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President Barack Obama's & The Department of Homeland Security's Temporary Relief for Qualified Undocumented Individuals in the Absence of Congressional Action for Permanent Relief

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**PRESIDENT BARACK OBAMA’S & THE DEPARTMENT OF
HOMELAND SECURITY’S TEMPORARY RELIEF FOR
QUALIFIED UNDOCUMENTED INDIVIDUALS IN THE
ABSENCE OF CONGRESSIONAL ACTION FOR PERMANENT
RELIEF**

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I. INTRODUCTION

It is June 15, 2012, and Annie Soto¹ has just heard President Barack Obama give a live speech concerning immigration reform in the United

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States.² For the majority of Americans, this speech was like any other speech made by the President before an election. However, for Annie and almost one million undocumented young people in the United States who are in her similar position, President Obama's speech could potentially be life altering. Four years ago, Annie graduated top of her class from a local south Florida high school. As a result of her hard work, Annie was awarded for her merits with a full scholarship to a Florida university that upcoming semester. Unfortunately, Annie would have to decline an opportunity which a majority of her peers can only dream of having. Like thousands of other undocumented teenagers in the United States, Annie was brought to America illegally by her parents as a young child. Moreover, Annie, like so many others, was oblivious to her status in the United States. In her eyes, she is, and will always be, an American. Annie has been in the United States for twenty-one years; she is now twenty-two. This talented young woman has had to put down her studies for what she thought would be an indefinite period of time. The President's speech however, gave this young woman, alongside hundreds of thousands of undocumented young people who were brought to the United States illegally and raised Americans, some hope of continuing the education that was promised to them their whole lives. It is an opportunity for individuals like Annie, who have worked hard to reach that point in their lives, to live from amongst the shadows again.³ For Annie, this means that she can now remain in the United States without the fear of being deported at any given time.⁴ But most importantly, this will allow Annie, and the 800,000 other undocumented individuals in Annie's same shoes, to continue their efforts toward legislation that will grant them a pathway to citizenship—allowing them to finally further their education like the friends they grew up with and have the chance to achieve the American

science and interdisciplinary studies/social science and a minor in history. The author wishes to thank her family and loved ones for all of their support, love, and motivation throughout the years. The author would also like to thank her mother and father for encouraging her to pursue her legal education and always believing in her. Additionally, the author would like to extend sincere gratitude to *Nova Law Review*, its members, and the faculty for all their hard work and dedication.

1. Annie Soto is a fictional character, whose story is based on the lives of thousands of undocumented young people living in the United States.

2. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

3. *See id.*

4. *See id.*

dream.⁵ The speech and actions by the Department of Homeland Security (DHS) have allowed this select group of qualified individuals a chance to surface from amidst the shadows without fear of deportation to estranged countries.⁶ However, this action is in no way a permanent fix, which means that this effort may be rescinded at any time by a future administration.⁷ This will mean that once again, these individuals, who are not a threat to American society, may be subject to deportation.⁸ The resolution to these individuals' problems is an act by Congress.⁹ The President in his speech stated, "Congress needs to act" since these individuals merit a permanent fix, not just a temporary solution to their ongoing problem.¹⁰

There have been critics who have surfaced stating that the President and the DHS have gone beyond their constitutional authority in executing this new immigration policy that immediately stops the deportation or future deportation of more than 800,000 young, undocumented individuals who meet a certain criteria.¹¹ Such critics have stated that the President and the DHS have circumvented Congress by halting the deportation of individuals who would have qualified for the DREAM Act,¹² which was rejected in Congress on numerous accounts, the latest rejection being in 2010.¹³ Moreover, critics want the Supreme Court of the United States to overturn the DHS's use of prosecutorial discretion in relation to halting the deportation of these qualified immigrants.¹⁴ This article will attempt to explain in detail the new immigration policy laid out by President Obama, his administration, and the

5. Humberto Sanchez, *Marco Rubio's Immigration Plans Foiled*, ROLL CALL, June 18, 2012, http://www.rollcall.com/issues/57_152/Marco_Rubio_Immigration_Plans_Foiled-215430-1.html.

6. President Barack Obama, *supra* note 2.

7. *Id.*

8. See Press Release, Office of the Press Sec'y, Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> [hereinafter Deferred Action Press Release]; President Barack Obama, *supra* note 2.

9. President Barack Obama, *supra* note 2.

10. *Id.*

11. *Kelly's Court: Is President Obama's Immigration Move Legal?*, at 2:39 (FOX News television broadcast June 18, 2012), available at <http://video.foxnews.com/v/1695684924001/is-president-obamas-immigration-move-legal/>; see Sanchez, *supra* note 5.

12. *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 5:00; see also DREAM Act of 2010, S. 3992, 111th Cong. § 1 (2010) (stating that "[t]his Act may be cited as the 'Development, Relief, and Education for Alien Minors Act of 2010'").

13. Sanchez, *supra* note 5.

14. See *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 3:44.

DHS on June 15, 2012.¹⁵ This article will further explain the right of the Executive Branch to execute its prosecutorial discretion in immigration cases by first explaining the role of prosecutorial discretion in immigration cases, followed by an explanation of the role prosecutorial discretion plays in immigration cases today and the role of judicial review.¹⁶ Next, this article will address how the DREAM Act, a law exclusive to the determination of Congress, differs from the Executive Branch's use of prosecutorial discretion on individuals who would have qualified for the DREAM Act.¹⁷ Lastly, this article will address the potential future of the individuals who will be affected by the new immigration policy in regards to Congress's possible passing of legislation that will give a more permanent answer to an ongoing problem.¹⁸

II. THE EXECUTIVE HALT ON THE DEPORTATION PROCEEDINGS OF QUALIFIED UNDOCUMENTED ALIENS

President Barack Obama, acting as head of the Executive Branch, alongside Janet Napolitano, Secretary of Homeland Security, an entity of the Executive Branch,¹⁹ executed a memorandum enforcing "the Nation's immigration laws against certain young people who were brought to [the United States] as children and know only this country as home."²⁰ The President announced in a live speech on June 15, 2012, that Secretary Napolitano had proclaimed that the DHS and the President's administration will be taking "new actions . . . to mend [the] nation's immigration policy."²¹ The President also stated that the administration's efforts along with the efforts of the DHS would ensure the fairness and efficiency of the new immigration policy regarding certain individuals who meet the strict criteria.²² The President referred to the individuals that would be affected by this new enforcement by the Executive Branch as "Dreamers," similar to the "Dreamers" associated

15. *See infra* Part II.A.

16. *See infra* Part II.B.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *The Executive Branch*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Feb. 24, 2013).

20. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement 1 (June 15, 2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>.

21. President Barack Obama, *supra* note 2.

22. *Id.*

with the DREAM Act.²³ However, the DREAM Act, as the President points out and as outlined above, has failed numerous times in Congress due to “politics.”²⁴ Despite Congress’s rejection of the proposed legislation, the President stated in his speech that effective immediately, the DHS would halt the deportation proceedings of eligible individuals that do not pose a threat to the security of the nation or the safety of the public.²⁵ Such individuals who meet the criteria presented by the DHS will be able to request, within the upcoming months, “temporary relief from deportation proceedings and apply for work authorization.”²⁶

The President went on to assure the nation that this effort on behalf of his administration and the DHS was not the DREAM Act, since the passing of the DREAM Act is left to Congress to decide, but rather is a temporary relief for individuals who meet certain strict criteria.²⁷ The temporary relief received by qualified individuals will not provide the individual with permanent lawful status in the United States, nor will it lead to permanent lawful status.²⁸ Rather, it is the job of “Congress, acting through its legislative authority, [to] confer these rights” to permanent lawful status.²⁹ The President also assured that this action was not amnesty and would not promote the continuation of illegal immigration into the United States.³⁰ Moreover, the President explained that immigration enforcement would be and has been directed at individuals who are a threat to national security and the public, as well as the strengthening and prioritizing of their efforts to block the borders from individuals attempting to enter the United States illegally.³¹ The President also stated that individuals who would be eligible for requesting temporary relief from deportation would have to meet strict guidelines, explained in further detail in a following section.³²

23. *Id.* The President stated:

These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart[s], in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they're undocumented until they apply for a job or a driver's license, or a college scholarship.

Id.

24. *Id.*

25. President Barack Obama, *supra* note 2.

26. *Id.*

27. *Id.*

28. *ICE FAQ: Deferred Action Process*, ICE, 2, <http://www.ice.gov/doclib/about/offices/ero/pdf/faq-deferred-action-process.pdf> (last visited Feb. 24, 2013).

29. Memorandum from Janet Napolitano, *supra* note 20, at 3.

30. President Barack Obama, *supra* note 2.

31. *Id.*

32. See Memorandum from Janet Napolitano, *supra* note 20, at 1; President Barack Obama, *supra* note 2; *infra* Part II.A.

A. *Provisions Outlined in the Memorandum Executed by the Department of Homeland Security*

The Secretary of Homeland Security has executed the provisions regarding the recent enforcement of immigration laws in a memorandum pursuant to the ongoing efforts by DHS to direct the allocation of funds on high priority cases like the deportation of criminals and terrorists.³³ The memorandum dated June 15, 2012 sets out the immediate exercise of “prosecutorial discretion”³⁴ in the enforcement of “the Nation’s immigration laws against certain young people.”³⁵ The characteristics of the qualifications for this temporary immigration effort are almost identical to the required qualifications for an individual who would have benefited from the proposed DREAM Act legislation.³⁶ The efforts of the recent enforcements, as discussed by the President in his speech earlier this year, is a temporary pathway for the possibility of passing a form of DREAM Act legislation by Congress, on which members of both parties can come to a consensus.³⁷ Moreover, the DHS and the Obama Administration are focusing their efforts on prosecuting high priority cases, which include individuals who had the intent to cross American borders and remain illegally in the United States, and towards individuals who pose a threat to national security and the safety of the public.³⁸ Rather, the President has stated that individuals who pose no threat like the individuals typically referred to as “Dreamers,” should be given temporary relief from deportation proceedings through “deferred action”³⁹ due to their lack of intent in committing the crime of purposely remaining in the United States illegally.⁴⁰

The first requirement for an individual to qualify for the DHS’s immigration efforts is that the individual arrived in the United States before the

33. See Memorandum from Janet Napolitano, *supra* note 20, at 1–3.

34. *Id.* at 1. The use of prosecutorial discretion “confers no substantive right, immigration status, or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the [E]xecutive [B]ranch . . . to set forth policy for the exercise of discretion within the framework of the existing law.” *Id.* at 3.

35. *Id.* at 1.

36. Compare *id.* at 1–3, with DREAM Act of 2010, S. 3992, 111th Cong. § 4 (2010).

37. President Barack Obama, *supra* note 2.

38. Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

39. President Barack Obama, *supra* note 2. “Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 2.

40. Memorandum from Janet Napolitano, *supra* note 20, at 1; see President Barack Obama, *supra* note 2.

age of sixteen,⁴¹ is currently below the age of thirty, and knows only this country as his or her country.⁴² The Secretary of Homeland Security stated that such individuals “lacked the intent to violate the law,” and thus, are not priority cases to which the DHS should focus its efforts on deporting.⁴³ Moreover, the individual must demonstrate that he or she has “continuously resided in the United States for a [sic] least five years”⁴⁴ before the actual date of the memorandum—June 15, 2012.⁴⁵ Additionally, the individual must show that he or she is either currently enrolled in school, such as high school, “has graduated from high school, [or] has obtained a general education development certificate” (GED).⁴⁶ Honorably discharged veterans who have served in the Coast Guard or Armed Forces may qualify for temporary relief as well.⁴⁷ Furthermore, to qualify for temporary relief, the individual must “undergo [a] biographic and biometric background check[.]”⁴⁸ The last requirement to be eligible is the need for good standing and a virtually clean record.⁴⁹ The person may not receive this help if they are a convicted felon, have been convicted of “a significant misdemeanor offense,” or more than three misdemeanor offenses that did not occur on one specific date or arise from a specified act.⁵⁰ Individuals that risk the security of the nation or the safety of the public are disqualified from receiving temporary relief from deportation.⁵¹ The above requirements must be met through “verifiable doc-

41. Memorandum from Janet Napolitano, *supra* note 20, at 1. Documentation used to evidence that an individual came to the U.S. prior to the age of sixteen “includes, but is not limited to: financial records, medical records, school records, employment records, and military records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

42. Memorandum from Janet Napolitano, *supra* note 20, at 1.

43. *Id.*

44. *Id.* Documentation used to demonstrate that an individual has been in the U.S. for five years preceding June 15, 2012 “includes, but is not limited to: financial records, medical records, school records, employment records, and military records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

45. Memorandum from Janet Napolitano, *supra* note 20, at 1.

46. *Id.* Documentation used to show that an individual “is currently in school, has graduated from high school, or has obtained a GED certificate includes, but is not limited to: diplomas, GED certificates, report cards, and school transcripts.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 5.

47. Memorandum from Janet Napolitano, *supra* note 20, at 1. Documentation used to demonstrate an individual “is an honorably discharged veteran of the Coast Guard or Armed Forces . . . includes, but is not limited to: report of separation forms, military personnel records, and military health records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 5.

48. *Id.* at 4.

49. *See id.*

50. Memorandum from Janet Napolitano, *supra* note 20, at 1; *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

51. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

umentation” before the individual can qualify for temporary relief.⁵² Each case will be decided on an individual basis and the DHS will not provide assurance as to whether or not a qualified individual will be granted temporary relief.⁵³

1. Process for Individuals Encountered by a Division of the Department of Homeland Security

Additional requirements addressed in the memorandum by the Secretary of Homeland Security pertain to individuals who have encountered United States Immigration and Customs Enforcement (ICE), United States Customs and Border Protection (CBP), or United States Citizenship and Immigration Services (USCIS).⁵⁴ ICE and CBP must exercise discretion on an individual level when dealing with individuals who have met the above requirements to avoid qualified individuals being⁵⁵ “apprehended, placed into removal proceedings, or removed.”⁵⁶ USCIS will ensure the implementation of the guidelines concerning “notices to appear” expressed in the memorandum.⁵⁷ The above process is to ensure that ICE and CBP narrow their efforts on high priority cases, rather than cases pertaining to individuals who pose no threat to national security or to public safety and simply wish to further their education.⁵⁸

2. Process for Individuals Currently in Removal Proceedings

The memorandum issued by Janet Napolitano also focuses one of its sections in addressing the steps ICE will take in relation to individuals who have met the aforementioned requirements for temporary relief, but are currently “in removal proceedings but not yet subject to a final order of removal.”⁵⁹ In such cases, ICE, through its prosecutorial discretion, will immediately offer deferred action for a two-year period with the possibility of renewal.⁶⁰ The memorandum further directs ICE to begin implementation of the provisions pursuant to the memorandum within sixty days of the date of

52. Deferred Action Press Release, *supra* note 8.

53. *Id.*

54. Memorandum from Janet Napolitano, *supra* note 20, at 2.

55. *Id.*

56. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 3.

57. Memorandum from Janet Napolitano, *supra* note 20, at 2.

58. *See ICE FAQ: Deferred Action Process*, *supra* note 28, at 3.

59. Memorandum from Janet Napolitano, *supra* note 20, at 2.

60. *Id.*; Deferred Action Press Release, *supra* note 8.

the memorandum, dated June 15, 2012.⁶¹ ICE must also “use its Office of Public Advocate to [allow] individuals who believe they [have met] the above [requirements to present] themselves through a clear and efficient process.”⁶²

3. Process for Individuals Not in Removal Proceedings

In addition to the aforementioned practices to now be taken by the agencies, the memorandum explains the process to be taken by USCIS when dealing with individuals who have met the requirements mentioned previously, and who also have not begun removal proceedings, but passed a background check.⁶³ According to the memorandum, the “USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action” on individuals who are at least fifteen and meet the requirements.⁶⁴ The deferred action shall consist of temporary relief for two years, with the possibility of renewal.⁶⁵ This process set forth by USCIS must be made available to all persons, despite age, to whom a final order for deportation has been entered.⁶⁶ In order for the USCIS to begin the above process on an individual, the individual must submit a request to allow the USCIS to review the individual’s case.⁶⁷

4. Qualifications for Work Authorization

Finally, the memorandum states that for all individuals who have received “deferred action” by ICE or USCIS, pursuant to the new immigration policy outlined in the memorandum, USCIS must accept said individuals’ applications⁶⁸ for determination of eligibility “for work authorization during

61. Memorandum from Janet Napolitano, *supra* note 20, at 1–2.

62. *Id.* at 2. The Office of the Public Advocate is a division created by ICE. *Public Advocate*, ICE, <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/> (last visited Feb. 24, 2013). “The public advocate works directly for ICE’s Executive Assistant Director of Enforcement and Removal Operations (ERO).” *Id.*

63. Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

64. *Id.*

65. *Id.* at 3.

66. *Id.*

67. See Deferred Action Press Release, *supra* note 8.

68. Memorandum from Janet Napolitano, *supra* note 20, at 3. Individuals, who qualify for temporary relief, may request work authorization by filing a Form I-765, Application for Employment Authorization. See *id.* at 2–3; *I-765, Application for Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/> (follow “Forms” menu; click on “Application for Employment Authorization” hyperlink) (last updated Nov. 29, 2012).

th[e] period of defer[ment].”⁶⁹ The individual must prove that he or she has “an economic necessity for . . . employment” to receive authorization to work during the deferment period.⁷⁰ Furthermore, once the two-year period has expired, and an individual requests and successfully receives an additional two years of deferment, the individual must also re-request an extension on his or her employment authorization if the economic need is still present.⁷¹

B. *The Role of Prosecutorial Discretion in Immigration Cases*

Prosecutorial discretion plays a crucial part in immigration cases.⁷² Doris Meissner, Commissioner of the then Immigration and Naturalization Service (INS),⁷³ issued a memorandum directing all service officers of the INS to execute prosecutorial discretion when dealing with immigration cases and reiterating the importance of the role of prosecutorial discretion when dealing with illegal immigration.⁷⁴ The Meissner memorandum, which is still in use today by the DHS, highlights how prosecutorial discretion is to be used by officers acting on behalf of the INS on a case-by-case basis.⁷⁵ The role of prosecutorial discretion is of utmost importance in the enforcement of immigration law, so much that the Meissner memorandum begins with the most important direction for the execution of such discretion by stating:

Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In

69. Memorandum from Janet Napolitano, *supra* note 20, at 3.

70. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 2.

71. *Id.* at 3.

72. *See, e.g.*, Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, & Reg’l & Dist. Counsel 1 (Nov. 17, 2000), available at <http://Iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>.

73. *Id.* In 2003, the Bush Administration reorganized the presidential power by combining the INS with the Customs Service. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 244 (5th ed. 2003).

74. *See* Memorandum from Doris Meissner, *supra* note 72, at 1.

75. *See id.*; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel 1 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from Janet Napolitano, *supra* note 20, at 2.

exercising this discretion, officers must take into account . . . [the] effective enforcement of the immigration laws and the interest[] of justice.⁷⁶

Prosecutorial discretion extends in a number of ways, such as deciding which “offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”⁷⁷ However, prosecutorial discretion is the sole responsibility of the agencies responsible for the enforcement of the law.⁷⁸ It is solely within their discretion to prosecute an individual or not.⁷⁹ The Supreme Court has consistently held, in cases such as *Heckler v. Chaney*⁸⁰ and *Reno v. American Arab Anti-Discrimination Committee*,⁸¹ that it is an agency’s responsibility to enforce laws and it has the sole discretion of whether to enforce the laws or whether or not to prosecute an individual.⁸² The purpose of executing prosecutorial discretion in immigration cases is to make sure that the allocation of money is directed where it is most needed.⁸³ This is specifically laid out in the Meissner memorandum, which states that prosecutorial discretion is not a summons for the violation of the law, but “[r]ather . . . a means to use the resources [the INS has] in a way that best accomplishes [their] mission of administering and enforcing the immigration laws of the United States.”⁸⁴ The Meissner memorandum is still the basis for the use of prosecutorial discretion at the DHS today.⁸⁵ Shoba Sivaprasad Wadhia, Professor at Pennsylvania State University Dickinson School of Law, highlights the importance of prosecutorial discretion in attaining “cost-effective law enforcement and relief for individuals who present desirable qualities or humanitarian circumstances.”⁸⁶ The primary need for this tool is because it is economically impossible to be able to prosecute and investigate all the violations incurred as

76. Memorandum from Doris Meissner, *supra* note 72, at 1.

77. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010); *see also* Memorandum from Doris Meissner, *supra* note 72, at 2.

78. *See* Memorandum from Doris Meissner, *supra* note 72, at 2.

79. *Id.*

80. 470 U.S. 821 (1985).

81. 525 U.S. 471 (1999).

82. Memorandum from Doris Meissner, *supra* note 72, at 3 (quoting *Chaney*, 470 U.S. at 831) (citing *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483–84).

83. *See* Wadhia, *supra* note 77, at 244.

84. Memorandum from Doris Meissner, *supra* note 72, at 4.

85. *See* Memorandum from John Morton, *supra* note 75, at 1.

86. Wadhia, *supra* note 77, at 244.

a result of illegal immigration.⁸⁷ Therefore, by using prosecutorial discretion, the allocation of money has been geared to a priority system, with the most concern and money distribution going to cases considered high priority.⁸⁸ High priority cases include those that concern the “protecti[on] [of] public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.”⁸⁹ Without this tool—which has been widely used for years in matters concerning immigration law—such high priority cases will go unresolved, which may result in danger to the public and the nation as a whole.⁹⁰

It is important to note, as President Barack Obama and Secretary Napolitano have stated numerous times, that the execution of prosecutorial discretion does not confer any form of immigration status on an individual, nor is it a pathway to citizenship; rather, it is a temporary halt to the deportation proceedings of certain qualified individuals.⁹¹ This has been addressed multiple times when executing the INS’s prosecutorial discretion in immigration cases, including the Meissner memorandum, which directed all agencies that “it must [be made] clear to the alien that exercising prosecutorial discretion does not confer any immigration status, . . . or any enforceable right or benefit upon the alien.”⁹²

1. Deferred Action as a Primary Function of Prosecutorial Discretion

One of the ways prosecutorial discretion is exercised is through the use of “deferred action.”⁹³ Deferred action has been and still remains one of the primary ways the DHS executes its right to prosecutorial discretion.⁹⁴ Furthermore, the “theory of prosecutorial discretion” has been used in immigration cases for over sixty years on both an individual level and a group level.⁹⁵

87. Memorandum from Doris Meissner, *supra* note 72, at 4.

88. *Id.*

89. *Id.*

90. *See id.* at 3–4.

91. President Barack Obama, *supra* note 2; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3.

92. Memorandum from Doris Meissner, *supra* note 72, at 12; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3.

93. Wadhia, *supra* note 77, at 246. “Deferred action is a discretionary action initiated at the discretion of the agency or at the request of the alien” Memorandum from Emilio T. Gonzalez, Dir., U.S. Citizen & Immigration Servs., to Prakash Khatri, Ombudsman, U.S. Citizen & Immigration Servs. 1 (Aug. 7, 2007), *available at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

94. Wadhia, *supra* note 77, at 246; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

95. Wadhia, *supra* note 77, at 265.

Secretary Napolitano stated that deferred action is an act of prosecutorial discretion which an agency—DHS—must employ.⁹⁶ But it is important to note, however, that an individual or group may not request deferred action unless the DHS has granted it.⁹⁷

The use of prosecutorial discretion has been evident in recent years.⁹⁸ Secretary Napolitano announced four years ago that the granting of deferred action for a period of two years would be issued to both widows and widowers, who have been married to their citizen spouse for less than two years and reside in the United States, alongside their unmarried children who are below the age of twenty-one.⁹⁹ More recently, however, the DHS has executed its prosecutorial discretion through the use of deferred action at a micro level concerning individuals who would have qualified for the DREAM Act.¹⁰⁰ For instance, in 2009 the DHS granted deferred action at a micro level to eighteen-year-old Taha, who was brought to the United States by his parents at the age of two from Bangladesh, India.¹⁰¹ Now, effective June 15, 2012, the Obama Administration and the DHS, in an attempt to fix the current American immigration system absent action by Congress, used its prosecutorial discretion by deferring the deportation or future deportation of young individuals who meet a certain criteria.¹⁰² The purpose for this, as both President Obama and Secretary Napolitano announced, is to “focus [the] immigration enforcement resources in the right place[.]”¹⁰³ However, the President and Secretary Napolitano have assured the American people and critics that this action on behalf of the DHS is within its scope of prosecutorial discretion and that such discretion has been a part of the immigration system since long before the current presidential term.¹⁰⁴

96. Memorandum from Janet Napolitano, *supra* note 20, at 1–2.

97. Wadhia, *supra* note 77, at 265.

98. *Id.* at 262–63.

99. Press Release, Office of the Press Sec’y, DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm.

100. See *News Flash: Taha Receives Deferred Action!!!*, DREAM ACTIVIST (July 24, 2009), <http://www.dreamactivist.org/news-flash-taha-recieves-deffered-action/>.

101. *Id.*

102. President Barack Obama, *supra* note 2.

103. *Id.*; see also Memorandum from Janet Napolitano, *supra* note 20, at 1.

104. See Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

2. The Possibility of Judicial Review for the Use of Prosecutorial Discretion

Many critics have questioned the constitutionality of the latest move made by the DHS and the Obama Administration, arguing that both groups went beyond their constitutional authority when executing their prosecutorial discretion to halt the deportation of more than 800,000 young individuals who meet a certain criteria.¹⁰⁵ However, the memorandum issued on June 15, 2012 to David Aguilar, Acting Commissioner CBP,¹⁰⁶ Alejandro Mayorkas, Director of the USCIS,¹⁰⁷ and John Morton, Director of ICE¹⁰⁸ specifically notes that “[t]his memorandum confers no substantive right, immigration status or pathway to citizenship. Only . . . Congress, acting through its legislative authority, can confer these rights. It remains for the [E]xecutive [B]ranch . . . to set forth policy for the exercise of discretion within the framework of existing law.”¹⁰⁹ Thus, if the issue were submitted to the Supreme Court to review the current actions of the DHS, the likely outcome would most likely go in favor of the DHS, due to precedent cases demonstrating the Court’s hesitation to review discretionary decisions made by immigration agencies.¹¹⁰ Professor Wadhia has commented on the matter, stating that immigration agencies are “virtual[ly] immun[e] from judicial review.”¹¹¹ The reason that the Supreme Court hesitates in reviewing the prosecutorial decisions of immigration agencies is because such decisions are based on a multitude of unknown factors considered by the agencies in making their decisions whether or not to prosecute an individual.¹¹² In *Chaney*, the Supreme Court reasoned that the agencies are better equipped than the courts in making expert decisions as to whether or not to enforce the law.¹¹³

105. *Kelly’s Court: Is President Obama’s Immigration Move Legal?*, *supra* note 11, at 0:04, 0:10, 1:56.

106. Federal Government’s unified border agency. ALEINIKOFF ET AL., *supra* note 73, at 244.

107. Federal agency that deals with matters pertaining to “naturalization and . . . immigration benefits.” *Id.*

108. *ICE Overview*, ICE, <http://www.ice.gov/about/overview> (last visited Feb. 24, 2013). U.S. Immigration and Customs Enforcement is the principal investigative arm of the U.S. Department of Homeland Security . . . and the second largest investigative agency in the federal government. [It was] [c]reated in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, [which are no longer in effect] . . .

Id.

109. Memorandum from Janet Napolitano, *supra* note 20, at 3.

110. Wadhia, *supra* note 77, at 287.

111. *Id.* at 286.

112. *Id.* at 287.

113. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

The Court stated that “the agency must not only assess whether a violation has occurred, but whether [the] agency resources are best spent on this violation or another . . . [or] whether the agency has enough resources to undertake the action at all.”¹¹⁴ Furthermore, the Court also stated that Congress would have to essentially decide whether an agency’s decisions should be subject to review, and that it is not up to the courts to make such a determination.¹¹⁵ Similarly, in *American-Arab Anti-Discrimination Committee*, the Supreme Court held that decisions by the Attorney General as to whether or not to “commenc[e] proceedings, adjudicat[e] cases, [or] execut[e] removal orders” against an undocumented individual were discretionary in nature and not subject to judicial review.¹¹⁶ Supreme Court precedent has made it difficult for judicial review in this area absent some congressional act to limit the prosecutorial discretion of immigration agencies.¹¹⁷ For this reason, it is unlikely that—without some congressional act to limit DHS’s prosecutorial discretion—the Supreme Court will review the actions of Secretary Napolitano and the Obama Administration in halting the deportation of more than 800,000 undocumented individuals.¹¹⁸

III. THE DREAM ACT

This morning, Secretary Napolitano announced new actions my administration will take to mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called “Dreamers.” These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.¹¹⁹

The above excerpt comes from a speech given by the President of the United States on June 15, 2012 in the Rose Garden of the White House.¹²⁰

114. *Id.* at 831.

115. *Id.* at 838.

116. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483, 485–86 (1999).

117. *See Chaney*, 470 U.S. at 832.

118. *See Kelly’s Court: Is President Obama’s Immigration Move Legal?*, *supra* note 11, at 0:11; *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483; *Chaney*, 470 U.S. at 832.

119. President Barack Obama, *supra* note 2.

120. *Id.*

To those Americans familiar with the DREAM Act, a federal legislative act that recently failed in Congress in 2010, the President's speech sounds all too familiar.¹²¹ However, this speech was not an announcement that the federal government would provide a pathway to citizenship for hundreds of thousands of undocumented minors.¹²² Rather, this speech was the announcement of an executive decision not to prosecute or deport certain young undocumented individuals that meet specific detailed criteria, provided for by the DHS.¹²³ As the President stated in his speech the morning of June 15, 2012, "[t]his is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people. It is the right thing to do."¹²⁴ Many critics have stated that the President and the DHS's actions circumvented congressional authority since Congress most recently denied the DREAM Act in 2012.¹²⁵ However, although the concept and individuals affected by this new immigration policy remain the same, the outcome is significantly different.¹²⁶ As stated previously in this article, the DHS and the Obama Administration have made it clear that the execution of prosecutorial discretion through the use of deferred action on qualified individuals is not permanent relief like the relief that would be afforded by the DREAM Act.¹²⁷ Rather, it is a temporary "policy for the exercise of discretion within the framework of the existing law."¹²⁸ Thus, this action does not evade congressional authority, and is also within the scope and nature of executive authority.¹²⁹ This recent decision

121. *Id.*; see 8 U.S.C. § 1229b (2006 & Supp. II 2008). "[A] year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got [fifty-five] votes in the Senate, but Republicans blocked it." President Barack Obama, *supra* note 2.

122. Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

123. Memorandum from Janet Napolitano, *supra* note 20, at 2; President Barack Obama, *supra* note 2.

124. President Barack Obama, *supra* note 2.

125. *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 1:34, 2:45.

126. *PBS Newshour: What Obama's Immigration Move Means for Undocumented Youth, Politics* (PBS television broadcast June 15, 2012), available at www.pbs.org/newshour/bb/politics/jan-june12/dreamact_06-15.html. Cecilia Munoz, Director of the White House Domestic Policy Counsel, points out in an interview with PBS that the decision by Secretary Napolitano is not permanent and will not give these qualified undocumented individuals a pathway to citizenship as would the DREAM Act, which is up to Congress to decide on, not the DHS. *Id.*

127. See Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

128. Memorandum from Janet Napolitano, *supra* note 20, at 3.

129. See *id.*

leaves an opportunity for Congress to once again act in a positive way and create a pathway to citizenship for undocumented minors, who through no fault of their own have been brought to the United States and raised Americans.¹³⁰ As the President stated, “[p]recisely, because [the execution] is temporary, Congress needs to act.”¹³¹

This portion of the article will explain the DREAM Act that was rejected by the Senate in 2010 and its provisions, as well as the differences between it and the DHS’s execution of prosecutorial discretion. Moreover, this section will discuss the future of the individuals affected by both a future passing of the DREAM Act and the new immigration policy laid out by both the Obama Administration and the DHS.

A. Overview of the DREAM Act

Up until June 15, 2012, undocumented minors who were brought to the United States illegally as young children or infants through no fault of their own could potentially be deported at any moment by the ICE.¹³² Some of these individuals, if lucky, would receive deferred action through the use of prosecutorial discretion at the micro level.¹³³ However, not every undocumented minor who met these criteria would receive deferred action, and most would have to be deported back to countries they may not know “or even speak the language.”¹³⁴ This constant deportation of young, talented individuals from the United States is what brought about the creation of some form of legislation that would allow these hardworking individuals to continue their quest to live the American Dream.¹³⁵ The legislative act that resulted from this need for fairness was the DREAM Act; however, numerous versions of the DREAM Act have been before Congress throughout the years, yet not one version has been able to pass Congress and become law.¹³⁶ The most recent version presented to Congress of the DREAM Act was in 2010.¹³⁷ Ironically, both the Republican and the Democratic Parties drafted

130. President Barack Obama, *supra* note 2. “There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments.” *Id.*

131. *Id.*

132. See Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

133. Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 624 (2011).

134. *Id.*; Memorandum from Janet Napolitano, *supra* note 20, at 2.

135. Barron, *supra* note 133, at 623–24.

136. *Id.* at 623.

137. *Id.*

the legislation.¹³⁸ However, only the Democratic Party voted for it in the House of Representatives while the Republican Party did not.¹³⁹ Although the provisions of the 2010 DREAM Act were more restrictive than the previously presented versions, the concepts of each version of the DREAM Act have remained, for the most part, constant since its creation in 2001.¹⁴⁰ Each version of the DREAM Act has contained two essential parts that the activists of the DREAM Act have pushed for: The first includes a pathway to citizenship for individuals who were illegally brought into the United States before the age of sixteen, and the second part consists of the receipt of public benefits that would have otherwise been unavailable to those individuals due to their lack of legal status in the United States.¹⁴¹

The first benefit provided for by the 2010 version of the DREAM Act is its pathway to citizenship for individuals who qualify.¹⁴² To qualify for the DREAM Act, an undocumented individual must have arrived in the United States prior to the age of sixteen and have remained in the United States for at least five consecutive years.¹⁴³ The 2010 version of the DREAM Act also requires that the individual qualifying for the DREAM Act be no more than thirty years of age at the time of its enactment.¹⁴⁴ Thus, an individual who is thirty-five and who arrived in the United States at the age of twelve would not qualify for citizenship under the DREAM Act.¹⁴⁵ Additionally, to qualify, an individual must demonstrate that he or she has been “admitted to an institution” of postsecondary education in the United States and must also show that he or she has received a high school diploma or a certificate of GED.¹⁴⁶ However, it should be noted that while an individual may meet the above requirements for qualification of the DREAM Act, an individual may still be disqualified for a number of different reasons including having a criminal background,¹⁴⁷ being a threat to the safety of the public, or a threat to the security of the nation.¹⁴⁸ The last and most puzzling of the requirements necessary to qualify for the DREAM Act is the requirement that an individual must have “good moral character.”¹⁴⁹ While no definition for

138. President Barack Obama, *supra* note 2.

139. *Id.*

140. See Barron, *supra* note 133, at 632–33.

141. *Id.* at 626.

142. *Id.*

143. DREAM Act of 2010, S. 3992, 111th Cong. § 4(a)(1)(A) (2010).

144. *Id.* § 4(a)(1)(F).

145. See *id.*

146. *Id.* § 4(a)(1)(D); Barron, *supra* note 133, at 627.

147. 8 U.S.C. § 1227(a)(2) (2006 & Supp. II 2008).

148. *Id.* § 1227(a)(4).

149. Barron, *supra* note 133, at 628.

“good moral character” exists in any of the versions of the DREAM Act, the Immigration and Nationality Act (INA) has provided a set list of activities which are to be used in determining whether an individual would qualify as having “good moral character” or not.¹⁵⁰ Moreover, the INA states that this is not an exhaustive list and that other activities may disqualify an individual from having “good moral character.”¹⁵¹ More importantly, the decision is left to the discretion of the Secretary of Homeland Security, who will make the determination as to whether an individual is of “good moral character” if he or she acts in a way not listed by the INA, but acts in a questionable manner.¹⁵² Thus, if an individual is found to have violated any of the requirements of the DREAM Act, “[t]he Secretary of Homeland Security shall terminate the conditional nonimmigrant status,”¹⁵³ by returning the individual to his previous status of undocumented alien.¹⁵⁴

Once the individual is found to have met the requirements necessary to qualify for the DREAM Act, the individual must take steps outlined by the Secretary of Homeland Security as to the procedures for applying.¹⁵⁵ Not only do these individuals have to qualify and apply for relief, they are also required to apply no later than one year from the date the individual was admitted to a postsecondary school in the United States,¹⁵⁶ the date the individual received a high school diploma or GED in the United States,¹⁵⁷ or the date of enactment of the DREAM Act,¹⁵⁸ whichever is latest.¹⁵⁹ Additionally, each individual is required to submit biometric and biographic data to rule out past criminal history.¹⁶⁰ Moreover, the individual must undergo a medi-

150. *Id.*

[T]he INA states that an individual shall not be found to have good moral character if he or she: (1) is or was a habitual drunkard; (2) derives income principally from illegal gambling activities; (3) has been convicted of two or more gambling offenses; (4) has given false testimony for the purpose of obtaining any benefit under the INA; (5) has been incarcerated for 180 days or more as a result of conviction; or (6) has been convicted of an aggravated felony.

Id.

151. *See* 8 U.S.C. § 1101(f) (2006).

152. Barron, *supra* note 133, at 628.

153. DREAM Act of 2010, S. 3992, 111th Cong. § 5(c)(1) (2010). “The term ‘conditional nonimmigrant’ means an alien who is granted conditional nonimmigrant status under this Act.” *Id.* § 3(3)(A).

154. *Id.* § 5(c)(2).

155. *See id.* § 4(a)(3).

156. *Id.* § 4(a)(4)(A).

157. S. 3992 § 4(a)(4)(B).

158. *Id.* § 4(a)(4)(C).

159. *Id.* § 4(a)(4).

160. *Id.* § 4(a)(5)–(6). Without an individual submitting both biometric and biographic data, “[t]he Secretary of Homeland Security may not cancel [or defer] the removal of an” individual who would otherwise qualify for relief under the 2010 DREAM Act. *Id.* § 4(a)(5).

cal examination pursuant to the policies laid forth by the Secretary of Homeland Security,¹⁶¹ and must “register[] under the Military Selective Service Act.”¹⁶² Once an individual has met all of the requirements and has qualified and applied for the DREAM Act, the individual may begin the pathway to citizenship promised by the Act itself.¹⁶³

The 2010 bill presented to the 111th Congress required that an individual go through three stages before completing the pathway to citizenship with the minimum time frame being thirteen years.¹⁶⁴ The first stage is a conditional ten-year period during which time the individual receives a “nonimmigrant status.”¹⁶⁵ This status may be revoked at any time if the individual is found to have violated certain restrictions.¹⁶⁶ During this time, the individual is not required to complete “postsecondary education or military service.”¹⁶⁷ Furthermore, the earliest an individual may request his or her status to change from “nonimmigrant” to “alien lawfully admitted for permanent residence,” the second stage of the DREAM Act, is in the ninth year of the first stage.¹⁶⁸ Thus, if an individual applies for relief under the DREAM Act at the age of eighteen, he or she would not be able to request a status change until the age of twenty-seven.¹⁶⁹ Up until that time, the individual will be conditionally legal in the United States.¹⁷⁰ Upon the individual’s completion of the first stage, the individual’s status becomes ““alien lawfully admitted for permanent residence.””¹⁷¹ However, unlike the first stage, the second stage would require the individual to have completed at least two years of postsecondary education or military service.¹⁷² Moreover, an exception to the requirements necessary for the second stage exists.¹⁷³ If an individual can demonstrate that he or she had “compelling circumstances” that did not allow him or her to meet the requirement, and he or she can show unusual hardship, then the Secretary of Homeland Security may waive the

Such data will then be used by the DHS to conduct background checks to determine whether an individual is harmful to the security of the public or the nation. S. 3992 § 4(a)(6).

161. *Id.* § 4(a)(7).

162. *Id.* § 4(a)(8).

163. *See id.* § 6(k); *see also* Barron, *supra* note 133, at 626.

164. Barron, *supra* note 133, at 626.

165. *Id.*

166. *Id.*

167. *Id.*

168. S. 3992 § 6(a), (c); Barron, *supra* note 133, at 626–27.

169. *See* S. 3992 § 6(c).

170. *Id.*

171. Barron, *supra* note 133, at 626–27.

172. *Id.* at 627.

173. *Id.* at 630.

requirement pursuant to the right of prosecutorial discretion.¹⁷⁴ The last stage “provides for naturalization¹⁷⁵ upon compliance with all relevant provisions of the INA, and after three years of residence in the United States as a legal permanent resident.”¹⁷⁶ It should be noted that the three-year wait for application is different than the normal five-year wait required by those applying for legal residence in the United States.¹⁷⁷ Aside from the benefit of possibly becoming a citizen of the United States, the DREAM Act would also provide for the receipt of limited public benefits to individuals who qualified.¹⁷⁸ However, such benefits have been limited substantially in the 2010 version of the DREAM Act compared to the DREAM Act presented in 2001.¹⁷⁹

B. *Comparing and Contrasting the DREAM Act to the New Executive Immigration Policy*

The DREAM Act and the DHS’s new execution of prosecutorial discretion would ultimately affect the same group of individuals.¹⁸⁰ Although this is true, the two reliefs consist of very different outcomes for these individuals and ultimately determine the rights afforded to them in the long run.¹⁸¹ As previously stated, the DHS’s execution of prosecutorial discretion is not a pathway to citizenship and does not change the immigration status of the individuals that qualify for deferred action.¹⁸² Rather, these individuals are only given the peace of mind of not being deported for a period of two years, as well as the possibility of receiving work authorization upon proof of economic necessity.¹⁸³ On the other hand, the passing of the DREAM Act would provide these qualified individuals with both a pathway to citizenship and public benefits, which would otherwise only be accessible to legal residents and/or citizens of the United States.¹⁸⁴ It is important to note that the

174. S. 3992 § 6(d)(2)(A)(ii)–(iii); Barron, *supra* note 133, at 630.

175. “The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever.” 8 U.S.C. § 1101(a)(23) (2006).

176. Barron, *supra* note 133, at 627.

177. Compare S. 3992 § 4(a)(1)(A), with *id.* § 6(k).

178. Barron, *supra* note 133, at 631; see also S. 3992 § 11.

179. Barron, *supra* note 133, at 631. The 2010 Bill did not include the possibility for individuals who qualified to receive affirmative school grants, rather they would be able to receive student loans, which would have to be paid back. *Id.*; see also S. 3992 § 11.

180. See President Barack Obama, *supra* note 2.

181. Compare *id.*, with Memorandum from Doris Meissner, *supra* note 72, at 2–4.

182. Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2; see *supra* Part II.B.

183. Memorandum from Janet Napolitano, *supra* note 20, at 2–3; see *supra* Part II.A.3., 4.

184. Barron, *supra* note 133, at 632; see *supra* Part III.A.

DREAM Act would provide an individual with nonimmigrant status, which would enable the individual to work as well as the right to travel in and out of the United States without a visa.¹⁸⁵ However, as Secretary Napolitano and the President have stated, the deferred action of these 800,000 individuals is not a legal status and will give no permanent relief.¹⁸⁶ Thus, it would not permit the individual to travel in and out of the country nor allow the individual to qualify for work authorization absent a showing of economic necessity.¹⁸⁷

As a result of the 2010 failure of the DREAM Act, these undocumented individuals were afforded no relief and could be subject to deportation at any time,¹⁸⁸ thus clouding the system with cases not worthy of deportation.¹⁸⁹ Therefore, in order to use its resources wisely, the DHS, using its right to prosecutorial discretion, chose to defer the deportation or future deportation of individuals who for all intents and purposes posed no threat to national security or the public.¹⁹⁰ The DHS and the President, without taking into account their views on the DREAM Act, used cost-effective tools to prioritize the individuals who will or will not be deported out of the country.¹⁹¹ By deferring the deportation proceedings of low-priority cases, the DHS will be able to focus on the deportation of high-priority cases such as drug dealers, criminals, terrorist, and other cases that may pose a threat to the public and society while giving temporary relief to individuals who have not purposely violated any of the immigration laws of the country.¹⁹² However, such action would afford only temporary relief, while still leaving the need for permanent relief.¹⁹³

IV. "THE RIGHT THING TO DO"

Although this execution of prosecutorial discretion is temporary relief for individuals who have not purposely violated the law, it is a form of relief

185. DREAM Act of 2010, S. 3992, 111th Cong. § 5(a)–(b) (2010).

186. President Barack Obama, *supra* note 2; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3; *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 3:48.

187. *See* Memorandum from Janet Napolitano, *supra* note 20, at 3.

188. *See* Barron, *supra* note 133, at 623–24, 626.

189. *See* Memorandum from Janet Napolitano, *supra* note 20, at 1.

190. *Id.*

191. *Id.* at 2–3; *see also* President Barack Obama, *supra* note 2.

192. *See* Memorandum from Janet Napolitano, *supra* note 20, at 1–2; *see also* President Barack Obama, *supra* note 2.

193. President Barack Obama, *supra* note 2; *see* Memorandum from Janet Napolitano, *supra* note 20, at 3.

that will allow qualified undocumented individuals to remain in the United States without the fear of possible deportation to estranged countries.¹⁹⁴ More important is the fact that this action would allow the DHS to direct its limited funds at cases that pose a threat to the safety of the public and the nation.¹⁹⁵ These individuals will be allowed to remain in the United States for a period of two years with the possibility of renewal,¹⁹⁶ which will allow Congress to focus on the more important issue of actually passing the true goal, the DREAM Act.¹⁹⁷ Such efforts will aid Congress in the future when passing the DREAM Act, which will provide these individuals—otherwise affected by DHS's new immigration policy—with permanent relief through a pathway to citizenship.¹⁹⁸ It is very important that these immigrants, who would have to meet a very stringent set of requirements to qualify for the DREAM Act,¹⁹⁹ be able to receive some form of permanent relief, as living in two-year increments is not a positive way to live.²⁰⁰ There are, however, proponents of the DREAM Act, who are not on board with the DHS's execution of prosecutorial discretion.²⁰¹ Republican Senator of Florida, Marco Rubio, has stated that the recent Act by DHS “is a short-term answer to a long-term problem . . . [T]his short term policy will make it harder to find a balanced and responsible long-term one.”²⁰² It is important for both the Democratic and Republican parties to come to some form of agreement as to the DREAM Act so that these individuals are afforded the right to remain in the United States as citizens of the only country they know as home. It needs to be remembered by those opposing the law that this country was founded by immigrants,²⁰³ and at one point there was no set of immigration laws to follow.²⁰⁴ Eligible immigrants were afforded the right to stay in this country and to beneficially contribute to the growth and prosperity of the United

194. See Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

195. Memorandum from Janet Napolitano, *supra* note 20, at 1; President Barack Obama, *supra* note 2.

196. Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

197. President Barack Obama, *supra* note 2.

198. See Memorandum from Janet Napolitano, *supra* note 20, at 2–3; President Barack Obama, *supra* note 2.

199. See Barron, *supra* note 133, at 626–30; see also DREAM Act of 2010, S. 3992, 111th Cong. §§ 4–5 (2010).

200. See President Barack Obama, *supra* note 2.

201. See Sanchez, *supra* note 5.

202. *Id.*

203. President Barack Obama, *supra* note 2.

204. See *History of Immigration Laws in the U.S.*, EBSCOHOST CONNECTION, <http://connection.ebscohost.com/us/immigration-restrictions/history-immigration-laws-us> (last visited Feb. 24, 2013).

States.²⁰⁵ Therefore, it would only seem logical that immigrants who have not purposely violated any laws be allowed to remain in the United States given they demonstrate a commitment to becoming legal Americans and further abiding by the requirements necessary to qualify for a pathway to citizenship. It is also noteworthy to point out that many of these individuals will or are already beneficially contributing to the country in numerous ways. One of the important ways in which these individuals are contributing is through the economy.²⁰⁶ As the President has stated to the people of the United States, “it [would] make[] no sense to expel talented young people . . . who want to staff our labs . . . start new businesses, or defend our country simply because of the actions of their parents.”²⁰⁷ President Obama is not the only one who believes the DREAM Act will add greatly to the economy of the United States, as many activists and politicians have stated time and time again that expelling young individuals who have done no wrong and are ready and willing to learn and contribute to society would greatly disadvantage the United States.²⁰⁸ Studies have demonstrated that, in the long run, the benefits of the DREAM Act are great.²⁰⁹ The Congressional Budget Office estimates that the DREAM Act, if passed, would increase revenue by more than two billion dollars, as well as reduce deficits by more than one billion dollars over a ten year period.²¹⁰ What is brushed aside is the amount of money Americans have already invested in these qualified undocumented individuals.²¹¹ By not allowing them to directly contribute to the United States’ economy, the American public is essentially losing money.²¹² These are individuals who, for all intents and purposes, have lived and gone to school in the United States their entire lives, schools that Americans pay for through taxes.²¹³ By passing the DREAM Act, these individuals would be allowed to continue their education and contribute to society and the econo-

205. See President Barack Obama, *supra* note 2; Javier Palomarez, *Make the DREAM Act a Reality*, S. FLA. SUN SENTINEL, Dec. 18, 2010, at A20; *History of Immigration Laws in the U.S.*, *supra* note 204.

206. Palomarez, *supra* note 205.

207. President Barack Obama, *supra* note 2.

208. *Id.*; Palomarez, *supra* note 205. “[W]e [Americans] actually want well-educated kids in our country who are able to succeed and become part of this economy and part of the American dream.” *Barack Obama in 2008 Democratic Debate on the Eve of Super Tuesday*, ONTHEISSUES (Jan. 31, 2008), http://www.onthissues.org/archive/2008_dems_super_tuesday_barack_obama.htm.

209. Palomarez, *supra* note 205.

210. *Id.*

211. *Id.*; see Sanchez, *supra* note 5.

212. See Palomarez, *supra* note 205.

213. *Id.*

my.²¹⁴ Additionally, the DREAM Act will aide in the “nation’s efforts to have the highest proportion of college graduates in the world by 2020.”²¹⁵ Seeing that many Americans are concerned that the DREAM Act will incentivize the future illegal immigration of many undocumented individuals, it is important that the DREAM Act be passed as part of a larger comprehensive immigration plan to discontinue illegal immigration into the United States.²¹⁶ Such a plan would prevent the future crossing of hundreds of thousands of undocumented individuals while still providing permanent relief to those individuals who have been paying the price of their parents’ mistakes.²¹⁷

V. CONCLUSION

A better understanding of the actions of the government is the first step to a better immigration system in the United States. The public’s awareness of the role the DHS plays in the expelling or non-expelling of individuals from our country is crucial in the support of legislation that will further benefit the country as well as hundreds of thousands of worthy candidates. The DHS and the President have not gone beyond their constitutional authority by using prosecutorial discretion in picking and choosing what cases to give high priority to, as the Supreme Court has consistently held that prosecutorial discretion is the sole right of the immigration agencies to conserve the limited resources available to them.²¹⁸ It is important to note that the most recent use of prosecutorial discretion by the DHS will affect the same group of individuals who would have otherwise qualified for the DREAM Act had it passed in the Senate in 2010.²¹⁹ But it will by no means give the same result. Therefore, it is up to the American public to push the government and its politicians to pass the DREAM Act in order to give Annie and other similar individuals, who are living in and beneficially contributing to the United States, the protections afforded to Americans under the United States Constitution. “It is the right thing to do.”²²⁰

214. *Id.*

215. *Id.*

216. See Barron, *supra* note 133, at 648.

217. See President Barack Obama, *supra* note 2.

218. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974), *superseded by statute*, FED. R. EVID. 104 (a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171 (1987); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868)); see also Memorandum from Doris Meissner, *supra* note 72, at 3.

219. Compare Memorandum from Doris Meissner, *supra* note 72, at 7–8, with DREAM Act of 2010, S. 3992, 111th Cong. § 4(a)(1)(A)–(F) (2010).

220. President Barack Obama, *supra* note 2.