . . And, you know really make a pitch that this is smart law enforcement . . . this is the way to kind of do your job effectively."⁹⁸

Some senior officials plainly referenced the criminal law enforcement model in explaining the pre-DACA years. When speaking with David about the challenges of implementing the Morton memos priorities, he noted that discretion was something that immigration officials could appropriately exercise:

You can look at other examples where a . . . district attorney, umm, because of people load, may make the decision that . . . we will no longer arrest work for . . . possession of small amounts of marijuana. We're gonna issue a summons, something similar to a traffic citation. And local jurisdictions and states . . . and even the federal government does that sort

93. Interview with Steve, U.S. Dep't of Homeland Sec. (Feb. 26, 2018) (transcript on file with authors).

94. Interview with David, *supra* note 66.

95. *Id.*

96. See Frank Sharry, *ICE Out of Control: Time to Rein in Rogue Agency and Pass Immigration Reform*, HUFFINGTON POST (May 30, 2010), https://www.huffingtonpost.com/frank-sharry/ice-out-of-control-time-t_b_519201.html [<https://perma.cc/B9CB-TH2L>].

97. Interview with Georgia, *supra* note 75.

98. *Id.*

of thing all the time. And you know, the officers charged with implementing those decisions, they do. It doesn't [necessarily] mean they like it or support it⁹⁹

Horace, a member of senior leadership in DHS overseeing the other agency components, described it this way:

ICE's infrastructure is more what you would imagine from a law enforcement case management structure. You know, where like they have things where they're tracking like aspects of cases and individuals from like a case perspective but that's a lot different from like a benefits agency, right, where there's a lot more paper, or like whatever material, to justify a thing.¹⁰⁰

Another senior ICE official confirmed this account. Frank spent many years working overseas on behalf of the federal government before joining the leadership team in ICE.¹⁰¹ One of his duties was trying to translate the Morton memos directives into meaningful change in the field offices. As he described his role:

I pleaded with the administration, as did others . . . to try to change the hearts and minds of many of those thousand attorneys, and to take a different role . . . than they have previously had in some cases literally for decades . . . in that they should not treat all cases alike, and that they should focus their efforts . . . their talents, and their energy on truly high priority cases, like terrorists and human rights violators, and murderers and rapists and immigration frauds . . . and to . . . not spend as much time and perhaps in some cases, not spend any time on visa overstays of individuals who had come into the country as young people . . . or people that had frankly come into the country later in life but had been good . . . civil citizens in a sense, quotation marks around "citizens" . . . and had not committed crimes, and had contributed to their communities and had paid their taxes.¹⁰²

Journalists from the *Houston Chronicle* obtained documents from ICE's Houston field office.¹⁰³ These documents include a variety of forms of communications and cover a period of approximately six months, from June 2010 to January 2011.¹⁰⁴ This was just a few months removed from the March 2, 2011, Morton memo articulating the different enforcement priorities and only a few weeks removed from the June 17, 2011, Morton memo providing immigration officers with guidance on how to exercise prosecutorial discretion.¹⁰⁵ For this reason, the Houston field office

99. Interview with David, *supra* note 66.

100. Interview with Horace, *supra* note 90.

101. Interview with Frank, *supra* note 69.

102. *Id.*

103. See Carroll, *supra* note 19. The documents obtained through this FOIA request are available at *2011 ICE Report/FOIA Request*, SCRIBD, <https://www.scribd.com/document/58810530/2011-ICE-Report-FOIA-request> [<https://perma.cc/84NU-Q9TR>] (last visited Mar. 15, 2019).

104. See *2011 ICE Report/FOIA Request*, *supra* note 103.

105. See *supra* note 7 and accompanying text.

documents provide a glimpse into how immigration bureaucrats responded to directives issued by political appointees.

The Houston field office documents tend to confirm that ICE lawyers viewed the Morton memos in terms of increasing efficiency in the office rather than in terms of realizing equity-oriented outcomes. Agenda items for meetings included titles such as “Improving the Efficiency of the Removal Process: Prosecutorial Discretion” with a focused examination of administrative devices such as joint motions to reopen, appeals, and remands.¹⁰⁶ Leadership in the Houston office seemed to commit to the task of changing office culture through the development of local implementation policies and regularly held team meetings.¹⁰⁷

The experience of the Houston office during this time suggests that local offices struggled to find ways to translate the Morton memos’ dictates into practice. In a memo to the attorneys in his office, Chief Counsel Gary Goldman explained that the “universe of opportunities to exercise prosecutorial discretion is large.”¹⁰⁸ Goldman then continued to impress upon the legal staff a particular vision of lawyering, one that reflects traditional notions of prosecutorial power long associated with the criminal context:

We have been empowered with independent authority to exercise prosecutorial discretion. We work not in a world of black and white but one of many shades of grey. That is the beauty of prosecutorial discretion.

...

ICE Senior Leadership does not want their attorneys to merely fill a seat in immigration court and blindly prosecute every case handed to them. The current administration wants attorneys of greater sophistication, independence, and complexity in decision making.¹⁰⁹

106. Working Agenda, Field Legal Operations Management Planning Session (Aug. 2–3, 2010), <https://www.scribd.com/document/58810530/2011-ICE-Report-FOIA-request> [<https://perma.cc/84NU-Q9TR>] (agenda at pages 5–6).

107. See Email from Gary L. Goldman to Riah Ramlogan (Aug. 6, 2010, 5:36 PM), <https://www.scribd.com/document/58810530/2011-ICE-Report-FOIA-request> [<https://perma.cc/84NU-Q9TR>] (email at page 7).

108. Memorandum from Gary Goldman, Chief Counsel, Office of the Chief Counsel, U.S. Immigration & Customs Enforcement to All Attorneys, Hous. Office of the Chief Counsel (Aug. 16, 2010), <https://www.scribd.com/document/58810530/2011-ICE-Report-FOIA-request> [<https://perma.cc/84NU-Q9TR>] (memorandum at pages 17–18). Goldman further observed:

It broadly encompasses NTA review, court litigation, not opposing relief, joining in a Joint Motion, not appealing an adverse decision, etc. Further opportunities arise at the appellate level with the extraordinary amount of work reaching the Board of Immigration Appeals and the Circuit Court of Appeals. We also seek efficiencies in the removal process through continuing dialogue with ERO, HSI, CIS, CBP, and EOIR, through improved written advocacy, remands, etc.

Id.

109. *Id.* This memo was ultimately rescinded and replaced by one issued by central leadership, but it still confirms that the message on the importance of prosecutorial sorting of migrant send by political leaders like Edgar and Frank was received by those in at least one field office. See August 2010 Morton Memo, *supra* note 64; see also Email from Gary L. Goldman to Richard W. Bennett et al. (Aug. 24, 2010, 2:04 PM), <https://www.scribd.com/>

More than anything, the model of government lawyering embraced by the DHS during the pre-DACA years bears shades of a key assumption that defines criminal law enforcement—namely, that the prosecutor is in the best position to judge the merits and equities of a case.¹¹⁰ This was one of the reasons some political appointees recoiled at the transition to the DACA model: it wrested the power to decide who “deserved” removal from the hands of immigration lawyers, modeled after prosecutors, and channeled that power into the hands of bureaucrats in USCIS. David, the senior ICE official, describes his reaction to the DACA program in terms of what is lost:

[T]he idea of prosecutorial discretion or deferred action is not something uncommon in law enforcement. It’s common in law enforcement at every level, but it more typically is applied to individuals on a case by case basis, you know at the scene of the incident. You know, if two officers arrive at a bar fight just off-campus, to put it in your world . . . you know they see two people standing there kind of bloodied, and the prosecutorial discretion process begins. They have to decide you know, are they going to arrest one or both? What are they going to charge him with? They take him to some sort of a, a magistrate that decides whether or not this is worth the court’s time, whether or not there’s probable cause . . . are they going to detain them, are they going to set bond? A state prosecutor is going to decide whether or not to plea the case. You know all of that is prosecutorial discretion. But it tends to be on a case by case basis. DACA was the first of a series of policy decisions that took large numbers of people off the enforcement table . . . rather than considering them on a case by case basis.¹¹¹

C. Infrastructure

As was widely reported in 2012, members of the White House met with Dreamer advocates during the lead-up to the program’s announcement.¹¹² The pressure was mounting and it was unfolding publicly. Not surprisingly, on June 15, 2012, Secretary Napolitano issued a memorandum announcing the creation of the DACA program.¹¹³

Many government officials acknowledged that these advocacy efforts spurred on the DACA conversation within the White House. As Georgia explained, “[T]here were more and more conversations we were having with legal experts, you know outside of government . . . smart law professors around the country who had also been looking more at it. Our White House Counsel’s office as well. I think the work sped up in the spring of 2012.”¹¹⁴

document/58810530/2011-ICE-Report-FOIA-request [https://perma.cc/84NU-Q9TR] (email at page 28).

110. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010).

111. Interview with David, *supra* note 66.

112. See Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J. (Oct. 14, 2012), <https://www.wsj.com/articles/SB10000872396390443982904578046951916986168> [https://perma.cc/HP8N-VHXU].

113. See *supra* note 2 and accompanying text.

114. Interview with Georgia, *supra* note 75.

A less well-known part of the story had to do with the conversations taking place among DHS senior leadership. These conversations seemed to be taking place independent of the ones unfolding within the White House. Even though these discussions were happening independent of one another, both the White House and the DHS ended up pretty much in the same place. Georgia observed that “we were all kind of going in the same direction anyway.”¹¹⁵

The creation of DACA represented a reallocation of authority away from ICE to USCIS. Implementing the vision of the Morton memos conflicted with agency culture. As Horace, a former senior DHS official, observed: “[I]f you don’t have the trust and the buy-in, something of this nature is not going to succeed, right? Cause ultimately it has to rise or fall in the field. And as we’ve seen, there are pockets of pretty mass resistance.”¹¹⁶ Isaac, another senior DHS official who served the administration during the same period, explained that the struggle to implement that vision “had to do with the leadership that was put in place at ICE and, you know, just a culture of, you know, ‘Hands off, we’re law enforcement, we do what we want.’”¹¹⁷ In turning to USCIS, the challenge was no longer one of culture but rather of infrastructure.

USCIS had experience with handling and overseeing the benefits program.¹¹⁸ At the same time, DACA was a massive undertaking. And USCIS needed to build a system to handle the flood of applications that DACA would generate. As Horace, a senior DHS official, observed:

So, you know, USCIS, as you probably know, has . . . very old infrastructure and by infrastructure, I merely mean sort of the computer systems that they have to process and the various associated sort of support services they have there, you know, for a long time, you know, as of many things relating to benefits, an application was done totally on paper.¹¹⁹

In the end, USCIS modified an application it had been using to process applications for Temporary Protected Status.¹²⁰

As was the case with prosecutorial nonenforcement decisions in ICE, denials of DACA applications within USCIS were exercises of discretion. And as is the case with almost all discretionary agency decisions, denials are not reviewable by federal courts.¹²¹ Still, USCIS did provide a rough approximation of a review process through its ombudsman office. Those

115. *Id.*

116. Interview with Horace, *supra* note 90.

117. Interview with Isaac, U.S. Dep’t of Homeland Sec. (Oct. 13, 2016) (transcript on file with authors).

118. *See supra* note 11 and accompanying text.

119. Interview with Horace, *supra* note 90.

120. The TPS form is recorded as an I-821 form, while the DACA form is I-821D. *See I-821, Application for Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/i-821> [<https://perma.cc/45AF-6CX5>] (last visited Mar. 15, 2019); *I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/i-821d> [<https://perma.cc/K2PZ-LZNN>] (last visited Mar. 15, 2019).

121. *See* 8 U.S.C. § 1252(a)(2)(B) (2012).

working within the ombudsman office did not have the authority to reverse findings by USCIS adjudicators, but if an applicant disagreed with a disposition, she could request that the ombudsman office inquire about the process.¹²² In a report issued by the ombudsman office in 2013—the year after DACA went into effect—the ombudsman identified “transparency and consistency for individuals requesting deferred action” as a key goal for its office.¹²³

Some who worked within the ombudsman office thought that USCIS faced serious challenges in implementing DACA. Felicia worked in this office during the Obama administration.¹²⁴ A lawyer by training, she came to USCIS from the nonprofit sector, where she had helped provide legal services to immigrant communities.¹²⁵ When asked about the types of problems her office addressed, Felicia noted:

In the most recent round of renewals, the agency system had a glitch that caused background checks to . . . fall out of the queue. . . . They were serious enough that it posed grave delays, and the agency wasn't very straightforward about it. At all. Not with the community, not with the Congress, or with our office.¹²⁶

Although many depictions of DACA—both judicial¹²⁷ and popular¹²⁸—portrayed it as an opportunity for agency officials to rubber-stamp applications, Felicia provided a more nuanced description of this picture. She confirmed the suspicion harbored by many immigrant-rights activists that contact with law enforcement, even minimal contact, could be the basis for exclusion from the program.¹²⁹ Again, here is Felicia:

I recall seeing cases . . . where we felt the person met the requirement but USCIS disagreed. . . . [W]e went back and forth on several cases that presented adjudications issues. . . . [A]nd it was really hard for us to push those . . . in which there had been a criminal arrest. Even if we felt that the underlying offense . . . disqualified the individual for DACA, I think the agency, you know the officers who . . . had the strictest, I think the most restrictive position on some of these cases . . . they were very sensitive to congressional inquiries about DACA recipients with criminal backgrounds.

122. *Ombudsman—Case Assistance*, *supra* note 44.

123. See OMBUDSMAN, CITIZENSHIP & IMMIGRATION SERVS., ANNUAL REPORT 2013, at viii (2013), https://www.dhs.gov/sites/default/files/publications/CISOMB_2013_Annual_Report%20508%20final.pdf [<https://perma.cc/92F9-9DCQ>].

124. Interview with Felicia, U.S. Citizenship & Immigration Servs. (Dec. 1, 2017) (transcript on file with authors).

125. *Id.*

126. *Id.*

127. See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

128. See Jessica M. Vaughan, Dir. of Policy Studies, Ctr. for Immigration Studies, Statement to the U.S. Senate Comm. on the Judiciary (Oct. 3, 2017), <https://www.judiciary.senate.gov/imo/media/doc/10-03-17%20Vaughan%20Testimony.pdf> [<https://perma.cc/GN75-4S4M>].

129. Interview with Felicia, *supra* note 124.

Or criminal arrest[s], rather. So I think it was nearly impossible for us to move any of those cases.¹³⁰

D. Information Markets

As legal scholars have noted, the move toward a DACA model for discretionary relief signaled the embrace of transparency as a mode of governance.¹³¹ But abandoning the “black box” of the prosecutorial model¹³² in favor of an open and transparent model for relief presented new regulatory challenges. Because deferral could not be granted until and unless noncitizens affirmatively applied for such relief, USCIS officials focused their attention on ensuring that information on the content and parameters of the program were as accurate as possible.

Carl worked closely with the USCIS director during the DACA rollout.¹³³ He noted that after the program was announced in June 2012, but before USCIS began accepting applications, agency officials were reluctant to “go out with even a little bit of piecemeal stuff here and there” for fear of generating “confusion among advocacy groups or service organizations.”¹³⁴ To the extent USCIS communicated with the public, Carl noted, “The message was, yes, we are working towards this, [but] don’t prepare anything, don’t give *notarios* anything. We are the official source. We will give things out on or about August 15.”¹³⁵

Adam Cox and Cristina Rodríguez have noted that one process-based shortcoming of DACA was its lack of public input, something that could have inevitably improved and legitimated the program.¹³⁶ Bert worked as a senior legal advisor in the Obama administration after DACA had already been created.¹³⁷ He made a similar point about the administration’s decision not to create DACA through notice-and-comment procedures, which is how significant policies are typically created:

I was surprised they didn’t use notice and comment. Not because I thought it was clear that they had to, because it was pretty clear that someone would challenge them on this ground, and why leave ourselves vulnerable to that possible lawsuit? It probably would have delayed things about a year, but at the time they had the year. And to this day I scratch my head and think why they didn’t do it.¹³⁸

130. *Id.*

131. See Cox & Rodríguez, *supra* note 9, at 197–205.

132. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (describing prosecutorial decision-making as a “black box” due to a lack of regulation compelling transparency).

133. Interview with Carl, U.S. Citizenship & Immigration Servs. (Apr. 28, 2016) (transcript on file with authors).

134. *Id.*

135. *Id.*

136. See Cox & Rodríguez, *supra* note 9, at 217–18.

137. Interview with Bert, U.S. Citizenship & Immigration Servs. (Apr. 4, 2016) (transcript on file with authors).

138. *Id.*

Our interview data shows that many officials did engage stakeholders and other constituents even if it was not through channels prescribed by the Administrative Procedure Act. In this way, DACA created a sort of information economy in which entities like agencies, nonprofit immigrant-serving organizations, and for-profit *notarios* could establish value in (or in the case of *notarios*, defraud and potentially ruin) the lives of immigrants with information about a program drafted by Secretary Janet Napolitano and announced by President Obama in the Rose Garden.

USCIS officials also evinced a sensitivity to norms governing the various noncitizen communities. Gaia, who advised USCIS officials as a lawyer and counselor, noted that a challenge throughout the DACA rollout was convincing eligible Asian American noncitizens to apply.¹³⁹ She explained: “We kept hearing a culture of shame from [Asian Pacific American] groups. People were less inclined to come out with that status because of shame. Didn’t see that with various Latino groups. For them, it was more about fear.”¹⁴⁰ The empirical data seems to confirm this basic trend. According to the Migration Policy Institute (MPI), the DACA participation rate for people of Mexican origin is 68 percent while the highest participation rate among Asian Americans belongs to South Koreans at 24 percent.¹⁴¹ Chinese application rates are even lower. Despite comprising the largest subgroup of the Asian American community, the participation rate of Chinese Americans is only 3 percent.¹⁴² Other studies largely confirm this basic pattern.¹⁴³

Trained as a lawyer, Serena also worked within USCIS.¹⁴⁴ A child of Korean immigrants, she advised USCIS leadership on a variety of legal and policy-related matters.¹⁴⁵ In discussing the role that she and other senior leadership played in the DACA rollout, Serena explained that it went beyond

139. Interview with Gaia, U.S. Citizenship & Immigration Servs. (Mar. 28, 2016) (transcript on file with authors).

140. *Id.*

141. *Deferred Action for Childhood Arrivals (DACA) Data Tools*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles> [<https://perma.cc/Y5X5-MJU8>] (last visited Mar. 15, 2019).

142. *Id.*

143. The Brookings Institution obtained data on DACA through a FOIA request. It found that Mexican applicants comprised 74.9 percent of all DACA applications and South Koreans consisted of 1.5 percent of the total applicant pool. See Nicole Prchal Svajlenka & Audrey Singer, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, BROOKINGS (Aug. 14, 2013), <https://www.brookings.edu/research/immigration-facts-deferred-action-for-childhood-arrivals-daca/> [<https://perma.cc/UB85-8H2E>]. Another study that relies on the Brookings data and that focuses specifically on Asian Americans records the DACA application rates of Koreans at 35 percent and Chinese at 5 percent. See EunSook Lee, *Increasing Asian American and Pacific Islander DACA Participation: Overview and Grantmaking Recommendations*, GCIR tbl.C (Apr. 2014), <https://web.archive.org/web/20150922014347/https://www.gcir.org/sites/default/files/resources/AAP1%20DACA%20Summary%20Brief%20Design.pdf> [<https://perma.cc/ZN5S-VA8Z>]. One possible explanation for the difference in rates between the Brookings and Lee studies on the one hand and the MPI study on the other is the dataset. The former relied on DACA rates through 2013 while the latter reflects data through August 2018.

144. Interview with Serena, Dep’t of Homeland Sec. (May 23, 2018) (transcript on file with authors).

145. *Id.*

merely conveying information to the public. She said that oftentimes, it felt as if she urged and prodded stakeholders to engage the process, to agitate those in power: “There were times when I would reach out to the Asian Americans groups and say ‘You guys need to show up. I need you to, like, stomp your feet, like you know, be a bigger voice.’”¹⁴⁶

III. THE ETHICAL DISCRETION OF IMMIGRATION LAWYERS IN THE GOVERNMENT

The delegation of authority to and away from an agency in a given matter strongly shapes how ambiguities will be resolved and the speed with which those resolutions will come.¹⁴⁷ But the relationship between the location of authority, the regulatory outcomes, and the external political environment also informs the construction of the duties owed by lawyers.

A. Normative Innocence

Immigration enforcement policy during the Obama administration borrowed freely from the prosecutorial model associated with the criminal law tradition. Gail, a high-ranking DHS official, described ICE officers as “immigration cops,”¹⁴⁸ which is consistent with the messaging that OPLA lawyers received—that they occupied roles similar to prosecutors in the criminal legal system. Prior to working in the administration, Gail spent several years as a federal prosecutor.¹⁴⁹ She justified DACA precisely on these terms: “[T]he sanction in immigration enforcement, deportation . . . ha[s] significant consequences on a person’s life. And although it’s civil/administrative, it’s kind of quasi-criminal. And even in administrative law there’s the concept of prosecutorial discretion.”¹⁵⁰ At the same time, we should have a clear picture of what exactly is being borrowed.

The reality is that discretion in this context tries to serve many different purposes. A prosecutor may decline to charge a defendant because the underlying proof is weak (legal reasons), because of limited resources (administrative reasons), or because it would not be fair to do so (equitable reasons).¹⁵¹ DACA was justified on all of these grounds. And the message was clear: just as prosecutors enjoy freedom from judicial interference in the realm of charging discretion,¹⁵² so should immigration officials enjoy similar

146. *Id.*

147. See Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227, 245–46 (2012); see also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1133, 1134–35 (2012).

148. See Interview with Gail, Dep’t of Homeland Sec. (June 17, 2016) (transcript on file with authors).

149. *Id.*

150. *Id.*

151. See Bowers, *supra* note 110, at 1656–57.

152. See *Wayte v. United States*, 470 U.S. 598, 607 (1985); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422–23 (2008).

degrees of autonomy. Some of the opposition to DACA was certainly political disagreements masquerading as procedural objections.¹⁵³ But some of it might also be the difficulties of asking any prosecutorial entity to impose sanctions for reasons of mercy or normative innocence—that is, when one has formally violated the law but not violated broader moral codes.

Josh Bowers, for example, argues that there are many reasons to doubt that prosecutors are necessarily better situated than other actors in the criminal legal system to evaluate whether or not charging a particular defendant would be fair, including the difficulty of obtaining relevant facts in arrest records.¹⁵⁴ Prosecutors rely on police to gather the underlying facts, and even if prosecutors are inclined to exercise equitable discretion, the police will not necessarily share that sentiment, which makes it hard to determine whether a particular defendant fits the types of “normatively innocent” person entitled to relief.¹⁵⁵ This institutional reality helps explain why OPLA attorneys might have felt resentment toward the creation of DACA. That program was popularly understood as a repudiation of ICE as a whole, but from the vantage point of OPLA attorneys, they were being penalized for the shortcomings of Enforcement and Removal Operations (ERO), the branch of the agency that plays the role of the police to OPLA’s prosecutors. This is consistent with the view shared by senior DHS and ICE officials: that OPLA attorneys followed orders but that perhaps they were not in the best position to evaluate normatively innocent migrants because the underlying files may not have been properly prepared by ERO with that goal in mind.

Even if ICE could obtain buy-in from both the prosecutorial and investigatory arms of its agency, the exercise of equitable discretion along these lines would still pose challenges to modern administrative norms and practice. Generally speaking, administrative law has developed in a manner that seeks to minimize unfettered discretion exercised by government officials. As Rachel Barkow points out, “In a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process, there is little space for the exercise of unreviewable legal power that is dispensed without reason and without the need to be consistent.”¹⁵⁶

The interview with Edgar reflects the sort of discomfort and disconnect of incorporating principles of mercy into the immigration realm. The interview spanned two separate sessions. In the first interview, Edgar described the process of issuing the Morton memos this way:

I—I don’t think people were feeling the change quick enough, and . . . we had talked about it when we established the simple enforcement priorities that we would also revise and issue a new policy on prosecutorial

153. See Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 119 (2016).

154. Bowers, *supra* note 110, at 1701.

155. See *id.*

156. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1339 (2008).

discretion. You know, . . . who are you gonna, you know, show some, you know, for lack of a better word, you know, mercy towards.¹⁵⁷

He mentioned mercy reluctantly, almost in passing. In the second interview with Edgar, upon revisiting the topic of mercy, he expressed much greater resistance to that characterization. Here is the exchange:

STEPHEN LEE: Like I'm trying to figure out how much, how much of the program was just about like a, you know, sorting from the institutional perspective to make sure you could highlight the priorities and . . . help use resources, and how much of it was sort of seen as like a—almost like a clemency, uh, akin to that kind of procedure.

EDGAR: Uh, clemency I don't even think is the right word, and I don't like the mercy word, that's a really weird word for me to use. . . . Um, but it's more like this; I think it was like, well, this is the right thing to do. We shouldn't waste any resources on these people, right?¹⁵⁸

After explaining the various benefits that Dreamers could obtain through DACA, Edgar continued:

You know, um, this is a population that shouldn't be touched. There was a lot of that, so that I wouldn't say mercy is the right word. It's not like, okay, we're going to show compassion to this population, I mean but it was more like, hey, this is a population that this country shouldn't waste any money or time deporting. I mean this was the kind of mindset we had, right? And we should just—shouldn't waste time or money on this—energy on this population, and this is the best way to take care of it, so we're going to do it.

Um, I, I don't think we were looking at it like a—I mean I think here was . . . certainly some sympathy for the situation these people find themselves in. There was a lot of sympathy, right? These—I think we—that's reflected in the [DACA] memo.¹⁵⁹

Edgar then concluded by reiterating that it was the right thing to do: “And there was a real strong conviction that this was the right thing to do, both from a . . . moral or just an ideal policy perspective but also . . . an enforcement perspective.”¹⁶⁰ Not all of our interview subjects expressed ambivalence about the equitable strains of DACA. Many fully embraced it while others simply did not acknowledge it during the course of being interviewed. But Edgar's struggle to land on a firm position on DACA's equitable dimensions reflects the difficulty of fitting nearly unfettered discretionary decision-making within the modern administrative state.

Immigration scholars have defended the DACA program as a constitutionally permissible expression of the president's duties to “take Care” that the laws be faithfully executed.¹⁶¹ These types of arguments have

157. Interview 1 with Edgar, *supra* note 74.

158. Interview with Edgar, U.S. Immigration & Customs Enf't (Sept. 14, 2016) (transcript on file with authors).

159. *Id.*

160. *Id.*

161. See generally Shoba Sivaprasad Wadhia, *Response: The Obama Administration, in Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59 (2012).

tended to amount to a broader defense of the president's ability to preserve resources and set priorities. Focusing on the normative innocence of DACA beneficiaries highlights another executive power also memorialized in the Constitution, namely the power to pardon and to grant clemency.¹⁶² Presidents can exercise this power in a systematic fashion, which provides the president with a "bully pulpit" to persuade Congress and the public that legislation should be changed.¹⁶³ In many ways, DACA did precisely that. DACA's content was derived entirely from the DREAM Act, a failed legislative action, which sent a strong signal of the president's disappointment with the failure to pass the bill. But because DACA was presented as an exercise of prosecutorial discretion grounded in the logic of resource allocation and the centralization of authority, the moral dimensions of the program did not figure easily or readily into public justifications for the program. DACA as an act of clemency points to an alternative reality in which the program operated as a moral disagreement with an immigration system created by Congress that deprived childhood arrivals of any meaningful attempt to adjust their status.

Viewing DACA through the lens of clemency also forces the question of accountability. Professor Barkow observes:

Because the clemency decision is squarely placed with the President, it is a decision for which he or she is plainly accountable. Executive discretion not to bring charges could rest anywhere down the chain of command, including a law enforcement officer's decision not to arrest or investigate, or a line prosecutor's decision not to bring charges. Unlike the President, those individuals are neither elected nor directly democratically accountable.¹⁶⁴

This observation pairs with the view from within the Obama administration that DACA offered the country a big and daring governmental program. In a candid moment, Edgar bluntly stated the motivation for moving away from the prosecutorial-discretion model toward DACA: "I think a lot of our internal reflection was boy everything we've done has been half measures—everything's been compromises, you know with ICE. Well maybe we should just say fuck the compromises, you know, and just get something done."¹⁶⁵ While DACA certainly moves past the "half measure" of a Morton memos regime, the clemency frame suggests that DACA itself was a kind of hedge. It reflected a discretionary decision that avoided the moral implications of an immigration code that created the pool of childhood arrivals in the first place.

162. See U.S. CONST., art II, § 2, cl. 1 ("The President . . . shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

163. See Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 14 FED. SENT'G REP. 139, 139 (2001).

164. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 839 (2015).

165. Interview 1 with Edgar, *supra* note 74.

As Peter Markowitz and Lindsay Nash argue, the president has the power to pardon noncitizens for their immigration offenses.¹⁶⁶ A clemency version of DACA could have offered noncitizens the same terms for relief but would have proceeded in a different form. The name of the president, and not the Secretary of Homeland Security, would be on the issuing document. In the version of DACA that we know, government lawyers advised Secretary Napolitano and grounded the program in cornerstone administrative law decisions like *Heckler v. Chaney*,¹⁶⁷ which discouraged judges from scrutinizing too heavily the nonenforcement decisions of agencies. In the clemency version of DACA, government lawyers can do even less because the nature of pardoning is political—the rewards and penalties are issued in the arena of political elections.

As for *that* version of DACA, Georgia intimated that the president was reluctant to use his bully pulpit too aggressively, at least on that issue. As she explained:

[T]he impact [DACA] would have on the legislative debate is also something we talked about. People wanted us to do DACA immediately after the DREAM Act failed in 2010, and I think the President was still not ready to go there. And you know, a part of it was that he knew it was going to have an impact on the debate. It could have a positive impact in jumpstarting the conversation, . . . or it could have a negative impact. We weren't certain umm the impact it was gonna have. In our case an election was also happening, so when we did announce it . . . the kind of excitement around DACA, combined with you know the outcome of the election actually did jumpstart the debate again in 2013.¹⁶⁸

In the end, it is tempting to conclude that policies taking power away from frontline lawyers and giving it to high-level advisors means that government lawyers should not effectuate policies grounded in views of normative innocence. The mixed and at times jumbled justifications for DACA suggests this to be the case. But it also seems true that these sorts of executive actions could be squarely based on equitable considerations like normative innocence or mercy so long as the president himself—and not frontline officers or even his political appointee surrogates—was willing to bear the political cost for doing so.

B. Persistent Moral Engagement

Scholars argue that lawyers acting in an *advisory* capacity to political actors at the upper echelons of the executive branch are obligated to incorporate principles of independence and candid advice-giving in their

166. See generally Peter L. Markowitz & Lindsay Nash, *Pardoning Immigrants*, 93 N.Y.U. L. REV. 58 (2018).

167. 470 U.S. 821 (1984).

168. Interview with Georgia, *supra* note 75.

work.¹⁶⁹ They have a greater duty to the public interest,¹⁷⁰ implicitly due to the weight of authority that they bear, whereas lawyers acting in an *advocacy* capacity, particularly those who represent agencies in litigation, arguably have a greater duty to carry out that agency's imperatives as defined by supervisors and the political appointees to whom they report.¹⁷¹ Scholars have forcefully argued that lawyers in the latter category do not possess ethical discretion with regard to their own conceptions of the public interest and are duty-bound to take orders and implement policies.¹⁷² In this section, we explore how the foundational dichotomy in the government-lawyering literature—public interest versus agency imperative—both holds up and comes apart in the context of the immigration initiatives discussed above. These conceptions contextualize the Morton memos and DACA, even as the facts from these policy narratives test the continuing vitality of the ideas that shape the ethical practice of government lawyering.

Judge Patricia Wald called the public interest the “phantom client” of the government lawyer.¹⁷³ It is almost a truism that government lawyers—among multiple other duties—are charged with advancing the public interest:

A government lawyer serves the interests of many different entities: his supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is a part, and the public interest. . . . The government attorney's duty is not to a client but to the set of institutions through which society is governed and the public interest is pursued.¹⁷⁴

But the idea is tested by the various contexts in which government lawyers practice. They perform widely varied functions with differing levels of authority for their practices.¹⁷⁵ This is the case for the immigration lawyers serving the state. As described above, lawyers like Georgia advise the president in the White House, while Edgar serves the Secretary of Homeland Security, David provides counsel to principals in ICE, and frontline attorneys represent the government in adversarial deportation proceedings overseen by

169. See David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 *FORDHAM L. REV.* 705, 712 (2012).

170. See Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *STAN. L. REV.* 1931, 1970–71 (2008).

171. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 *U. CHI. L. REV.* 1293, 1294–97 (1987).

172. See *id.* at 1294.

173. Patricia M. Wald, “*For the United States*”: *Government Lawyers in Court*, 61 *LAW & CONTEMP. PROBS.* 107, 128 (1998) (“Strong advocacy by government lawyers of their agency clients is to be desired, but most judges want the government lawyer to consider the ‘public interest,’ ephemeral as that is, to be his phantom client as well.”).

174. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 *HARV. L. REV.* 1244, 1414–15 (1981).

175. See *id.* at 1417 (“The government attorney himself is a mythical being. The federal district judge, his law clerk, the Federal Trade Commission hearing officer, the General Counsel of the Army, the state attorney general, and the local prosecutor and city attorney may all be characterized as ‘government attorneys,’ in that they belong to the bar and work for the government. Yet these individuals perform a variety of very different tasks, including investigation, prosecution, adjudication, and general policymaking.”).

DOJ lawyers in their role as administrative adjudicators.¹⁷⁶ The capacity of these attorneys to exercise independence and to act on their understanding of the public interest varies widely depending on their position in the agency hierarchy, their proximity to political figures with authority, and their function, whether advisory or advocacy.

This challenge is exacerbated when an agency acts on controversial subject matter. Indeed, foundational to the public-choice critiques of the public interest, such as by Jonathan Macey and Geoffrey Miller, is the contention that a common good cannot be discerned and acted upon:

[T]he constitutional system of checks and balances depends upon the institutional loyalty of its attorneys. Although this argument runs counter to the common intuition that the government attorney should act to further the common good, we argue that this common view is ultimately insupportable, in large part because there is simply no consensus in our pluralistic society as to what constitutes the common good.¹⁷⁷

In the immigration context, there are sharply contested views about what the state should do with regard to undocumented people in the United States. Macey and Miller would likely point to the immigration example as a prime case study arguing against the pursuit of the public interest in government lawyering. In their conception, politics is a market in which individual interests compete for primacy.¹⁷⁸ Government lawyers must remain careful to either work on behalf of the winning ideas, or on behalf of elected leaders, and to refrain from advancing their own vision of the common good through their work.¹⁷⁹ When government lawyers act with a degree of independence from political authorities they are understood to be in danger of substituting their own individual beliefs for government policy.¹⁸⁰ In the rhetorical structure suggested by William Simon, the choice that is constructed is between legitimate, libertarian, client-centered “legal” ends versus illegitimate, inchoate, “moral” ends.¹⁸¹

176. See *supra* notes 68, 75, 78 and accompanying text.

177. Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1116 (1995).

178. See *id.* at 1108.

179. See *id.* at 1106.

180. See Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 299 (“The underlying problem in the public interest approach derives from the government lawyer’s discretion to fashion a personal and subjective notion of the public good.”).

181. Critics, such as William Simon, pointed to the constraints imposed by the terms of engagement:

Although critics of conventional legal ethics discourse often adopt the law versus morality characterization, its strongest influence is to bias discussion in favor of conventional, especially libertarian, responses. Typically the conventional response is portrayed as the “legal” one; the unconventional response is portrayed as a “moral” alternative. This rhetoric connotes that the “legal” option is objective and integral to the professional role, whereas the “moral” alternative is subjective and peripheral. Even when the rhetoric expresses respect for the “moral” alternative, it implies that the lawyer who adopts it is on her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers

There is dissensus in every policy arena, even those understood to rely upon a common moral code, as in the case of torture.¹⁸² Indeed, there are political interests in the United States that benefit from dissensus even in the face of established facts. A public-choice approach to government lawyering, combined with manufactured dissensus, leads to winner-take-all politics in which elected officials are motivated to mobilize the state in favor of their narrow political interests, as appears to be occurring currently. And government lawyers engaged in prosecutorial functions have been largely freed of limits that might be imposed by ethical norms, as they have pursued the agency imperatives of a carceral state.¹⁸³ DACA presents an example of government lawyers acting in advisory roles and counseling their principals to implement policy in contravention of applicable law with some underlying notion of a public interest at stake. Even in the muddled policy justifications for DACA delineated in the preceding section, government lawyers reluctantly embraced equity-based rationales that aligned with the direction ultimately given to them by the White House. The dichotomy between public interest and agency imperative comes apart in this instance. Government lawyers appear to have a degree of moral engagement in the midst of policy dissensus both outside and within the state.

C. Constructing the Public Interest

DACA may help us understand with greater clarity how the public interest is constructed in government lawyering. The pre-DACA years of DHS immigration enforcement provide greater texture to ongoing discussions about how power is and should be allocated within the executive branch. A group of administrative law scholars have shined a light on an “internal separation of powers.”¹⁸⁴ These principles and legal mechanisms help create rivalries within the executive branch akin to traditional notions of separation of powers, which govern the federal government generally and for the same purpose: to reduce the consolidation of power in one faction thereby guarding against tyrannical rule.¹⁸⁵

and law students to argue for the “moral” alternative. In many such situations, however, both alternatives could readily be portrayed as competing *legal* values.

The specious law-versus-morality characterization is used most frequently to privilege client loyalty.

William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1114 (1988).

182. See generally Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006).

183. See Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 559–60 (2015).

184. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) [hereinafter Michaels, *Enduring*]; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016).

185. Michaels, *Enduring*, *supra* note 184, at 520.

In terms of accountability, internal separation of powers became more important as the Obama administration transitioned from the first term to the second. In describing DACA, Horace observed that “[i]t was also really important . . . from a policy perspective that the program be essentially self-funded.”¹⁸⁶ As the DHS utilized DACA as a mechanism for protecting Dreamers, agency decisions became even more insulated against congressional oversight given that the program was self-funded. This stands in stark contrast to the prosecutorial-discretion model in which Congress could dial down DHS funding through the appropriations process. But allowing otherwise removable immigrants to apply for deferred-action status enabled USCIS to collect fees, which effectively kept the program afloat and more importantly insulated against congressional intervention through the funding process.¹⁸⁷

This dynamic within the Obama administration illustrates two points that once again complicate the public-interest versus agency-imperative dichotomy. First, frontline lawyers and officers in ICE may have been pursuing what they perceived to be the public interest, as defined by laws on the books and congressional opposition to changes to those laws.¹⁸⁸ Relatedly, the public interest is defined down in the face of difficult social challenges, such as migration and economic dislocation. The state begins to define success through quantitative performance measures.¹⁸⁹ In Mary Fan’s words, “the system slides into staging impressive displays of power rather than doing the hard job of aiming for effective strategy.”¹⁹⁰

Second, when frontline lawyers feel political or personal affinity with enforcement agents, there is potential for pervasive individual or institutional conflicts.¹⁹¹ When OPLA attorneys saw their office (or the authority of their

186. Interview with Horace, *supra* note 90.

187. See U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 73,292, 73,331 (Oct. 24, 2016) (listing the application fee for temporary protected status as \$50); see also *Our Fees*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/forms/our-fees> [<https://perma.cc/CYC3-UGBK>] (last visited Mar. 15, 2019) (“USCIS is almost entirely funded by application and petition fees.”).

188. See Macey & Miller, *supra* note 177, at 1116 (“To the extent that government attorneys clash within the agency itself, however, there is a potential for the government attorney to advance his own interests at the expense of the agency as a whole.”). But as Miller argues:

In a system of checks and balances it is not the responsibility of an agency attorney to represent the interests of Congress or the Court. . . . [T]he constitutional system presumes—indeed, depends upon—the institutional loyalty of its lawyers. Congress has manifold opportunities—including powers of purse, oversight, investigation, and impeachment—to punish presidents or cabinet officers who do not administer the law to its liking. It does not need the allegiance of agency attorneys to fulfill its constitutional functions.

Miller, *supra* note 171, at 1296.

189. See Mary De Ming Fan, *Disciplining Criminal Justice: The Peril amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 27–56 (2007) (describing incentives in federal criminal prosecution in favor of numerical targets over fairness).

190. *Id.* at 28.

191. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 473 (2017) (“Pervasive individual conflicts arise out of commonly shared personal interests that may influence the decision-making of all prosecutors in an office.

office)¹⁹² or ICE enforcement agents as their client, conflicts arose when the leadership to whom they report sought to move the agency against those preferences.¹⁹³ Interestingly, this happened to a degree even when leadership sought to endow ICE attorneys with greater prosecutorial discretion. While leadership saw the Morton memos as authority-enhancing, the substantive end of the administrative closure of thousands of deportation cases cut against frontline policy preferences. Immigration prosecutors in ICE refrained from exercising their discretion. In contrast, lawyers in advisory functions relied, at least in part, on a conception of the public interest.

The scholarly debate over public fiduciary theory may help us understand how government lawyers may define the public interest.¹⁹⁴ Evan J. Criddle and Evan Fox-Decent argue that government lawyers have “first order” duties to their putative clients and “second order” duties to a broader conception of the public interest.¹⁹⁵ Seth Davis warns against an investment in the legitimation of a fiduciary government, a conception repeatedly used by colonial regimes to oppress and harm indigenous peoples.¹⁹⁶ The government deploys discretionary power over private parties and displaces their agency. Davis’s warning is particularly apropos in this case because of the vulnerability of undocumented people, like American Indians, to the plenary power of the federal government.

In the case of DACA, social movement organizations mobilized against the immigration enforcement practices of the Obama administration with particular vigor after the failure of the DREAM Act in 2010. Social

Institutional conflicts arise from the prosecutor’s connection to the prosecutorial office as an institution rather than from any personal interest or relationship to another party.”). More directly, police hold bargaining power over prosecutors. Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 763–64 (2018) (“Prosecutors’ offices are reliant on the police to provide the essential service of detection of crimes. This reliance gives the police bargaining power over prosecutors, and when prosecutors act in ways the police disapprove of, police can voice that disapproval by withholding their services from prosecutors in the future.”).

192. Macey & Miller, *supra* note 177, at 1119 (“[G]overnment attorneys will seek to expand their power within an agency at the expense of the agency, or to expand the power of the agency at the expense of society.”).

193. See R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 394–95 (1937); Cox & Rodríguez, *supra* note 9, at 151–73 (describing the “two-principals” model in immigration law, where agencies report to both the legislative and executive branches); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308, 330 (1976); Note, *supra* note 191, at 760–61 (explaining agency costs in criminal prosecutors’ offices).

194. See generally FIDUCIARY GOVERNMENT (Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim & Paul D. Miller eds., 2018).

195. See generally Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (discussing democratic accountability of public agencies through means other than the “proxy representation” of elected officials); Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in FIDUCIARY GOVERNMENT, *supra* note 194, at 67.

196. Seth Davis, *Pluralism and the Public Trust*, in FIDUCIARY GOVERNMENT, *supra* note 194, at 281, 282 (“Fiduciary government is ‘saturated’ with metaphors that have underwritten oppression and unjust relationships ‘as natural, necessary, and just.’” (quoting Robert W. Gordon, *Law and Ideology*, 3 TIKKUN, Jan.–Feb. 1988, at 14, 16)).

movements mobilize power in multiple ways. In this case, political interests within and outside of the government aligned to produce a proto-administrative regime that offered temporary, contingent respite from immigration enforcement.¹⁹⁷ Government lawyers in advisory roles used their ethical discretion to coproduce DACA. Drilling down on the role of social movements in the construction of the public interest in government lawyering, particularly in the context of prosecutorial-justice regimes, is an essential endeavor in the age of mass incarceration and should be the subject of future work in this area.

CONCLUSION

In this Article, we have tried to remind legal scholars that lawyers in the government perform a diverse and heterogeneous array of work related to immigration policy. Revisiting immigration-enforcement policies of the Obama administration not only helps to empirically confirm the centralization theory of DACA advanced by immigration scholars but also shows that competing notions of professional responsibility and government lawyering animated the process by which authority was assigned, withdrawn, and reassigned. We know that government lawyering makes a difference in the realm of immigration enforcement, and we are just at the beginning stages of knowing exactly how and why it does.

DACA provides a case study in how a type of *administrative justice* came to replace *prosecutorial justice*, in part due to the ethical discretion exercised by lawyers acting in advisory functions at the White House and within DHS. Lawyers must always construct client interests in the varied contexts in which they work,¹⁹⁸ and that construction is never as straightforward as public-choice theorists might posit. There is a degree of ethical discretion inherent in the decision-making of all lawyers, including those in service of the government. A conception of the public interest that may cause the lawyer to reconstruct their client's interests through some form of moral dialogue is an inherent element of the lawyer-client relationship.¹⁹⁹ This moral autonomy is essential in a context in which prosecutorial power remains largely unchecked. In the case of DACA, administrative justice enabled government lawyers to advance the public interest.

197. There are analogous historical antecedents worth further examination. *See generally* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538 (2018) (discussing the historical roots of petitioning as a means by which the politically weak may exercise influence on government).

198. Stephen Ellmann, *Lawyers and Clients*, 34 *UCLA L. REV.* 717, 776–78 (1987) (lawyers may enhance types of client autonomy through contestation rather than client-centered service).

199. *See* STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 279–318 (2009).